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INDIAN CASES

1925.

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MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 65 OF 1922.

January 30, 1925.

Present:—Mr. Justice Madhavan Nair.

SANKARA NARAYANA PILLAI—RESPONDENT No. 2—APPELLANT

versus

GANGAMMAL AND OTHERS—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 71—Execution of decree—Sale—Failure to pay purchase-money—Re-sale—Liability to make up deficiency in price—Proclamation of sale—Omission to mention time and place of sale—Date of sale not specified in proper place—Irregularity—Illegality.

There is no general rule for distinguishing between an illegality and an irregularity in a Court sale. The decision in every case must rest on the special facts of the case. [p. 2, col. 1.]

Where an auction-sale is held in the Court premises and within the usual office hours, the mere omission to mention the time and the place of the sale in the sale proclamation does not amount to an illegality, in absence of proof that such omission caused a low price to be fetched. [p. 2, col. 2.]

The omission to mention the date of sale in the sale proclamation in its proper place is an irregularity, but in the absence of evidence to show that any possible bidder was kept away owing to his not knowing the exact date of the sale as a result of the date not being entered in its proper place, the sale is not vitiated. [*ibid.*]

The provision contained in O. XXI, r. 71 of the C. P. C. is a salutary one intended to minimise the hardship resulting from the purchaser's default and there is no reason why the Court should refuse to give effect to it, unless the defaulting purchaser would be substantially prejudiced. [p. 3, col. 1.]

Appeal against a decree of the Court of the Subordinate Judge, Tuticorin, in A. S. No. 87 of 1921, preferred against an order of the Court of the District Munsif, Tuticorin, in E. A. No. 419 of 1921, in O. S. No. 219 of 1919.

Messrs. *Chidambaram* and *Marthandam*, for the Appellant

Mr. *G. Tiruvengadachariar*, for the Respondents.

JUDGMENT.—The first auction-purchaser of certain properties sold in execution of the decree, in Original Suit No. 219 of 1919 on the file of the Court of the District Munsif of Tuticorin, is the appellant in this civil miscellaneous second appeal. He purchased the property for Rs. 2,600 and deposited 25 per cent. of that amount, but failed to deposit the balance in time. The sale was, therefore, set aside and a re-sale was ordered. At the re-sale, the same property fetched only Rs. 1,400. The judgment-debtor then applied under O. XXI, r. 71, for the recovery of the difference of Rs. 1,200 from the appellant (first auction-purchaser), on the ground that the re-sale which resulted in the sale of the property, for a smaller amount, was caused by his failure to complete the purchase in time and that, therefore, he is responsible for paying her this difference in price. Both the lower Courts upheld the contentions of the judgment-debtor.

In this appeal, the appellant has urged only two points which are specified as points Nos. 2 and 3 in the memorandum of appeal, presented by him to the lower Court. These are: (1) the time and place of sale were not mentioned in the proclamation issued for re-sale, and the re-sale is, therefore, null and void and cannot affect the appellant. (2) The date of the re-sale was not specified in the proclamation and, therefore, the re-sale would not bind him.

As regards point No. (1), it may be mentioned at the very outset that this objection was not pleaded by the appellant in his objection statement filed before the District Munsif; nor was it argued before the First Court. No evidence also has been adduced to show that it was on account of the non-mention of the time and place in the proclamation of sale that the property

failed to fetch the original price. What is argued is that the omission complained of is not an irregularity, but an illegality and that, therefore, the re-sale is a nullity. As pointed out by Oldfield, J., in *Jayarama Aiyar* v. *Vridhigiri Aiyar* (1), it is difficult to lay down any general rule for distinguishing between an illegality and an irregularity and the decision in any case must rest on its special facts. The cases cited by the learned Vakil in support of the argument that the omission to mention the time and the place in a proclamation for the sale amounts to an illegality are all clearly distinguishable. In *Basharutulla* v. *Uma Churn Dutt* (2), the property that had been advertised for a particular date was sold on the date, but at an earlier hour, than that stated in the proclamation for sale and the Court held that in such circumstances, there was no sale within the meaning of the Code. The reason is obvious and is thus stated by the learned Judge:

"When the time advertised arrived, the property had been sold, and the whole thing was over; and when persons came for the purpose of attending the sale at the time advertised, they found that the property had been sold, and that they were too late."

Following this case, it was held in *Jayarama Aiyar* v. *Vridhagiri Aiyar* (1), that when it was intimated in the village where the lands were situate, that a sale would be held at a place and by an officer different from those fixed by the proclamation, the sale held at the place and by the official fixed by the proclamation is illegal and a nullity and not merely an irregularity, obviously on the ground that the effect of the intimation given was to divert the possible bidders to a place, where the sale was not held and, therefore, it could not be said that the property had been sold within the meaning of the Code. In *Subraya Venkatesh* v. *Ganga Narain* (3), it was found that the property re-sold was not the property originally sold. It is clear that, if the same property is not re-sold, the first auction-purchaser cannot be made liable for the deficiency in price, as there has been no sale of the property originally sold to him. The re-sale in such circumstances is a nullity.

In the present case, there was no misstatement of time or place in the proclamation, nor was the property re-sold, different from the one originally sold: only the time and the place are not mentioned in the proclamation. In the absence of any notification to the contrary, as pointed out by the Subordinate Judge, it is not unreasonable to hold that the purchasers would presume that the sale would, as is well-known and usual, be held within the premises of the Court, which holds the sale and within the usual office hours. As has already been pointed out, it has not been proved by evidence that the omission complained of brought about a deficiency in the price of the property, when it was re-sold. I hold that the re-sale in this case has not been vitiated by any illegality, on account of the omission to mention the time and place in the proclamation.

The second objection deals with the omission to mention the date of the sale in the proclamation. The date is not mentioned in its appropriate place; but it can clearly be inferred from the date, upto which interest on the decree amount is calculated and the context in which this date is mentioned in the body of the proclamation clearly shows that it is the date of sale that is referred to therein. It is true that the date of sale should not be left to mere inferences. But in this case the date of sale is specifically mentioned with sufficient clearness in another place also, namely, in the left-hand corner at the top of the sale proclamation, though this is not the place allotted for its mention. Under these circumstances, it cannot be said that the intending purchasers would have been in any way misled as regards the date, when the sale was to be held. The omission to mention it in its proper place is no doubt an irregularity; but no evidence has been let in to show that any possible bidder was kept away, owing to his not knowing the exact date of the sale. The appellant has also not given any evidence to connect the irregularities complained of, with the loss alleged to have resulted, on account of such irregularities. The appellant's case, as his counter-statement would show, was not that the deficiency in the price was due to those irregularities; but there was no justification for the re-sale at all, as the omission to pay the $\frac{3}{4}$th of the sale price was not in any way

(1) 59 Ind. Cas. 167; 44 M. 35; 12 L. W. 182; 39 M. L. J. 188; (1920) M. W. N. 490.
(2) 16 C. 794; 8 Ind. Dec. (N. S.) 527.
(3) 11 Ind. Cas. 989; 35 B. 395; 13 Bom. L. R. 678.
(4) 43 Ind. Cas. 685; 41 M. 474; 23 M. L. T. 9; 34 M. L. J. 156; 7 L. W. 159; (1918) M. W. N. 121.

due to default on his part. The second objection must also be overruled.

As pointed out by Wallis, C. J., in *Annavajhulu Venkatachellamayya Garu* v. *Ramagirjee Neelakanta Girjee* (4), the provision in O. XXI, r. 71, is a salutary one, intended to minimise the hardship resulting from the purchaser's default and there is no reason why the Court should refuse to give effect to it, unless the defaulting purchaser would be substantially prejudiced. As already mentioned, not even an attempt has been made to show that the appellant was in any way substantially prejudiced in this case, on account of the omissions complained of.

In my opinion, the order of the Court below is right and this civil miscellaneous second appeal is dismissed with costs of the second respondent.

V. N. V.
Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2664 OF 1917.
December 21, 1922.

Present:—Mr. Justice Martineau and Mr. Justice Campbell.

GOKAL CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat NIHAL DEVI—DEFENDANT—RESPONDENT.

Hindu Law—Custom—Succession—Daughter-in-law, right of—Aroras *of Kasur, Lahore District.*

There is no custom among the *Aroras* of Kasur in the Lahore District whereby the widow of a predeceased son succeeds to the property left by her father-in-law in preference to the latter's reversioners, in contravention of the general rule of Hindu Law. [p. 8, col. 1.]

First appeal from a decree of the Subordinate Judge, First Class, Lahore, dated the 16th July 1917.

Bakhshi *Tek Chand* and Mr. *Mohammad Rafi*, for the Appellants.

Lala *Tirath Ram*, for the Respondent.

JUDGMENT.—The parties in this case are *Aroras* of the town of Kasur in the Lahore District. The plaintiffs are the sons of Khazana Mal, and the defendant is the widow of Bishan Das who was the grandson of a brother of Khazana Mal. The members of the family were traders and money-lenders. Bishan Das died before his father Narain Das, and the dispute between the parties arose after the death of Narain Das, which occurred in 1911. The plaintiffs allege that they and Narain Das formed a joint Hindu family, and they sue for a declaration that the property in their possession, specified in the lists attached to the plaint, is the property of the joint family of which they are now the sole members, and for an injunction restraining the defendant from interfering therewith contending that she has no rights except those of residence and maintenance. They also sue for possession of certain moveable property which they say is with the defendant.

The defendant denies that the members of the family were joint, and pleads that the property in respect of which a declaratory decree is asked for belonged to her father-in-law Narain Das and that she is his heir by a local and family custom. She also denies that the property of which the plaintiffs ask for possession is with her.

The Subordinate Judge has found that Narain Das and the plaintiffs did not form a joint Hindu family, and that the defendant has proved that among *Aroras* there is a special custom by which a widow succeeds to her father-in-law's estate. He has accordingly dismissed the suit and the plaintiffs appeal. It will be sufficient to discuss the question of the custom set up by the defendant as the appeal must, in our opinion, succeed on this point. Thirty-four instances have been adduced in support of the custom, and the lower Court considers that 24 of these are clear instances in the defendant's favour. It may be noted, however, that, although the defendant pleaded a family custom, none of these instances occurred in the family to which the parties belong, and in fact none occurred in the *got* of the parties, namely the *khetarpal got*. Only the first nine instances are from the town of Kasur, the others being nearly all instances from villages in the Kasur and Chunian *Tahsils* of the Lahore District and in Districts other than Lahore. Instances from villages are of little value in the present case, and in this connection we may refer to *Motan Das* v. *Morni Bai* (1), a case relating to *Aroras* of Multan City at page 174.* We will consider the instances

(1) 26 Ind. Cas. 450; 33 P. R. 1915; 37 P. W. R. 1915; 102 P. L. R. 1915.

*Page of P. R. 1915—[*Ed.*]

in the order in which they are given in the lower Court's judgment.

Instance No. 1.—Dhana Singh's land was mutated in 1906 in favour of his daughter-in-law, *Musammat* Sardha Devi, and her husband's brother Dhari Mal. But notwithstanding this mutation the defendant's own witness Sundar Das (D. W. No. 1) admits that Dhari Mal did not give possession of the property to *Musammat* Sardha Devi. *Musammat* Sardha Devi, in fact, sued for possession of her share of some land which Dhari Mal had mortgaged, and the suit was dismissed by the Munsif, Mehta Lekh Raj, on the ground that under the Hindu Law she had no right of succession to her father-in-law (P. B. III, page 170). No custom appears to have been set in that case. It is true that a joint mortgage was effected by Dhari Mal and *Musammat* Sardha Devi in favour of Sant Ram (D. W. No. 2), but as *Musammat* Sardha Devi had been entered in the Revenue Records as a co-sharer, it was natural for the mortgagee to insist on her joining in the mortgage. Tulsi Ram, a witness for the defendant, states (P. B. I, page 70) that *Musammat* Sardha Devi and Dhari Mal jointly sold half of the shop to him, but Dhari Mal, who was a witness for the plaintiff (page 104), was not questioned in cross-examination with regard to that sale, although he had denied in examination-in-chief that *Musammat* Sardha Devi had any right in the property left by his father, and *Musammat* Sardha Devi herself was not called to give evidence. This instance, therefore, cannot be said to be one in which a daughter-in-law has actually succeeded.

Instance No. 2.—The land left by one Kahn Chand was mutated in favour of his daughter-in-law *Musammat* Thakari along with her husband's brothers Maghi Ram and Ram Lal on the 31st July 1912 (P. B. III, page 238). But at the time when that mutation took place the dispute between the present parties was going on before the Revenue Authorities. The Assistant Collector had already sanctioned mutation in favour of the defendant, and the plaintiffs had appealed from that order to the Settlement Collector, who dismissed the appeal on the 29th November 1912 (P. B. III, page 295), and it is noteworthy that it was the defendant's cousin and agent Lachhman Dass who appeared before the Revenue Officer in the mutation proceedings which took place on Kahn Chand's death and stated that the latter had left a daughter-in-law, who had not been mentioned in the *patwari's* report as one of the heirs. Maghi Ram and Ram Lal both disputed *Musammat* Thakari's right to succeed to the property, and there is no evidence to show that she really got possession. Neither *Musammat* Thakari herself, nor any one of the family has given evidence, while Saudagar Mal, a witness for the plaintiff, has stated positively (P. B. I, page 131) that *Musammat* Thakari did not get any of the property, but that it all went to her husband's brothers. This instance, therefore, like the first is not shown to be one in which a daughter-in-law has inherited.

Instance No. 3.—Wadhawa Mal's property passed to his daughter-in-law *Musammat* Har Kaur. But this is not a case of succession, since *Musammat* Har Kaur took the property under her father-in-law's Will, as proved by the evidence of his brother Bhana Mal (P. B. I, page 120), who produced an attested copy of the Will (P. B. III, page 170).

Instance No. 4.—Khazana Mal's property is said to have been inherited by his daughter-in-law and two witnesses, Kesho Das (D. W. No. 5) and Sant Singh (D. W. No. 12), have deposed to this. Kesho Das is not an *Arora* but a *Brahman*, and does not know the daughter-in-law's name or what property Khazana Mal left besides a house. Sant Singh also knows little about the matter. He is not a *khetarpal Arora*, and, although he says the daughter-in-law is in possession of his (Khazana Mal's) estate, he admits in cross-examination that he did not see her in possession. Sardari Mal (P. W. No. 5) says that Khazana Mal, who was his brother, left no property at all and that the house he lived in had been lent to him by the witness' father. Khazana Mal's daughter-in-law has not been produced, and it cannot be held to be proved that she inherited her father-in-law's property.

Instance No. 5.—The property of one Maghi Mal is stated by Bahadur Singh (D. W. No. 11) to have been inherited by his daughter-in-law, the widow of Haria, alone with her husband's brothers, but against this there is the statement of the plaintiffs' witness Sukh Ram (P. B. I, page 132) that the property was inherited by Maghi Mal's grandson, a son of Haria, and that

it was on the grandson's death that his mother succeeded. The Subordinate Judge has consequently not relied on this instance, and we agree with him that it is not shown to be an instance of a daughter-in-law's succession. The best evidence would have been that of Haria's widow, who has not been produced.

Instance No. 6.—One Mehra Mal's property is said to have been inherited by his daughter in law, but the only evidence is that of one Bulaki (D. W No. 21), who is not related to Mehra Mal. Bulaki admits that Mehra Mal left only one house, so that the fact of Mehra Mal's daughter-in-law living in the house in which she would have a right of residence would prove nothing. This instance is, therefore, of no value.

Instances Nos. 7, 8 *and* 9.—These are not shown to be cases of succession of a daughter-in-law, and they may be cases of widows succeeding to the property of their husbands. The lower Court has consequently left them out of consideration, and Counsel for the respondent also does not rely on them.

Instance No. 10.—The land held by one Sahibu Mal of village Sanda in the Kasur *Tahsil* passed on his death in 1903 to his sons, Labha Ram and Bhana Mal, and to *Musammat* Naraini, the widow of his predeceased son, Chuni Lal, but a copy has been filed only of the mutation order relating to the land which Sahibu Mal held as mortgagee. Labha Ram (D. W. No. 7) admits that on his father's death he and his brother had a dispute with *Musammat* Naraini and that they settled it by giving her 36 *ghumaons* out of the total estate of 250 *ghumaons* obtaining from her an agreement that she was not to alienate it, and he adds that if this property were not sufficient they would maintain her. It thus appears that *Musammat* Naraini really took the land by way of maintenance rather than by right of inheritance. The lower Court says that the land given to her was of superior quality; but Labha Ram does not say this, but only says that *Musammat* Naraini took the land which she considered good, the instance supports the plaintiffs rather than the defendant.

Instance No. 11.—The property of Ram Ditta at village Chuharpura in the Kasur *Tahsil* was inherited in 1906 by his daughter-in-law *Musammat* Thakari (P. B. III, page 278). But in the first place *Musammat* Thakari, in her application for a succession certificate and in the statement which she made in the certificate proceedings (pages 279 and 282) said that she was the only heir of her father-in-law, and, although Anant Ram (D. W. No. 3) and Kalu Mal (D. W. No. 4) say that her husband left cousins, they do not state the exact relationship. In the second place the property left by Ram Ditta seems to have been very small. Kalu Mal who is *Musammat* Thakari's father says that Ram Ditta owned only 9 or 10 *ghumaons* of land and held only 12 *kanals* as mortgagee, and the debts due to him were stated by *Musammat* Thakari in her application for the succession certificate to amount only to Rs. 240-8-0. Her husband's collaterals would have had to maintain her, and they may have thought it proper to let her have for her maintenance the little property which Ram Ditta had left. This instance does not help the defendant.

Instance No. 12.—The property of one Atma Singh of *Mauza* Hujra in the Montgomery District is said to have been inherited by his daughter-in-law, but Bahadur Singh (D. W. No. 11), the only witness who mentions this instance, has no personal knowledge of it, and admits in cross-examination that he has only heard about it, and that he does not even know Atma Singh's *got*.

Instance No. 13.—This is a judgment given on the 22nd December 1915 by Rai Maya Ram, Subordinate Judge (P. B. III, page 289), in which he found in favour of the right of the daughter-in-law to succeed; but most of the instances on which he based his decision are among those which have been mentioned by the lower Court in its judgment in the present case. We have already discussed some of them and shown that they do not prove the right of the daughter-in-law to succeed, and the others will presently be shown to be equally valueless. Rai Maya Ram also mentioned as one of the instances the present defendant's succession to her father-in-law's property, notwithstanding that the suit contesting her right to succeed was pending at the time. He referred to only five other instances, in three of which the particulars necessary to enable us to judge whether the instances were in point and supported the custom set up by the defendant are not given, while the remaining two were instances occurring in the family

to which the parties to that case belonged, and even as regards those two it does not appear what was the extent of the property inherited. The defendant in that case had pleaded a special family custom, and the two instances in which a daughter-in-law had succeeded in the family may have carried weight. In the present case, on the other hand, although a family custom was pleaded, not a single instance of a daughter-in-law succeeding in the family has been cited. Rai Maya Ram's judgment is in our opinion of little value as an instance showing the existence of the custom.

Instance No. 14.—The land left by Hakim Singh, a resident of village Punnunsinghwala in the Chunian *Tahsil*, who died in 1909, was mutated in the names of his two sons, and his third son's widow *Musammat* Indar Kaur (P. B. III, page 193); but this instance does not appear to be in point in the present case, as Hakim Singh was an agriculturist, as admitted by the defendant's witness Gurbakhsh Singh (P. B. I, page 66), who was a cousin of *Musammat* Indar Kaur's husband.

Instance No. 15.—The land of Jiwana Mal of Khudian, a village in the Chunian *Tahsil*, was mutated in the name of his two sons and his two daughters-in-law (P. B. III, pages 218 and 226); but this took place in 1913, while the present suit was pending, and the Settlement Commissioner had already on the 29th November 1912, upheld the *Naib Tahsildar's* order mutating in the defendants' favour the lands claimed by the plaintiffs, as that any mutations sanctioned by Revenue Officers in the Lahore District after that date cannot have any value as instances of a daughter-in-law's succession.

Instance No. 16.—The land owned by Amira at Khudian was mutated on the 20th April 1910 in favour of his son Bhag Mal and his daughter-in-law *Musammat* Jawali (P. B. III, page 222). It is, however, not certain whether *Musammat* Jawali's husband Duni Chand died before or after his father. Amira had died in August 1909. The *patwari* wrote his report of the death on the 2nd April, 1910, mentioning only the name of Bhag Mal as the heir of Amira. On the 20th April Bhag Mal stated before the *Naib Tahsildar* that Amira had two sons, Duni Chand and himself, but that Duni Chand had died and that Jawali was his (that is Duni Chand's) heir. This would leave the impression that Duni Chand died after his father, and it is possible that he may have died during the interval of about eight months which elapsed between Amira's death and the *patwari's* report. At any rate the matter is not clear, and Sardari Mal (D. W. No. 16) who mentions the instance, does not say whether Duni Chand died before his father or not, so that the instance is inconclusive. The best evidence would have been that of *Musammat* Jawali or Bhag Mal, and they are not produced.

Instance No. 17.—One Mangal's land at Doburji in *Tahsil* Chunian was mutated in favour of his daughter-in-law *Musammat* Kirpa Devi and his grandson Jagan Nath (P. B. III, page 205). That mutation was effected on the 10th April 1914, and for the reason given above in regard to instance No. 15, it is of no value. It is also to be noted that Jagan Nath is a minor and may yet contest *Musammat* Kirpa Devi's right to succeed.

Instances Nos. 18 *and* 19.—One Sardari Mal's widow is said to have succeeded to the property of her father-in law, Arura Mal, a resident of Dholan in the Chunian *Tahsil*, along with her husband's brother, and similarly on the death of one of the brothers named Shivan Ditta his property is said to have passed to his daughters-in-law and surviving son. The only witness as to these instances is Bhagat Ram (D. W. No. 9), a cousin of the defendant, and he is contradicted by the plaintiffs' witness Saudagar Mal who says (P. B. I, page 131) that the daughters-in-law did not inherit, but only got maintenance. Here again the best evidence, namely, that of the daughters-in-law, is withheld, and the instance must be held to be improved.

Instance No. 20.—This relates to the succession of the property of one Mangal Singh. But his son Jaimal Singh (D. W. No. 10), though he says his sister-in-law succeeded to the property of his father along with his brothers, goes on to say that she had adopted his son after her husband's death and passed on her share to him, so that this is not a case of the succession of a daughter-in-law at all, and the lower Court has left it out of consideration.

Instance No. 21.—The property of one Vir Bhan of village Jajja in the Chunian *Tahsil* is said to have been inherited by

his daughter-in-law, the widow of Ganpat. There is no documentary evidence in regard to this instance. Bura Singh, who deposes to it, says (P.B. I, page 65) that Vir Bhan died only two or three months back and that he had another son Diwan Chand who died a few days after Vir Bhan, leaving two minor sons. This instance is clearly of no value, as it is of recent occurrence and the persons interested in opposing the claim of the daughter-in-law are minors.

Instance No. 22.—The land of one Bahadur Singh of village Kanganpur is said to have devolved upon the widow of his son Jamita and Karam Singh, the son of Bahadur Singh's second son Kesar. But neither the daughter-in-law nor Karam Singh has come forward to give evidence, nor is the mutation order produced. The only witness in regard to this instance is Ralla Singh, who admits that he is not related to Bahadur Singh and we must regard the instance as improved. Ralla Singh, moreover, admits that Bahadur Singh was an agriculturist, though he says he was also a money-lender. No other instances are forthcoming from the Lahore District and the next seven instances are from the Ferozepore District.

Instance No. 23.—Karam Chand's land at Makho was mutated in 1903 in favour of his daughter-in-law *Musammat* Ram Rakhi (P. B. III, page 260). Dharmu Mal (D. W. No. 13), who has given evidence in regard to this instance as well as to other instances from Makho, says that Karam Chand's brothers were alive. They have not been produced, and it may be that they agreed to allow their brothers' daughter-in-law to take the land as it was only 42 *kanals*, 7 *marlas* in area and she would have needed it all for her maintenance. Har Dayal (P. W. No. 3) says (P. B. I, page 101) that the property of Karam Chand yields an income of only about Rs. 100 per annum. This instance, therefore, does not help the defendant.

Instance No. 24.—On the death of Sobha Mal of Makho in 1910 his land was mutated in the names of his sons Har Dayal and Mathra Dass, and his daughter-in-law *Musammat* Ishar Devi, the widow of Harnam Das (P. B. III, page 266), but notwithstanding this Har Dayal and Mathra Dass appear to have had possession of the whole property and to have paid *Musammat* Ishar Devi an allowance of Rs. 6 a month for her maintenance till 1915, when they and *Musammat* Ishar Devi referred the matter to arbitration (P. B. III, page 157), and the arbitrators awarded the whole property to Har Dayal and Mathra Dass, but increased *Musammat* Ishar Devi's allowance to Rs. 7 a month (page 160). This instance supports the plaintiffs rather than the defendant.

Instance No. 25.—This is a judgment (P. B. III, page 142), by Mr. Prenter, District Judge, dated the 2nd August 1909, in a case relating to *Aroras* of Makho, in which he held that it had not been proved that a daughter-in-law was entitled to succeed in preference to collaterals. This is a clear instance in favour of the plaintiffs.

Instance No. 26.—Dharmu Mal (D. W. No. 13) mentions the succession of one *Musammat* Bishan Devi, widow of Ram Rakha, but as a matter of fact there was no question of succession as Ram Rakha had been a member of a joint Hindu family with his brother and his widow was given a portion of the immoveable property for her maintenance under an agreement entered with her husband's brother on the 27th February 1915, (P. B. III, page 166).

Instance No. 27.—The land left by Nand Mal at Ferozepore was mutated in the names of his sons and his daughter-in-law *Musammat* Ganga Devi in 1904 (P. B. III, page 248); but this was done in the teeth of protest on the part of the collaterals, and in 1912 a deed was executed (page 173) by which Nand Mal's brothers gave certain property to *Musammat* Ganga Devi and the widows of the other sons who had died for their maintenance, while it was declared that the widows had no right in the remainder of the property. This again supports the plaintiffs.

Instance No. 28.—Sant Ram (D. W. No. 20) says that the property of Gobinda Mal, a resident of Ferozepore, was inherited by his daughter-in-law in the presence of his cousins, and then her daughter succeeded, but he also says there were two cases which went up to the Chief Court. No copies of the judgments of the Chief Court have been produced and in their absence it is impossible to place any reliance on Sant Ram's statement.

Instance No. 29.—This is a mutation which occurred on the death of one *Musammat* Gur Devi, but the Subordinate Judge says he does not see its relevancy, and the mutation order does not appear to have been printed.

Instances Nos. 30 *to* 33.—These are mentioned by the lower Court as being instances of the succession of daughters in law in the Muzaffargarh District, but there is no oral evidence regarding them and the mutations are not on the printed record. The lower Court has referred to Exs. D-25 to 28, but D-25 to 27 do not relate to these instances. D. 28 (P. B. III, page 268 to 272) shows that on the death of one Heman Mal the land at Chak Shori, of which he was the mortgagee, was mutated in the names of his sons and of one *Musammat* Khillo, but there is nothing to show that *Musammat* Khillo's husband was the son of Heman Mal, or that, if he was, he died before his father.

Instance No. 34.—This is from Minchinabad in the Bahawalpur State, and the only witness in regard to it is Sohan Singh (D. W. No. 8) who has no personal knowledge of it and speaks only from hearsay.

The result is that there is not a single instance of any value in the defendant's favour, whilst four of the instances cited, namely, Nos. 10, 24, 25 and 27, and the judgment of Mehta Lekh Raj referred to in connection with instance No. 1, support the plaintiffs. We hold, therefore, that the defendant has failed to prove the custom set up and that the rule of Hindu Law must be followed.

Admittedly under that law the plaintiffs are entitled to succeed to the property of their cousin Narain Das to the exclusion of the daughter-in-law and it becomes unnecessary to go into the question whether they and Narain Das constituted a joint family. They are entitled to a decree in respect of the property in their possession, but it is admitted that there is no evidence as to the existence of the moveable property which they allege to be in the possession of the defendant. We accept the appeal and pass a decree declaring that the plaintiffs are the owners of the property in their possession shown in the lists attached to the plaint, and that the defendant has no rights therein except those of residence and maintenance, and granting an injunction restraining the defendant from interfering with such property. The defendant will pay the plaintiffs' costs in both Courts except the costs incurred in respect of the claim mentioned in paragraph 11 (*d*) of the plaint.

Z. K. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 85 AND 86 OF 1924.

January 15, 1925.

Present:—Mr. Dalal, J. C.

SHARFUDDIN—PLAINTIFF—APPELLANT

versus

NIAMAT ALI—DEFENDANT—RESPONDENT.

Custom—Succession—Wajib-ul-arz, *entry in, construction of*—*Widow, whether owner or life-tenant*—*Evidence Act (I of 1872), s. 48*—*Custom, evidence of*—*Accepted interpretation of* wajib-ul-arz, *relevancy of.*

A *wajib-ul-arz* laid down that on the death of a proprietor his widow would be entitled to his share whether the deceased was separate from his brother or joint, but that the widow would not have any right of transfer. The widow was not given a right to adopt which was given to male owners, and it was further provided that the share of the deceased would be obtained by that person who was nearer in degree:

Held, (1) that the widow having been specifically made a successor to her husband and it not being stated that she would only have the usufruct she must be regarded as a full owner with certain restraints put on her rights of ownership; [p. 9, col. 2.]

(2) that where a widow succeeded to her husband no property devolved on the other heirs of the deceased and succession to the deceased opened out on the death of the widow and that the person nearest in degree to the deceased at the time of the death of the widow was entitled to succeed to the exclusion of all other heirs. [p. 10, col. 1.]

Niamat Ali v. *Ashiq Ali*, 67 Ind. Cas. 803; 9 O. L. J. 127; (1922) A. I. R. (O.) 96, *Farzand Ali* v. *Karim Bakhsh*, 61 Ind. Cas. 934; 8 O. L. J. 138 and *Harpal Singh* v. *Lekhraj Kuar*, 30 A. 406; 5 A. L. J. 425; A. W. N. (1908) 165, referred to.

Where the interpretation of a clause of a *wajib-ul-arz* is accepted by certain members of a family, the fact is admissible in evidence in a subsequent suit between the members of the family to show how a custom applying to the family was interpreted by members of that family. [*ibid.*]

Appeal from the decree of the Subordinate Judge, Sultanpur, dated the 5th February 1924, in Appeal No 142 of 1923, reversing that of the Munsif, Musafirkhana, dated the 2nd July 1923, in Suit No. 429 of 1922.

Mr. *M. Wasim*, for the Appellant.

Mr. *Zahur Ahmad*, for the Respondent.

JUDGMENT.—This is an interesting appeal and Mr. Wasim has argued it on behalf of his client with his usual ability and restraint. The pedigree, so far as is necessary for the purposes of this appeal, may be briefly stated to be that one Muhammad Bakhsh had three sisters, *Musammat* Sahebzadi, *Musammat* Dan Bibi and *Musammat* Ulfat Bibi. These sisters and his widow *Musammat* Abadi survived him. Devolution of property in this family is governed by the Muhammadan Law as modified by custom recorded in the *wajib-ul-arz*. *Musammat* Abadi according to that custom took

possession of the entire property belonging to Muhammad Bakhsh. When *Musammat* Abadi died none of the three sisters was alive and the defendant Niamat Ali, the surviving son of one sister *Musammat* Ulfat Bibi took possession of the property. There was no survivor among the sons of the other two sisters, so there was no one in equal degree to Muhammad Bakhsh with Niamat Ali alive at the time of the death of the widow of Muhammad Bakhsh.

Two suits were brought one by the descendants of *Musammat* Dan Bibi and the other by the descendants of *Musammat* Ulfat Bibi other than Niamat Ali for recovery of their shares of the property from Niamat Ali. The case of the plaintiffs in both the suits was that on the death of Muhammad Bakhsh his sisters succeeded to the property but their possession was postponed till the death of *Musammat* Abadi and that on the death of *Musammat* Abadi the successors-in-interest of the three sisters succeeded to the 1/3rd share of each sister in the property of which she became owner at the time of the death of Muhammad Bakhsh.

The learned Judge of the lower Appellate Court held that no property devolved on the three sisters and that the succession opened out on the death of *Musammat* Abadi. The learned Counsel for the plaintiffs-appellants conceded that if this view be correct his clients will be out of Court.

The question for decision, therefore, is, whether *Musammat* Abadi became owner and proprietor of the property in suit or she was only in enjoyment of the usufruct of the property while the three sisters of Muhammad Bakhsh were owners thereof. This is the clear way in which the plaintiffs' learned Counsel put forward the case on behalf of his clients. To decide this point reference must be made to the *wajib-ul-arz*. The *wajib-ul-arz* begins with the word which I take to be the right of succession of the widow. The words are: the widow is entitled to the share of her husband. Then it is narrated that she will be entitled to this share whether the husband was separate from his brother or joint. Obviously some idea of the Hindu joint family was agitating the minds of the persons who fixed this method of devolution of property. Then the *wajib ul-arz* goes on to state that the widow shall not have any right of transfer. Rules are then laid down as to the right of an owner of the property to adopt a son which right is not given to the widow. There is then the clause: "The share of the deceased will be obtained by that person who will be nearer in degree." In the presence of male issue the female is debarred from succession and finally a right of maintenance is given to wives not duly married and their children.

The argument of the appellant's learned Counsel was, that as soon as a Muhammadan dies his heirs under the Muhammadan Law become vested with the ownership of the property of the deceased. When the sisters proceeded to take possession the custom stepped in and said that you shall not take possession until the widow's death. He argued that custom will supersede law only in so far as special provision is made by custom and that where custom is silent law will have its usual force. I am, however, not able to interpret the *wajib-ul-arz* in the sense in which the appellants' learned Counsel would like it to be interpreted. The widow is specifically made a successor to her husband and it is not stated that she will only have the usufruct. It is true that she is deprived of the right of transfer while she is in possession. To my mind this does not convey the idea that she is to succeed only to the usufruct of the property. The proper interpretation ought to be that she is made full owner and then certain restraints are put on her rights of ownership. While she is in possession and owner nothing remains over to be vested in any other person

The learned Counsel warned the Court against following rules of law applicable to a Hindu widow because in the present case the estate was different in two respects, one that a widow was given certain rights even where her husband was joint with his brothers and secondly, transfer was completely prohibited and not allowed, as in the case of a Hindu widow, for certain purposes recognized as legitimate. At the same time it cannot be denied that the custom is borrowed by Muhammadans in this particular locality or village from observation of the law followed by their neighbours the Hindus. It will, therefore, not be wrong to presume that at the time of such adoption of the custom the idea would be present in the minds of the Muhammadans of devolution of property as it would devolve on Hindus where a Hindu widow entered into possession under certain

circumstances which permitted her possession according to Hindu Law.

The enquiry was made why the custom was silent as to what was to happen on the death of the widow if the widow was made full owner with a reservation on her right of transfer. My opinion is that the rule put by me in inverted commas above that the share of the deceased will be obtained by the relation nearer in degree would govern both cases—cases where a widow was surviving to succeed to the property and also to cases where no such widow survived. It is interesting to note that such an interpretation was accepted by the members of this family itself. The previous litigation between certain members of the family came up to this Court and will be found reported in the case of *Niamat Ali* v. *Ashiq Ali* (1). Niamat Ali defendant there is the same Niamat Ali who is defendant here. Ashiq Ali was a collateral connected by males to Muhammad Bakhsh and also son's son of *Musammat* Shahzadi sister of Muhammad Bakhsh. When Ashiq Ali brought the suit he claimed that the devolution to the property opened out on the death of the widow *Musammat* Abadi and that according to the term of the *wajib-ul-arz* twice referred to above he was *shaks karib* (nearer relation) to Muhammad Bakhsh on the death of the widow because those terms indicated connection by male and not through females. In my opinion this is admissible evidence as to how a custom applying to a family is interpreted by members of that family itself.

The learned Counsel for the appellants did not insist that this case was governed by a Single Judge's decision of this Court reported in *Farzand Ali* v. *Karim Bakhsh* (2). In that case there were definite words in the *wajib-ul-arz* clause indicating that the widow was only put in possession and did not succeed to proprietary interest in the property.

The way the appellant's learned Counsel has argued the appeal it is not necessary to refer to rulings dealing with the creation of a life-estate among Muhammadans. In *Harpal Singh* v. *Lekhraj Kuar* (3) a Bench of the Allahabad High Court interpreted the Privy Council decision of *Abdul Wahid Khan* v. *Nuran Bibi* (4) as an opinion of their Lordships that the creation of a life-estate was not consistent with Muhammadan usage. The appeal, however, was not argued from the point of view that *Musammat* Abadi Bibi held a life-estate in the property. As already indicated what was argued was that she was only in possession of the usufruct while the actual owners were the sisters of Muhammad Bakhsh.

In the view I take the appeals must fail and both of them are dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 67 Ind Cas. 803; 9 O. L. J. 127; (1922) A. I. R. (O.) 96.
(2) 61 Ind. Cas. 964; 8 O. L. J. 138.
(3) 30 A. 406; 5 A. L. J. 425; A. W. N. (1908) 165.
(4) 11 C. 597; 12 I. A. 91; 9 Ind. Jur. 283; 4 Sar, P. C. J. 627; Rafique and Jackson's P. C. No. 89; 5 Ind. Dec. (N. S.) 1157 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1516 OF 1922.
November 13, 1924.
Present:—Mr. Justice Ramesam.

T. GOVINDASAMI CHETTIAR—PLAINTIFF—APPELLANT
versus
A. R. M. A. L. P. L. PALANIAPPA CHETTIAR—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 108, 111—Lease for term—Breach of condition by lessor—Lessee, whether entitled to put an end to lease—Waiver—Liability to pay rent.

There is nothing in the provisions of ss. 108 and 111 of the Transfer of Property Act which entitles a lessee for a term to put an end to the lease on account of a breach of a term of the contract by the lessor. [p. 11, col. 2.]

Plaintiff granted a lease of a house for five years to the defendant and one of the terms of the lease was that within six months from its date the lessor should have a latrine constructed, a well sunk and a room built upstairs. The term was not carried out by the lessor but the defendant continued to occupy the house for nearly two years after the expiry of the period within which the construction had to be made and then purported to put an end to the lease. In a suit by the plaintiff to recover rent:

Held, (1) that it was not open to the defendant to continue to occupy the house after the breach by the plaintiff of the terms of the lease, without giving notice that he was willing to extend the time for performance up to a specified date, and then to throw up the lease on a date arbitrarily chosen by him; [*ibid.*]

(2) that under the circumstances it must be taken that the defendant had waived the benefit of the condition and that the plaintiff was, therefore, entitled to succeed. [*ibid.*]

Second appeal against the decree of the District Court, Madura, in A. S. No. 286.

of 1921, preferred against that of the Court of the District Munsif, Madura Taluk at Madura, in O. S. No. 44 of 1921, (O. S. No. 1143 of 1923, on the file of the Court of the District Munsif, Periakulam).

Mr. *T. L. Venkatarama Iyer*, for the Appellant.

Mr. *K. Rajah Iyer*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit for damages for breach of contract of lease. The lease was of a house in Periyakulam and is dated 12th November 1916 (Exs. I and A). It was executed by Subban Chetti, plaintiff's elder brother, and it is not denied that plaintiff is the person now entitled to the house. The lease was for five years. One of the terms of the lease is that within six months from its date, the lessor "shall have a latrine constructed, a well sunk and a room upstairs built." The lessee occupied the house up to 23rd February 1919 and a notice was given to the plaintiff on 3rd March 1919 alleging that the defendant vacated the house as the well was not sunk, and other necessary repairs were not effected. The plaintiff brought this suit for Rs. 521-12-9 being the rent for the period 23rd March 1919 to 15th September 1920. The District Munsif gave a decree but the District Judge reversed his decision and dismissed the suit.

Before me Mr. T. L. Venkatarama Iyer who has appeared for the appellant argued that the lessee for a term is not entitled to put an end to the lease, for breach of covenants in the lease. He can only claim damages for such breach, if any. It is unnecessary to refer to the authorities cited by him. For the learned Vakil for the respondent concedes that if there is a breach of mere covenants, the lessee is not entitled to put an end to the lease. See Woodfall, page 213: *Surplice* v. *Farnsworth* (1). But the respondent contends that the term is a condition in the lease and not a covenant. He relies on Foa on "Landlord and Tenant," pages 312 and 313. But the distinction between a condition and covenant is made only when a lessor relies on the breach for putting an end to the lease. At page 317 Foa says "In no case can the lessee take advantage of the proviso for re-entry in order to avoid the lease, even where it is in the form that the term shall cease or that the lease shall be void for all purposes." Anyhow s. 111 of the Transfer of Property Act contains no clause providing for the termination of the lease at the option of the lessee on account of a breach of a term of the contract by the lessor, similar to cl. (*g*) providing for a forfeiture at the option of the lessor. I am, therefore, unable to agree with the District Judge, when he says "It is further argued that the lease could only be avoided under the provisions of s. 108 of the Transfer of Property Act. Exhaustive as these provisions appear to be they do not say that a perfectly clear breach of contract is not a good ground for avoiding a lease". All that I have to observe is that the Act does not provide for the termination of the lease for a term by the lessee on account of a breach by the lessor. Nor is there anything in s. 108 to enable the lessee to avoid the lease.

But, assuming that the lessee is entitled to terminate the lease on account of the lessor's default in carrying out a term of the contract it seems to me that he has waived it. The lease provides for the construction of a well within six months, *i. e.*, 12th May 1917. It is not pretended t[illegible] time was extended by mutual agr[illegible] or that the lessee, while condoni[illegible] breach on 13th May 1917 gave n[illegible] the lessor extending the time for p[illegible] ance of the term upto any late[illegible] The lessee simply chose to conti[illegible] occupy the house till 23rd Februar[illegible] and then vacated it. It seems to m[illegible] open to the lessee to continue to o[illegible] the house after breach, without g[illegible] notice that he was willing to extend[illegible] time for performance upto a specified d[illegible] and then throw up the lease on a [illegible] arbitrarily chosen by him. If he did [illegible] put an end to the lease on 12th M[illegible] 1917, it must be taken that he has waiv[illegible] the benefit of the condition (assuming ther[illegible] was one). In this view, the plaintiff is en[illegible] titled to succeed.

I am not satisfied that plaintiff is entitled to the whole of the rent for the remaining period. In his deposition he says "I asked many persons. They said the rent was high. It seems to me that he demanded higher rent than people were willing to pay and could get no tenant. I think, it was his duty to mitigate damages by taking tenants for a smaller rent. The Vakils, to avoid calling for a finding, left it to me to fix the damages. I have fixed it at

(1) (1844) 7 M. & G. 576; 8 Scott N. R. 307; 13 L. J. C. P. 215; 8 Jur. 760; 66 R. R. 760; 135 E. R. 232.

half the suit amount and they have agreed to it."

The plaintiff will, therefore, have a decree for Rs. 260-4-4. The defendant will pay half the Court-fee in second appeal to plaintiff. Otherwise each party will bear his own costs throughout.

V. N. V. *Order accordingly.*

Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 124 OF 1924.

November 10, 1924.

Present:—Mr. Kinkhede, A. J. C.

BULAKICHAND—PLAINTIFF—APPLICANT

versus

AMIRALI AND ANOTHER—DEFENDANTS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 148, O. IX, r. 9—Dismissal of suit for default—Application to set aside dismissal—Dismissal set aside subject to payment of costs within period fixed—Failure to pay costs ...riod—Extension of time—Power of Court.

... 148 of the C. P. C. is applicable to proceed... ...cedent to the passing of a decree. [p. 14, col.

... an order requiring a party to do something ... certain period fails to mention the conse... resulting from the failure to obey the order, ...t has power under s. 148 of the C. P. C. to ...e period for compliance with the order. [p. 15,

...e an order dismissing a suit for default was ...e and the suit was restored on condition of ...intiff paying a certain sum to the defendant ... a certain period by way of costs, but the ...iff failed to make the payment within the period ...tioned:

...*eld*, that the Court had power under s. 148 of the ... C. to extend the time mentioned in the order ... the payment of costs. [*ibid.*]

...Case-law referred to.)

Civil revision against an order of the Sub-Judge, Second Class, Raipur, in Civil Suit No. 46 of 1924, decided on the 19th February 1924.

Mr. *A. C. Roy*, for the Applicant.

ORDER.—This is an application for revision of an order dated the 19th February 1924 passed by Mr. D. R. Vaidya, Sub-Judge, II, Raipur, in Civil Suit No. 237 of 1922. The present applicant was plaintiff in the lower Court. He filed his aforesaid suit on 10th August 1922 for removal of a drain and gate and for re-construction of a *kaccha* wall pulled down by the defendants and thus to restore the parties to *status quo ante*. The subject-matter of the suit was referred for adjudication to arbitrators by an order dated the 16th October 1922, but the proceedings for arbitration became abortive and the case was fixed for the defendants' written statement and issues for 31st January 1923. After the issues were framed the case was adjourned to 4th April 1923 for evidence of both parties. Plaintiff examined two witnesses on 4th April 1923 and four on 13th July 1923 Two remained. An order for examination of one on commission was passed and as regards the other the order was to arrest him and bring him before the Court on 11th September 1923. The defendants' witnesses being ordered to be re-dieted for 12th September 1923. Time was given to plaintiff to pay the commission fee till the next day for which the case was already fixed and defendants' witnesses were dieted. On 14th July 1923 plaintiff's next friend did not attend when the case was called at 11 A. M., and then again at 1-30 P. M. Mr. Samsherkhan who had taken charge of the case from 13th July 1923 passed the following order:—

14th July 1923.	Plaintiff absent. Defendant No. 2 in person.
11 A.M.	Will be called later on.

(Sd.) S. K. KHAN,
Second Munsif.

Again called at 1-30 P. M.

Plaintiff absent. Defendant No. 2 in person. The case is dismissed in default of plaintiff's appearance and in presence of defendant No. 2 at 1-30 P. M. Witnesses are discharged. The costs of the defendants shall be borne by the plaintiff's next friend.

(Sd.) S. K. KHAN,
Second Munsif.

The plaintiff's next friend made an application sometime after the dismissal, for restoration of the suit to file alleging that he was sitting outside in the verandah but had gone out temporarily and that on enquiry he learnt that in his absence the case was dismissed to his great surprise. This petition was supported by an affidavit also of the same date. The defendants opposed the petition for restoration alleging that the applicant was not on the Court premises between 11 A. M., and 3 P. M., and deliberately kept away. The plaintiff's next friend was prepared to abide

by the defendant No. 2 Safdar Ali's special oath but the latter declined to take it as being against his religion. The matter went to trial, and the said Munsif after hearing the evidence rejected the petition for restoration as disclosing no sufficient ground for setting aside the dismissal. The plaintiff through the same next friend preferred an appeal against the order refusing to restore the case to file and the learned Additional District Judge allowed the appeal and remanded the case to the Trial Court. His conclusions based on the evidence principally of a Pleader who had seen the plaintiff's next friend at 11-30 A.M., was that the applicant was present in Court at 11-30 A. M., and in subsequent hours with the exception of short intervals on 14th July 1923. He also held that the order of dismissal was proper but that the Munsif used his "*discretion improperly in refusing to restore the suit to file especially in view of the fact that the case was already adjourned* to 12th September 1923 and very little had to be done by the plaintiff in Court on 14th July 1923 and that he appeared before the Court shortly after the order of dismissal was passed and that the dispute involved was about rights in immoveable property." He, therefore, passed the following order:—

"I would, therefore, allow this appeal, set aside the order of the lower Court and order the suit to be restored to file on the applicant's paying Rs. 8 to the non-applicants in 8 days from this day. Parties should appear before the lower Court on 7th February 1924 * * * ."

"(Sd.) S. B. CHITNAVIS,
A. D. J."

"30th January 1924"

On remand the case went before Sub-Judge, Second Class, who took down the statements of the parties on 15th February 1924 and summarily rejected the petition for restoration on the ground that the amount of Rs. 8 was not deposited in time. The amount had, however, been deposited in Court on 9th February 1924. His view was that plaintiff "failed to do what the Appellate Court ordered as a condition precedent for restoration of suit" and he, therefore, refused to restore the case to file. He considered that the Appellate Court had clearly stated that the payment of Rs. 8 was a condition precedent and of essence for restoration and had so very properly fixed the case to be taken upon 7th February 1924. The dismissal of the suit was thus allowed to stand as before.

(Sd.) D. R. VAIDYA.
Second Sub Judge.

Against this order the plaintiff has preferred this petition for revision. The non-applicants did not appear though they were served with notices. The case was heard *ex parte* against them.

What I have to decide is whether the Court of first instance has failed to exercise a jurisdiction vested or it has acted with material irregularity or illegality in the exercise of such jurisdiction. This will necessarily depend upon the correctness or otherwise of the view that it took of the lower Appellate Court's directions. The learned Subordinate Judge, Second Class, regards the payment of Rs 8 in 8 days as a condition precedent and of essence for restoration of the suit. It is argued before me that the proper order where payment *in time* could have been made of the essence for restoration, would have been one which attached a penalty for a non-compliance with the same. A distinction is made between a term and a condition precedent on the strength of the ruling in *Narayan Chitko Juvekar* v. *Vithal Parshotam* (1). It is pointed out that here as in the reported case "there is no provision that, failing fulfilment by the plaintiff at the end of.....(time) his right under the..... (order) is to fail," and that "such an expression is what one would look for where the precise date was intended to form an essential element of the condition." Justice West and Birdwood, JJ., relied upon the case of *Sidney* v. *Vaughan* (2) as showing that the mention of something to be done coupled with an expression of time may but serve to indicate a term not to impose a condition *sine qua non*. They, therefore, observed as follows: —

"The mention of a term when a particular right is to become enforceable is not a condition whether the enforcement be otherwise subject to a condition or not."

In a case arising under O. IX, r. 13, C. P. C., out of an application to set aside an *ex parte* decree, the Court passed an order allowing the application, setting aside the *ex parte* decree and directing the suit to be restored to its original number for re-trial but appended the following direc-

(1) 12 B. 23; 6 Ind. Dec. (N. S.) 500.
(2) (1721) 2 Bro. P. C. 254; 1 E. R. 926.

tion to it "but the order of restoration will be subject to the payment of Rs. 15 as damages by the applicant within three days to plaintiff." The Sub-Judge who passed this order on 31st March 1913 was transferred almost immediately afterwards, and on the 4th of April 1913 the matter came before his successor, the money was not deposited or tendered within the time but it was tendered in Court on 4th April 1913 and refused by plaintiff, the question was whether the learned Subordinate Judge had jurisdiction to extend the time fixed by the order dated 31st March 1913 for payment of the money. I refer to *Jagarnath Sahi* v. *Kamta Prashad* (3). The Subordinate Judge there recorded a formal order definitely dismissing the application to have the *ex parte* decree set aside. Similarly in the present case also the Sub-Judge, Second Class, has passed an order definitely refusing to restore the suit to file. Ryves and Piggott, JJ., who heard the appeal observed at page 80* of the report:—

"In our opinion the learned Subordinate Judge on the 4th April 1913 was still seised of the original application under O. IX, r. 13 of the C. P. C., and had power to pass suitable orders in respect of the same. He could extend the time fixed for the payment of the prescribed damages, provided good cause was shown, under the powers recognized by s. 148 of the C. P. C. or he could proceed to pass a fresh conditional order, setting aside the decree upon terms, in place of the order of the 31st March 1913 which had become ineffectual through the failure of the applicants to comply strictly with the prescribed conditions."

They accordingly reversed the order and remanded the case for disposal.

In both these cases there was no provision that failing fulfilment of the order by plaintiff at the end of the time allowed his rights under the order were to fail and, therefore, the Courts were directed to ignore the failure. In *Nand Lal* v. *Kishorilal* (4), the Allahabad High Court had to consider the effect of an order refusing to restore a suit to file under the following circumstances:—

The plaintiff's suit was set down for hearing on the 2nd January 1914. He did not appear when the suit was called on and it was accordingly dismissed. Plaintiff presented himself in Court later on the same day. He explained his default and supported it by affidavit, stating that he was accidently delayed on his way. The Subordinate Judge thought that the affidavit did not afford sufficient reason for the plaintiff's failure to be present. However, after some consultation or discussion before the Court defendants informed the Court that they would have no objection to the granting of the plaintiff's application, provided each set of the defendants were paid adequate damages on account of costs incurred to date. Upon this an order was passed "directing plaintiff to pay, within one week, the sum of Rs. 250 to each of the four sets of defendants and *providing that in the event of his failure to do this the application to have the suit restored should stand dismissed.*" It was remarked that the Court below proceeded to pass an order which was intended to, and did, in fact, completely dispose of the application for restoration of the suit. It provided that on a certain event the application should stand dismissed.

I say that it is only to an order such as this that any completeness or finality could be said to attach. It is a self-contained order and provides even for the consequences of non-fulfilment thereof. No such order was passed in the present case by Rao Sahib Chitnavis and I am not, therefore, prepared to accept the narrow construction which the learned Sub-Judge, Second Class, has put upon it. Had there been any provision in the order dated the 30th January 1924 stating what the consequences of the non-fulfilment within the time fixed by it were to be, the Subordinate Judge's seisin over the case would have been limited to simply passing an order that the condition not having been fulfilled in time the conditional order granting restoration became *ipso facto* revoked or withdrawn. The absence of such a provision in the order makes all the difference and as remarked by Ryves and Piggott, JJ., the Sub-Judge, Second Class, had power to pass suitable order in respect of the application. He could still extend the time fixed, under the powers recognized by s. 148, C. P. C.

That s. 148, C. P. C., applies to proceedings antecedent to the passing of a decree is clearly established as a review of the case-law will show. It does not enable

(3) 23 Ind. Cas. 138; 36 A. 77; 12 A. L. J. 38.
(4) 26 Ind. Cas. 895; 12 A. L. J. 1270.

*Page of 36 A.—[Ed.]

the Court to extend time for doing acts allowed by *a decree, e. g.*, the time allowed by a pre-emption decree for payment of the sale-price: per Prideaux, A.J.C., in *Ambadas* v. *Laxman* (5), following *Suranjan Singh* v. *Rambahal Lal* (6), *Dharmaraja Iyer* v. *Sreenivasa Mudaliar* (7), *Bibi Sharofan* v. *Mahomed Habibuddin* (8), *Sajjadi Begam* v. *Dilawar Husain*(9) and *Komalsingh* v. *Jagannath* (10). It will be clearly seen from the following cases that the Court's jurisdiction to extend time once allowed by the Code itself is limited to proceedings anterior to the passing of the decree. *Ganga Ratan* v. *Chandika Prasad* (11) and *Firm Gobind Sahai-Rup Lal* v. *Gurdas Mal* (12). While in *Habibullah* v. *Gola Asmoter Khatun* (13) it was pointed out that where time has been fixed by a decree of Court for payment of Court-fee, the Court has no jurisdiction to amend the decree so as to enlarge the time for payment.

It will thus be clear that the Sub-Judge, Second Class, had ample jurisdiction to exercise his powers under s. 148, C. P. C., and to accept the deferred payment of Rs. 8 as a sufficient compliance with the order dated 30th January 1924 and excuse the delay of one day in the peculiar circumstances of the case. But he declined to do so and has, therefore, failed to exercise a jurisdiction vested in him by law. I am fully aware that I must allow a fairly considerable margin of discretion to a Subordinate Court in a case like the present, but having considered the matter fully I think, the reasons set forth by the Additional District Judge would have amply supported an extension of time upto the day of the lodgment of the adjournment costs into Court. I do not think that the order dated 30th January 1924 was such a conditional order as authorized the First Court to dismiss the application, for otherwise it is wrong to dismiss a case for non-payment of costs: *Feru Shaikh* v. *Beseswar Ghattak* (14).

I, therefore, acting under s. 115, C. P. C., set aside the order dated 19th February 1924 passed by the Sub-Judge Second Class and remand the case with directions to restore the suit to file and to proceed further with the trial of the suit on the merits.

The case has already been delayed and I should, therefore, like to see that it is finished soon. I, therefore, direct that the plaintiff's next friend should appear before the First Court on 24th November 1924 to ascertain the date which that Court might fix for proceeding further with the case. The defendants also must similarly appear on that day.

Costs of this Court will be borne by the applicant. Costs of proceedings for setting aside the dismissal hitherto incurred shall be borne by the applicant, so far as the First Court is concerned, while those in the lower Appellate Court shall be costs in the suit as already directed by that Court.

Z. K. *Case remanded.*

(5) 71 Ind. Cas. 401; 19 N. L. R. 8; (1923) A. I. R. (N.) 210.
(6) 21 Ind. Cas. 585; 35 A. 582; 11 A. L. J. 950.
(7) 31 Ind. Cas. 240; 39 M. 876; 2 L. W. 1074; 29 M. L. J. 708; 18 M. L. T. 486.
(8) 10 Ind. Cas. 148; 15 C. W. N. 685; 13 C. L. J. 535.
(9) 47 Ind. Cas. 4; 40 A. 579; 16 A. L. J. 625.
(10) 49 Ind. Cas. 840; 15 N. L. R. 39.
(11) 74 Ind. Cas. 573; 9 O. & A. L. R. 319; (1924) A. I. R. (O.) 179.
(12) 73 Ind. Cas. 648; (1924) A. I. R. (L.) 222.
(13) 74 Ind. Cas. 575; 37 C. L. J. 395; 27 C. W. N. 720; (1923) A. I. R. (C.) 612.
(14) 14 C. W. N. xl (40).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 767 OF 1923.
November 26, 1924.
Present:—Mr. Justice Mukerji.
DIP NARAIN SINGH AND OTHERS —PLAINTIFFS—APPELLANTS
versus
JAGMOHAN AHIR AND OTHERS— DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 76—Mortgage—Mortgagee encroaching upon mortgaged land—Suit by mortgagor for restoration—Remedy.

It is the duty of a mortgagee, when he takes possession of the mortgaged property, to manage it as a person of ordinary prudence would manage it if it were his own. A duty is cast on him to see that the property is not lost by any encroachment. So long as he is in possession as mortgagee he is trustee for the mortgagor and is bound to protect his rights. [p. 17, col. 1]

Where immoveable property is trespassed upon, a money compensation is not the proper remedy to the plaintiff. [p. 17, col. 2.]

Jethalal v *Lalbhai*, 28 B. 298; 6 Bom. L. R. 86 and *Ganga Din* v. *Jagat Tiwari*, 25 Ind. Cas. 198; 12 A. L. J. 1026, relied on.

Defendants were put in possession of certain property by the plaintiff under a mortgage for a definite

period. Shortly before the expiry of the period they erected a building on land adjoining to the mortgaged land and encroached upon a portion of the mortgaged land. After redeeming the property the plaintiff brought a suit for demolition of that portion of the building which stood on the mortgaged land and for restoration of the site to its original position :

Held, that during the period of the mortgage the defendants were entitled to use the land in any manner they pleased provided that on redemption they restored it to the same condition in which it was when the mortgage was made, and that, therefore, no question of acquiescence on the part of the plaintiff could arise and the plaintiff was entitled to have the building demolished and the site restored to its original condition. [p. 17, col. 1.]

Beni Ram v. *Kundan Lal*, 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 and *Shama Charan* v. *Babu Lal Misr*, A. W. N. (1904) 70, distinguished.

Second appeal against a decree of the Subordinate Judge, Jaunpur, dated the 3rd February, 1923.

Mr. *Mukhtar Ahmad*, for the Appellants.

Mr. *Damodar Das*, for the Respondents.

JUDGMENT.—The facts of the suit out of which this appeal has arisen are practically all admitted and are as follows :—

The plaintiffs and defendants Nos. 9 to 12 are the appellants in this Court. Defendants Nos. 9 to 12 being away from the district were made *pro forma* defendants. They and the plaintiffs possessed the same right in the property in suit. The predecessors-in-title of the plaintiffs and defendants Nos. 9 to 12 mortgaged plot No. 1763 which was their tenancy (presumably tenancy at fixed rate) for a period of 20 years in favour of the predecessors-in-title of defendants Nos. 1 to 8. This mortgage was executed on the 27th of June 1901 and was redeemed on 22nd of June 1921. The plaintiffs came to Court with the allegation that some six months before the institution of the suit the defendants encroached upon a portion of plot No. 1763 and built a house upon the same. They asked for the demolition of the construction and for the restoration of the site to its original position. Of course, the suit involved a claim for the recovery of possession.

The defence was that the building was an ancient one; that no portion of the land had been encroached upon and that the suit was due to the fact that the defendants refused to allow a redemption of the mortgage before the expiry of the term.

The Court of first instance found that 1½ *dhurs* of land had been encroached upon by the defendants' building and that the defendants constructed the building some 12 years before the institution of the suit. On these findings the learned Munsif gave a decree for Rs. 10 by way of compensation and dismissed the rest of the claim. On appeal this decision was affirmed.

The learned Subordinate Judge found the following:—

"The truth is only so much that when the house was built, plaintiffs never thought that defendants were encroaching and defendants never thought that they were doing anything wrong. Now after 12 years when the time for redemption arrived plaintiffs want to take their pound of flesh. You will find in the map that the house is a large one and a very small portion of it lies in plaintiffs' area."

The learned Subordinate Judge applying the principle of acquiescence affirmed the decree of the First Court.

In this Court it is contended on the authority of the Privy Council case of *Beni Ram* v. *Kundan Lal* (1) which has also been cited by the learned Subordinate Judge, that the rule of acquiescence does not apply to the facts of the case and that the plaintiffs were entitled to have their land restored to them.

The Counsel for the respondents cited two cases, namely, *Shama Charan* v. *Babu Lal Misr* (2) and *Haji Syed Muhammad* v. *Gulab Rai* (3).

The principle of acquiescence has been discussed by their Lordships of the Privy Council at page 502 in the case of *Beni Ram* v. *Kundan Lal* (1) already quoted. Although this Court in the case of *Beni Ram* v. *Kundan Lal* (1) came to the conclusion that the plaintiffs were bound by the principle of acquiescence, their Lordships of the Privy Council found themselves unable to agree with the view. In that case it appears that the predecessors-in-title of the defendants had taken a lease for a definite term of a certain piece of land. They did not use the land for the purpose for which they had taken it. After a few years they went on erecting buildings on the site. The buildings were of a permanent nature. On the lessees suing for recovery of possession after the expiry of

(1) 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022.

(2) A. W. N. (1904) 70.

(3) 20 A. 345; A. W. N. (1898) 68; 9 Ind. Dec. (N. S.) 581.

the term of the lease it was urged on behalf of the lessees, that the lessors never having objected to the erection of permanent buildings they were barred by the principle of acquiescence from maintaining the suit. Their Lordships of the Privy Council pointed out that the defendants knew that they were holding for a definite term, that they knew that they were entitled to erect any building they liked on the site provided they restored the land to its original condition after the expiry of the term of the lease. In the circumstances it was held that the principle of acquiescence would not apply.

It appears to me that the principle of the decision of *Beni Ram's case* (1) applies with full force to the facts of the case before me. In this case, the parties who were in possession were the mortgagees. Under the law in force, namely, under the Transfer of Property Act, s. 76, it is the duty of the mortgagee when he takes possession of the mortgaged property to manage it as a person of ordinary prudence would manage it if it were his own. This implies that a duty is cast on the mortgagee to see that the property is not lost by any encroachment. Further the same rule lays down that the mortgagee in possession is not to commit an act which is destructive or permanently injurious to the property. It cannot, therefore, be denied that the defendants so long as they were in possession as mortgagees, so to say, were trustees for the plaintiffs and were bound to protect the plaintiffs' rights. So long as the mortgagees were in possession, it cannot be expected that the mortgagors would be going about inspecting the land mortgaged in order to see that it has been well taken care of. The mortgage was for a definite period and during that period the mortgagees were entitled to use the land in any way they pleased provided they restored it to the same condition in which it was when the mortgage was made. No question of acquiescence in the circumstances can arise to bar the plaintiff's suit.

The cases cited by the learned Counsel for the respondents can easily be distinguished from the case before this Court. The decisions were given on the peculiar facts involved in them. In the case of *Haji Syed Muhammad* v. *Gulab Rai* (3), it was found that the plaintiff was not entitled to proprietary possession claimed by him but he had only a right of user over it. The defendant had raised the construction some two years before the institution of the suit. In the circumstances this Court refused to grant a mandatory injunction. In this case, the plaintiffs are tenants of the land and they are entitled to be put in physical possession of the same. In the case of *Shama Charan* v. *Babu Lal Misr* (2), the owners of the land lived within a few yards of the building and raised no opposition to the construction that was going on before their very face. In that case it might very well be said that the plaintiffs were bound to guard their own property and where it was encroached upon they were bound to tell the trespassers that they were under a mistaken idea that the land was theirs. In the case before this Court the defendants were bound to look after the interest of the plaintiffs and plaintiffs were under no obligation to look after their own property so long as the defendants were to do the same for them.

As regards compensation it has been held and I agree with the view that where immoveable property is trespassed upon, a money compensation is not the proper remedy to the plaintiff. This view was taken in the case of *Jethalal* v. *Lalbhai* (4) and in the case of *Ganga Din* v. *Jagat Tiwari* (5).

The result is that the plaintiffs' claim must succeed. I allow the appeal, set aside the decrees of the Courts below and decree the plaintiffs' suit with costs throughout. I allow the defendants sixty days from this date to remove the materials. The plan prepared by the Commissioner B. Bahadur Lal will be made a part of the decree and will be taken as indicating the extent of the land encroached upon.

Z. K.

Appeal accepted.

(4) 28 B. 298; 6 Bom. L. R. 86.
(5) 25 Ind. Cas. 198; 12 A. L. J. 1026.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 84 OF 1924.
January 14, 1925.
Present:—Mr. Dalal, J. C.

RAM PHER—PLAINTIFF—APPELLANT
versus
AJODHIYA SINGH AND ANOTHER—
—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 5, 14, applicability

of—Transfer of Property Act (IV of 1882), s. 45—Sale in favour of joint vendees—Pre-emption, suit for, against one vendee—Vendee, other, impleaded after expiry of limitation—Limitation, extension of—Suit, whether maintainable.

The Limitation Act must be taken to be exhaustive as regards extension of the period of limitation, and no equitable principle can be introduced which is not expressly recognised by the provisions of the Act. [p. 18, col. 2.]

Section 5 of the Limitation Act applies only to those proceedings which are specifically mentioned in that section, or to which the section may be made applicable by or under any enactment for the time being in force. A suit is not specifically mentioned in s. 5 nor are the provisions of that section made applicable to a suit by any enactment. The section has, therefore, no application to a suit. [*ibid.*]

Section 14 of the Limitation Act excludes time taken in a proceeding *bona fide* in a Court without jurisdiction against the particular defendant against whom the previous proceeding was taken. The provisions of the section cannot be availed of against a defendant against whom no previous proceeding was taken. [*ibid.*]

Where a sale is effected in favour of two vendees jointly and the sale-deed does not show the shares taken by the vendees in the property sold and no attempt is made to prove the share taken by each vendee, a suit for pre-emption against one of the vendees alone is not maintainable. The provisions of s. 45 of the Transfer of Property Act are not applicable to such a case. [p. 19, col. 1.]

Appeal against a decree of the Additional Subordinate Judge, Sultanpur, dated the 17th November 1923, confirming that of the Munsif, Sultanpur, dated the 27th August 1923.

Mr. *Zahur Ahmad* for Mr. *Niamat Ullah*, for the Appellant.

Mr. *G. N. Misra*, for the Respondents.

JUDGMENT.—The plaintiff, who is the appellant here, sued in the Trial Court for pre-emption of a certain property conveyed to two persons, Ajudhiya Singh and Sarju under a sale-deed, dated 27th February 1922. He instituted the suit on the 27th February 1923 against Ajudhiya alone. Proceedings were started and continued against Ajudhiya Singh and it was not till the 29th of May 1923 that the plaintiff discovered that Sarju was the other purchaser. On that date he applied to implead Sarju as defendant in the suit. On that date the suit as against Sarju was time-barred.

The Trial Court, whose decision was upheld by the lower Appellate Court, held that the suit was barred as against Sarju and that partial pre-emption cannot be claimed against Ajudhiya Singh.

In this second appeal argument was advanced that either under s. 5 or s. 14 or under the special circumstances of the case the period of limitation ought to have been advanced by the subordinate Courts. It is enough to say that s. 5 of the Limitation Act applies only to those proceedings which are specifically mentioned in that section or to which the section may be made applicable by or under any enactment for the time being in force, and that s. 14 excludes time taken in proceeding *bona fide* in Court without jurisdiction against the particular defendant. A suit is not specifically mentioned in s. 5 nor are the provisions of that section made applicable to it by any enactment. Section 14 will not be applicable because no proceeding was being taken in any Court against Sarju until the 29th of May 1923.

The learned Counsel quoted a Bench ruling of the Bombay High Court in *Satyabhamabai* v. *Govind* (1) in support of his contention that under the particular circumstances of the case extension of time may be granted independently of any Statute. In the present case the mistake of the plaintiff was due to an incorrect copy supplied to him by the Registration Department. It is not pleaded that the incorrect copy was supplied to him through any fraud of Sarju colluding with the officials of the Registration Office. In the Bombay case a general rule was enunciated that where the law creates a limitation, and the party is disabled to conform to that limitation without any default in him, and he has no remedy over, the law will ordinarily excuse him. The principle is founded on English rulings quoted by the learned Judges. I am not prepared to follow that rule unsupported by any other Indian decision. In my opinion the Limitation Act must be taken to be exhaustive as regards extension of the period of limitation, and no equitable principle can find a place there.

The appeal as against Sarju must be dismissed and I did not call upon the learned Counsel on the side of the respondents to answer this portion of the appeal.

As regards the suit against Ajudhiya Singh the learned Counsel for the appellant was correct in pointing out that this defendant did not raise any plea of non-joinder when he filed his written statement and that he was precluded in consequence from raising such a plea at a later stage of the litigation under r. 13 of O. I.

(1) 25 Ind. Cas. 66; 38 B. 653; 16 Bom. L. R. 441.

This point in his favour however does not carry the plaintiff far. Even if we hold that there was no plea of non-joinder, the Court can proceed under r. 9 which enjoins that no suit shall be defeated by reason of the non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. In the present case the difficulty is that the Court is not in a position to deal with the rights and interests of Ajudhiya Singh. Neither by evidence on behalf of the plaintiff nor by interrogatories issued to Ajudhiya has it been determined what rights and interests Ajudhiya Singh alone has in the property in suit. Support was sought of the provisions of s. 45 of the Transfer of Property Act and it was desired that this Court may hold that Ajudhiya and Sarju were interested in the property in equal shares. We however cannot take account of the second para. of this section until there is an absence of evidence. We must first consider the first para. that where consideration is paid out of a fund belonging to two vendees in common they are respectively entitled to interest in such property identical with the interest to which they were respectively entitled in the fund. This matter was capable of proof and the plaintiff ought to have led evidence or called upon Ajudhiya to declare what share he had in the consideration money. The plaintiff did nothing of the sort. It was through plaintiff's default that there was an absence of evidence. Under the circumstances, it cannot be concluded in his favour that the vendees are entitled to equal interest in the property. If he had made the necessary attempt to prove the different shares of the vendees and the vendees had failed to declare them, it might have been possible to give him benefit of the second para. of s. 45 of the Transfer of Property Act. In his statement dated 29th May Ajudhiya Singh definitely stated that Sarju and he jointly purchased the property. When the plaintiff desired a separate decree against Ajudhiya, that was his opportunity to question Ajudhiya what portion of the consideration money Rs. 1,450 declared by Ajudhiya to be the correct sale price was paid by him. When parties failed to carry on litigation in the Trial Court in the way they should, this Court will not be able to help them. The suit against Ajudhiya also, therefore, must fail for want of ascertainment of his share.

The learned Counsel for the respondent urged generally that the plaintiff was bound to sue for the entire property and quoted a Bench ruling of this Court in *Mahabir Prasad* v. *Ram Jiawan Lal* (2). I shall not discuss its applicability to the circumstances of the present case because in my opinion the occasion does not arise.

I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(2) 8 Ind. Cas. 272; 13 O. C. 260.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1231 OF 1922.

November 26, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

BEHARI LAL MUKHERJEE AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ASUTOSH BANERJFE AND OTHERS—PLAINTIFF AND OTHERS *Pro forma* DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 26—Easement, proof of—User, nature of—Pleadings—Claim of ownership and in alternative of easement, whether can be made.

In order to establish a right of easement under s. 26 of the Limitation Act it is enough for a plaintiff to prove that he has been exercising the right without interruption, without express or implied permission of the owner of the servient tenement and without secrecy or stealth. [p 20, col. 2.]

It is not inconsistent for a plaintiff to claim ownership in certain property and in the alternative a right of easement over the same. [p. 21, col. 1.]

Narendra Nath Barari v. *Abhoy Charan Chhattopadhya*, 34 C. 51; 4 C. L. J. 437; 11 C. W. N. 20; 1 M. L. T. 364, followed.

Appeal against the decree of the Subordinate Judge, Bankura, dated the 18th February 1922, modifying that of the Munsif, Khatra, dated the 20th August 1921.

Babus *Joges Chandra Roy* and *Nakuleswar Mukherji*, for the Appellants.

Dr. *Jadu Nath Kanjilal* and Babu *Purna Chandra Chandra*, for the Respondent.

JUDGMENT.—Plaintiffs-respondents brought a suit out of which this appeal has arisen for confirmation of possession of a certain tank on establishment of title thereto as appertaining to their *chak* Keshabad or in the alternative for declara-

tion of their right of easement for taking water from the said tank for irrigating their lands in that *chak*. The learned Munsif who tried the case dismissed the suit and found against the plaintiffs on both the points. On appeal the learned Subordinate Judge agreed with the Munsif as to the finding on the question of title but held that the plaintiffs succeeded in proving their alleged right of easement for drawing water from the tank for irrigation purposes.

Against this finding of the lower Appellate Court several objections have been taken. Firstly, it is urged that the plaintiffs and the defendants being tenants under the same landlord, no right of easement can be acquired by the plaintiffs against the defendants. This point was not raised in the pleadings in any of the Courts below and we have not sufficient findings as to enable us to examine this point.

It is next urged that there is no finding that the user by the plaintiffs of the water of the tank was open, peaceful, uninterrupted and as of right. There is no doubt that the judgment as recorded by the learned Subordinate Judge is not happily worded and is open to the criticism made by the learned Vakil for the appellants. But reading the findings of the learned Judge and his observations on the points raised before him we think that it will serve no useful purpose to remand the case back to him for inserting in his judgment words which are to be found in s 26 of the Indian Limitation Act. The findings of the learned Subordinate Judge are that according to the defendant's own witnesses there is a cut in the bank of the tank towards the plaintiff's *chak* which has existed for long over 20 years, that the plaintiffs have no other source of irrigation that it was absolutely necessary for them to take water from the tank for the purpose of irrigating their lands and that it may be presumed that they have been exercising this right for a considerable time. This conclusion, the learned Subordinate Judge draws from a certain *solehnama* between the parties filed in a criminal case. Taking into consideration these circumstances the learned Judge proceeded to examine the evidence adduced by the parties and observes that in the light of the above circumstances he prefers the evidence on the plaintiffs' side and holds that the plaintiffs have a right of easement over the tank and that the evidence of the defendants appeared to him to be very poor and unworthy of credit on this point On these considerations he found that the plaintiffs exercised that right for over 20 years ending within 2 years before suit. Then he refers to the evidence of one of the witnesses of the plaintiffs that there was a dispute between the parties about the ownership of the tank since 1305 and remarks that the dispute about the ownership of the tank did not necessarily indicate that there was a dispute over the plaintiffs' right to take water for irrigation. In the result he allowed the appeal and declared the plaintiffs' right of easement over the tank and ordered that the plaintiffs would be at liberty to take water from the tank in suit for irrigation of their lands in Keshabad *chak* whenever necessary by cutting an opening in the bank of that tank adjacent to that *chak* at the point marked B. There is a further direction that the plaintiffs should be bound to close up that opening after the necessary quantity of water has been drawn. These findings in our judgment amount to exercise by the plaintiff of this right of easement as of right for the period of 20 years uninterrupted and without obstruction. All the expressions used in s. 26, Limitation Act, have been judicially interpreted and it is now settled that in order to establish a right of easement it is enough for the plaintiff to prove that he has been exercising the right without interruption, without express or implied permission of the owner of the dominant tenement and without secrecy or stealth. The findings of the learned Judge amount to this that the right enjoyed by the plaintiff was an easement within the meaning of s. 26, Limitation Act, We think that this objection must be overruled.

The third point raised on behalf of the appellant is that the easement cannot be claimed over a property which is also claimed by the plaintiffs as belonging to them; or in other words, when the exercise of the right referable to the easement claimed is due to the assertion of a right of ownership in the property, the plaintiffs will not be entitled to claim easement over the property. This point has been set at rest by the Full Bench decision in the case of *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya* (1) where it has been held that it is not inconsistent for the plaintiff to claim

(1) 34 C. 51; 4 C. L. J. 437; 11 C. W. N. 20; 1 M. L. T. 364.

mourashi right in a property and in the alternative a right of easement over the same.

The fourth ground of attack is that the plaintiffs have failed to prove the user of the right claimed by them within two years of the institution of the suit. This objection is met by the finding of the learned Subordinate Judge which runs as follows:—"I also find that the plaintiffs exercised the right for over 20 years ending within 2 years before suit."

Lastly it is argued that the decree passed by the lower Appellate Court virtually dispossesses the defendants from the entire tank as the plaintiffs are entitled under it to use the water of the tank to the last drop. The plaintiffs claim the right to irrigate their lands by drawing water from this tank to irrigate their *chak* and that right has been found established by the lower Appellate Court. They are, therefore, entitled to draw so much water as is necessary for the purpose of irrigating the lands and no more. In this view of the plaintiffs' right the lower Appellate Court in its decree has ordered that the plaintiffs shall be bound to close up that opening after their necessity for water is over, whether the water of the entire tank would be necessary for irrigating the lands of the plaintiffs or a lesser quantity would be sufficient, it is impossible to judge. The decree as passed by the lower Appellate Court is explicit and there is no doubt with regard to this matter.

On the whole we think that the view taken by the lower Appellate Court must be upheld and this appeal should be dismissed with costs.

The cross-objection is not pressed and is accordingly dismissed.

Appeal and cross-objection dismissed.

Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST EXECUTION OF DECREE APPEAL No. 29 OF 1924.

January 6, 1925.

Present:—Mr. Dalal, J. C., and Mr. Wazir Hasan, A. J. C.

Kuer JANG BAHADUR—JUDGMENT-DEBTOR—APPELLANT

versus

BANK OF UPPER INDIA, LIMITED, LUCKNOW, THROUGH MR. H. HUNTER, LIQUIDATOR—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 39, 50, 68, 99, O. XXI, r. 22, Sch. III, Para. 1—Execution of decree—Transfer to another Court—Death of judgment-debtor—Execution against legal representative—Procedure—Failure to apply to Court passing decree—Irregularity—Duty of Court—Proceedings transferred to Collector—Civil Court, power to interfere.

Courts in India have to be careful to see that the process of the Court and the law of procedure are not abused by judgment-debtors in such a way as to make Courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights. [p. 22, col. 2.]

Where a Court passing a decree transfers it to another Court for execution under s. 39 of the C. P. C., and while the proceedings are being carried on in the Court of transfer, the judgment-debtor dies, the Court of transfer is not divested of jurisdiction over the execution proceedings by the death of the judgment-debtor. On the application of the decree-holder the Court of transfer, which is executing the decree, must issue a notice under O. XXI, r. 22 of the C. P. C. to the person against whom execution is applied for as legal representative of the deceased judgment-debtor. Where such notice is issued and the person against whom execution is applied for acquiesces in the proceedings and submits to the jurisdiction of the Court of transfer by putting forward objections to the execution, the mere fact that no application has been made under s. 50 of the Code to the Court which passed the decree will not vitiate the proceedings. [p. 23, cols. 1 & 2.]

Paragraph 1 of Sch. III to the C. P. C. puts the Collector in charge of the income of the property as well as of the property itself, and his powers over the income of the property cannot be interfered with by the Civil Court so long as he is in a position to exercise the powers conferred on him by the Schedule. [p. 24, col. 2.]

Case-law referred to.

Appeal against an order of the Sub-Judge, Hardoi, dated the 22nd April 1924.

Messrs. *A. P. Sen*, *H. D. Chandra* and *Krishna Bahadur*, for the Appellant.

Mr. *Bisheshwar Nath Srivastava*, for the Respondents.

JUDGMENT.—Kuar Jang Bahadur, a judgment-debtor in various execution proceedings, has instituted four appeals Nos. 29, 30, 42 and 43 of 1924 against certain

orders of the Subordinate Judge of Hardoi passed during those execution proceedings. There is a considerable amount of confusion in the appeals because separate orders in separate execution proceedings have not been made the subject of separate appeals. There are three execution proceedings Nos. 174, 175 and 176 of 1916 pending in the Court of the Subordinate Judge of Hardoi and Kuar Jang Bahadur's objections to the continuation of those proceedings were all dismissed, yet Appeal No. 29 has been filed with respect to the dismissal of objection in Execution Case No. 175 of 1916 only. The judgment-creditor in all the three execution proceedings is the Bank of Upper India in liquidation.

As to Appeal No. 30 the mistake is made of filing a joint appeal against two separate decree-holders, Jagat Narain minor and Munshi Lal.

Appeals Nos. 29, 42 and 43 raise one single question. We shall consider the facts of the case in which the decree-holder is the Bank of Upper India in liquidation.

The decree was passed on 29th April, 1916, by the Subordinate Judge of Lucknow against Raja Durga Prasad father of the appellant Jang Bahadur. It was transferred for execution to the Court of the Subordinate Judge of Hardoi the same year under s. 39 of the C. P. C. The decree was one for sale on foot of mortgage and as the property sought to be sold was ancestral property the Subordinate Judge of Hardoi transferred the proceedings in sale to the Collector of Hardoi under s. 68 of the C. P. C. After this action was taken, Raja Durga Prasad died on 23rd April, 1920.

On 2nd June, 1920 the Bank applied to have the decree executed against the appellant Jang Bahadur. The application was one for substitution of names, but according to law the proper procedure was to apply for execution against the legal representative of the judgment-debtor. The provisions relating to substitution of names contained in O. XXII, do not apply to execution proceedings as laid down in r. 12 of that Order. Notice was issued to Jang Bahadur as required by O. XXI, r. 22 (1) (*b*), but after service Jang Bahadur made no appearance. Proceedings in execution were, therefore, taken against him by order dated 4th August, 1920. During those proceedings Jang Bahadur made various objections both in the Court of the Subordinate Judge and before the Collector. After these proceedings had continued for three and a half years Jang Bahadur applied to the Subordinate Judge of Hardoi on 10th April, 1924 for an order that all proceedings in that Court subsequent to the date of the death of his father were without jurisdiction and should be set aside. This prayer was refused by the Subordinate Judge by his order dated 22nd of April 1924 and the present Appeal No. 29 is filed from one of those orders.

It may be mentioned that the money due to the Bank at present is over 4 *lakhs* of rupees and since 1916 neither the appellant nor his father has made any payment. For one reason or another the sale of the property has been postponed. Now the appellant thinks that he has discovered means of avoiding payment altogether. The argument put forward on his behalf is that he was wrongly brought on the record by the Subordinate Judge of Hardoi who had no jurisdiction to do so, as under s. 50 of the C. P. C. only the Court which passed the decree can receive application for execution of the decree against the legal representative of a deceased judgment-debtor. According to this argument the Court at Hardoi had no jurisdiction to receive such an application and take proceedings thereon and all proceedings should be stopped until a proper application for execution is made by the decree-holder in the Court having jurisdiction. The aim obviously is that when the decree-holder applies to the Court of the Subordinate Judge of Lucknow objection will be made of the application being time-barred as having been made three years after the next previous application. Use is sought to be made of a Court of law to perpetrate scandalous injustice. Their Lordships of the Privy Council observed as far back as 1872 that the difficulties of a litigant in India commence when he has obtained a decree. Courts in India have to be careful to see that process of the Court and law of procedure are not abused by judgment-debtors in such a way as to make Courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights.

In our opinion we are safe from perpetrating any such injustice. The principal authority quoted on behalf of the appellant is the Full Bench ruling of the Madras High Court in the case of *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (1). The facts of

(1) 28 M. 466; 15 M. L. J. 116.

that case however were different from those before us. In the Madras case the judgment-debtor died before any application for execution was put in by the decree-holder after the transfer of execution. No execution proceeding was being carried on in the Court of transfer at the time of the judgment-debtor's death. Under those circumstances the Madras High Court held that the application to execute the decree against the legal representative of the deceased judgment-debtor lay in the Court which passed the decree and not in the Court to which the decree was transferred. In our case the proceedings were being carried on in the Court of transfer at the time of the death of the judgment-debtor. The rule properly applicable would be that of O.XXI, r. 22 where the Court executing the decree is directed to issue a notice to the person against whom execution is applied for on the death of the judgment-debtor. Such a distinction appears to have been in the mind of the learned Chief Justice if we study the observations at page 470* of the report. When the opinion of the Full Bench was conveyed to the Divisional Bench in that case they refused to consider the entertainment of the petition for execution by the Court of transfer as an irregularity because an objection was taken by the judgment-debtor to the application being entertained by that Court. In the present case no such objection was taken and in fact the judgment-debtor continued to make objections to execution submitting to the jurisdiction of the Hardoi Court. It is instructive to notice how a Bench of the Madras Court itself has distinguished the case in *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (1) in *Raghavachari* v. *Paramaswami Pillai* (2). It was the judgment-debtor's legal representative who applied to the Court of transfer and desired it to hear his objections. The Madras High Court held that, in such a case the Court of transfer had jurisdiction to hear the objection and proceed with the execution. Obviously, therefore, the Madras High Court does not hold that the Court of transfer is divested of jurisdiction in the execution proceedings by the death of the judgment-debtor. They have formed an opinion as to the procedure to be adopted by the decree-holder in taking out execution proceedings against the legal representative of the judgment-debtor where the judgment debtor dies before any proceedings in execution are taken in the Court of transfer. When the judgment-debtor acquiesces in a different procedure and puts forward objections in the Court of transfer no case will arise of want of jurisdiction, but there would only be an irregularity of procedure curable under the provisions of s. 99 of the C. P. C.

Under the circumstances of the present case we are not required to dissent specifically from the ruling of the Madras High Court.

The case of *Sham Lal Pal* v. *Madhu Suden Sircar* (3) is in direct conflict with the Madras ruling and the Madras High Court specifically dissented from it. In that case also the judgment-debtor died before the judgment-creditor had taken steps for the execution of the decree against the judgment-debtor in the Court of transfer. The Judges of the Calcutta High Court pointed out that even assuming that an application under s. 234 (s. 50 of the present Code) to the Court which passed the decree was a necessary preliminary to proceedings under s. 248 (O. XXI of r. 22 of the present Code) the omission to make it was only an irregularity and under s. 478 (s. 99 of the present Code) the order of the Court of transfer was not such as should be reversed. In the present case there are no merits because it is not suggested that the legal representative of Durga Prasad was somebody other than the appellant, nor has the appellant been prejudiced by the application being made in the Hardoi Court as admittedly he resides within the jurisdiction of that Court. He himself submitted to the jurisdiction of the Hardoi Court for three and a half years. We have already pointed out that under the peculiar circumstances of the Madras case the Division Bench did not accept the plea of irregularity of procedure. It however did not lay down that the omission of an application under s. 50 to the Court which passed the decree can in no case be an irregularity capable of being remedied under the provisions of s. 99, C. P. C.

In the view we take it is not necessary to examine the other rulings quoted on behalf of the appellant:—*Hira Chand Harjivan Das* v. *Kastur Chand Kasi Das* (4),

(2) 55 Ind. Cas. 812; 11 L. W. 173.

*Page of 28 M.—[*Ed.*]

(3) 22 C. 558; 11 Ind. Dec. (N. S.) 372.

(4) 18 B. 224; 9 Ind. Dec. (N. S.) 657.

Seth Shapurji Nana Bhai v. *Shankar Dat Dube* (5), *Tameshar Prasad* v. *Tahkur Prasad* (6), *Amar Chandra Banerjee* v. *Gur Prosunno Mukerjee* (7).

Some of the cases relate to the transferee of a decree to which other considerations will apply as the case of a transferee is not covered by the provisions of O. XXI, r. 22. We have examined all these rulings but have nowhere discovered any definite pronouncement that at the death of a judgment-debtor the Court of transfer ceases to have jurisdiction. The Bomay High Court went so far as to hold that the application for execution against the legal representative was to be made to the Court which passed the decree, but the notice to the legal representative was to be issued by the Court of transfer. Obviously to give effect to the provisions of s. 50 several High Courts have held it desirable that the application for execution against the legal representative of a deceased judgment-debtor should be filed in the Court which passed the decree, but this method is considered a method of procedure at a time when the jurisdiction of the Court of transfer continues and the Court of transfer is considered the proper Court to issue notice to the legal reperesentative and carry on proceedings in execution without a fresh order of transfer. According to their opinion, the only thing wanting in a case like the present was an application to the Court which passed the decree and even those Courts would have held under the circumstances of the present case that the omission was only an irregularity.

We dismiss the Appeals Nos. 29, 42 and 43 of 1924 with costs.

As regards Appeal No. 30 the facts are these. After the decrees of the Bank and other decree-holders were transferred to the Collector of Hardoi under s. 68, C. P. C., and the Collector was taking proceedings in execution in accordance with rules given in the Third Schedule of the Code, the execution of a money decree was transferred to the Court of the Subordinate Judge of Hardoi. In execution proceedings he ordered the appointment of a Receiver to take the annual income of the property and pay off these particular decree-holders. In our opinion such an order was contrary to the provisions of para. 11 of the Schedule which lays down that no Civil Court shall issue any process against property within the control of the Collector under s. 68 in execution of a decree for the payment of money. The appointment of a Receiver and the direction to him to collect the income of the property are processes of the Civil Court. Paragraph 1 of the Schedule which enunciates the powers of the Collector puts the Collector in charge of the income of the property as well as of the property itself because he has power to raise the amount of the decree by letting the property in perpetuity or for a term or by mortgaging the whole or part of the property. His powers over the income of the property cannot be interfered with by the Civil Court so long as the Collector is in a position to exercise the powers conferred on him by Sch. III.

The question, however, is whether we can interfere at this stage when the judgment-debtor has raised this particular objection a long time after the orders were passed for the appointment of a Receiver. When the judgment-debtor previously appealed against those orders to this Court he did not raise this particular objection. We think, therefore, that proceedings up to date cannot be vitiated and we cannot direct repayment of the money collected by the Receiver to the judgment-debtor. In fact the judgment-debtor has no right to receive the money. If any person has that right he is the decree-holder in execution of whose decree the property was placed under the control of the Collector to exercise powers under Sch. III of the Code. We shall not interfere with what has been done so far.

We think, however, that the Receiver should be removed from the date of our present order. Appeal is made only in one case and our order will, therefore, apply to that case alone, but we direct the Judge of the lower Court to pass similar orders in other cases. There is so much confusion that it is not possible to determine in which particular case the appeal is lodged. The Judge of the lower Court however is directed to pass orders removing the Receiver in the cases of both decree-holders Jagat Narain minor and Munshi Lal. We make no order as to costs of this appeal.

Separate orders shall be entered in ever

(5) 17 A. 431; A. W. N. (1895) 74; 8 Ind. Dec. (N. S.) 599.
(6) 25 A. 443; A. W. N. (1903) 99.
(7) 27 C. 488; 14 Ind. Dec. (N. S.) 321.

appeal and separate decrees prepared in accordance with this judgment.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 250 OF 1924.

November 19, 1924.

Present:—Mr. Justice Krishnan.

SUDALAIMUTHU PILLAI *alias* APPAVU PILLAI AND OTHERS—PLAINTIFFS NOS. 2 TO 5—PETITIONERS

versus

PERIA SUDARAM PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), Sch. II, Art. 17 (6)—Civil Procedure Code (Act V of 1908), ss. 92, 115—Trust—Scheme suit—Relief for refund of misappropriations—Delivery of possession of properties to new trustees—Court-fee payable—Revision.

A suit under s. 92, C. P. C., praying that the defendant trustee should refund to the trust a specified amount misappropriated by him and also that certain properties should be handed over to the new trustees to be appointed under the scheme to be framed by the Court falls under Art. 17, cl. (6) of Sch. II to the Court Fees Act. [p. 26, col. 1.]

Ramrup Das v. *Sujaram Das*, 7 Ind. Cas. 92; 12 C. L. J. 211; 14 C. W. N. 932, relied on.

Where the Trial Court wrongly directs a higher fee to be paid on such a plaint, it is competent for the High Court to interfere in revision under s. 115, C. P. C., even though a remedy by way of appeal is open. [p. 26, col. 2.]

Chandramani Koer v. *Basdeo Narain Singh*, 49 Ind. Cas. 442; 4 P. L. J. 57, not followed.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Additional Subordinate Judge, Tinnevelly, dated the 21st March 1924, in O. S. No. 17 of 1921.

Mr. *S. Ramaswami Iyer*, for the Petitioners.

Mr. *P. V. Krishnaswamy Iyer*, for the Respondents.

JUDGMENT.—This is an application under s. 115, C. P. C., to revise an order passed by the Additional Subordinate Judge of Tinnevelly declaring that *ad valorem* Court-fee on Rs. 11,000 was payable on the plaint presented to him by the petitioner before me in this Court. The plaint was one under s. 92 of the Code, and in the plaint he asked that the defendants should be made to refund to the trust the sum of Rs. 11,000 at which figure he estimated the amount misappropriated by them. He also asked that certain properties in the possession of the defendants should be handed over to the new trustees to be appointed under the scheme to be framed by the Court, and these properties were valued at Rs. 90 at 5 times the annual assessment of the lands described in the schedule. The figure 11,000 was arrived at in this manner. He actually paid a stamp duty only of Rs. 10 on the plaint as for a declaration and urged that the other reliefs which he claimed in the plaint were not capable of valuation because he was not asking that the property should be handed over to himself and because he claimed no beneficial interest in those reliefs. The Subordinate Judge has held that the plaintiff was bound to pay Court-fees on those reliefs as they formed part of the subject-matter in dispute. It seems to me that this view is not correct. The plaintiff does not claim any beneficial interest in these sums, but only says that on going through the accounts a sum which he estimates at Rs. 11,000 would be found due by the trustees to the trust and that the trustees should be asked to make good to the trust itself that amount of money and hand over possession of the immoveable property. In such a case, we cannot treat those reliefs as being part of the subject-matter in dispute between the parties, they are merely ancillary reliefs. The case is covered by the ruling in *Ramrup Das* v. *Sujaram Das* (1). I respectfully follow the view taken in it by the learned Judges of the Calcutta High Court. No doubt, as pointed out by the Subordinate Judge, there is an observation in *Srinivasa* v. *Venkata* (2) that if damages on account of misappropriated moneys are claimed, Court-fee will have to be paid on such amounts. But these observations were unnecessary for the purpose of disposing of that case, and were only *obiter dicta*; and, therefore, I do not think that I am bound by those observations. It would be a hardship to worshippers who bring suits under s. 92 in order to see that the trusts are properly carried out and that the trustees do not misappropriate the moneys belonging to the trust or abuse the trust, to have to pay Court-fees upon such large sums of money.

(1) 7 Ind. Cas. 92; 12 C. L. J. 211; 14 C. W. N. 932.

(2) 11 M. 148; 4 Ind. Dec. (N. S.) 103.

It will practically prevent them from bringing such suits. I am, therefore inclined to think that this Court should take a lenient view as regards Court-fees with reference to claims of this sort. As it seems to me that the relief claimed clearly falls under Art. 17 (6) of the Second Schedule to the old Court Fees Act, which was in force when the plaint was filed, there is no reason why the plaintiff should not be allowed to file the plaint on a ten rupees stamp. The view taken by the Calcutta High Court in the case above quoted seems to me to be the proper view. My attention has been drawn to *Umrao Mirza* v. *Jones* (3), but that case was not one under s. 92 so far as can be gathered from the report. If it is supposed to lay down a rule which is in conflict with the ruling in *Ramrup Das* v. *Sujaram Das* (1) I think we should prefer to follow the later decision of the Calcutta High Court. *Omrao Mirza* v. *Jones* (3) was cited to the learned Judges in *Ramrup Das* v. *Sujaram Das* (1) as appears from the arguments of the Counsel before them, but no reference is made to it in the judgment. *Thakuri* v. *Bramha Narain* (4) has also been brought to my notice but it is easily distinguishable. In fact in that case the learned Judges held at p. 63 that Court-fee need not be paid upon any claim for damages as part of the account asked for under s. 92 and they distinguish the cases in *Delroos Banoo Begam* v. *Ashgur Ally Khan* (5) and *Omrao Mirza* v. *Jones* (3) already referred to. They, no doubt, say that if a prayer for an injunction against interference was added and if that is valued, Court-fee ought to be paid for it. Whether that portion of the decision is correct or not, it is not necessary for me to say, for there is no such claim put forward in this case. The Subordinate Judge has referred to 37 M. L. J. 447. But there does not seem to be any case in that report, having any bearing; there is clearly some error here. With reference to the new Court Fees Act, there is a clear ruling by Venkatasubba Rao, J., in *Ramanuja Naidu* v. *Allagappa Chetty* (6) in which he held in a case exactly similar to the present that a single Court-fee of Rs. 50 only need be paid. I should have been content merely to follow that case in deciding this case, had it not been for the fact that this case arises not under the new Act but under the old Act. It seems to me that the tendency has been in such cases to hold that a Court-fee of Rs. 10 is sufficient and the Legislature has now made it clear that extra Court-fees are not payable even though claims are made for accounts to be taken and for moneys to be paid by the defaulting trustee to the trust fund if he had misappropriated them. I hold that the Court-fee of Rs. 10 paid on the plaint is sufficient in this case.

It was also argued that whatever might be my opinion in the case, I should not interfere in revision as the parties have another remedy by way of appeal to the proper Appellate Court if the plaintiff refuses to pay the Court-fees and gets the plaint rejected. No doubt, there is such a remedy. But it seems to me to be a cumbrous remedy, for if the plaint is rejected he will have to pay the same stamp duty on appeal. It has been the practice of this Court to interfere in this class of cases in revision and set the matter right, so that no further trouble might arise. No conflict of opinion in this Court on this point has been brought to my notice, although it is true that the Patna High Court has taken a different view. In the case in *Chandramani Koer* v. *Basdeo Narain Singh* (7) the main argument was that the *cursus curiæ* of that High Court had been not to interfere under s. 115 in cases of this sort. But in this Court *cursus curiæ* has not been in that way at all. Therefore, the argument loses much of its force in this Court. It seems to me that it is open to this Court to interfere because the question is really one of jurisdiction as the plaint has to be rejected if the stamp duty is not paid. I am also of opinion that it is desirable that under s. 115, C. P. C. we should interfere and not leave the party to his remedy by way of appeal. I am, therefore, inclined to interfere under s. 115 in this case and I do so. The civil revision petition is allowed and the order of the Subordinate Judge is set aside and he is directed to take the suit on his file on the stamp of Rs. 10 already paid, and dispose of it according to law. Costs of this petition and costs in the lower Court will be dealt

(3) 10 C. 599; 5 Ind. Dec. (N. S.) 401.
(4) 19 A. 60; A. W. N. (1896) 187; 9 Ind. Dec. (N. S.) 39.
(5) 15 B. L. R. 167; 23 W. R. 453.
(6) 85 Ind. Cas. 801; 47 M. L. J. 656; 20 L. W. 716; 35 M. L. T. 124; (1924) A. I. R. (M.) 882.
(7) 49 Ind. Cas. 442; 4 P. L. J. 57.

with by the Subordinate Judge in his final order.

V. N. V. *Petition allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 172 OF 1922.

January 14, 1925.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

JAGMOHAN AGRAHRI AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

PRAG AHIR AND OTHERS—DEFENDANTS RESPONDENTS.

Hindu Law—Joint family—Alienation by manager—Benefit to family—Alienation, whether can be challenged.

Under the Hindu Law a transfer of family property can be made by the manager of the family either for legal necessity or for the family benefit. [p. 28, col. 2.]

Hunoomanpersaud Panday v. *Musammat Babooee Munraj Koonweree*, 6 M. I. A. 373 at p. 423; 18 W. R. 81*n*; Sevestre 25*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147, followed.

Where by an alienation of family property it is intended to get rid of an estate which is inconveniently situated, which has no *sir* land attached to it, and which is not sufficiently profitable, and to substitute for it something that is likely to yield a larger income by an extension of the family business then being carried on, the transaction cannot be challenged. [p. 28, col. 2.]

Girdharee Lall v. *Kantoo Lall*, 14 B. L. R. 187; 22 W. R. 56; 1 I. A. 321; 3 Sar. P. C. J. 380 (P. C.) and *Mohanund Mondul* v. *Nafur Mondul*, 26 C. 820; 3 C. W. N. 770; 13 Ind. Dec. (N. S.) 1125, relied on.

Krista Chandra Chowdhury v. *Ratan Ram Pal*, 35 Ind. Cas. 673; 20 C. W. N. 645 at p. 647; 23 C. L. J. 432 and *Ganga Prasad* v. *Ram Sarup*, 60 Ind. Cas. 68, distinguished.

First appeal from a decree of the Subordinate Judge, Basti, dated the 24th of January 1922.

Messrs. *P. L. Banerji* and *N. Upadhiya*, for the Appellants.

Messrs. *U. S. Bajpai* and *Saila Nath Mukerji*, for the Respondents.

JUDGMENT.—The plaintiffs are the sons of Narain, and seek to set aside a sale of certain ancestral property situated in the village Buzurgwar, which was effected by the latter in favour of Madho and others now represented by the defendants-respondents, on the 2nd of April 1910. The sale was effected for a consideration of Rs. 3,200 the whole of which was paid in cash to the vendor at the time of registration.

The allegation of the plaintiffs was that they were not bound by the sale inasmuch as it was effected for no legal necessity. The defendant vendees, however, contended that the property sold was situated at a considerable distance from the place where Narain was residing, that it yielded a very small profit to the family, and that the sale in question was effected in order to benefit the family by applying the proceeds to business which was likely to yield greater profit. The plaintiffs also asserted that the sale was effected without consideration and that the property sold was of greater value than that paid by the defendants vendees. These facts were, however, controverted by the defendants vendees.

The Court below found that the property in question was not of a larger value than that represented by the sale consideration paid by the defendants vendees, that the sale was effected for consideration and for the benefit of the family, and that the plaintiffs were consequently bound by it.

We have examined the evidence adduced in the case and are satisfied that the property sold yielded a very small profit to the family, and that owing to the distance at which it was situated, the family found some difficulty in managing it.

The property sold comprised a 5-annas 5-pies share in one of the *mahals* of *Mauza* Buzurgwar, which was situated at a distance of about 16 miles from Bardand where the family resided. The sale deed mentioned that the village was situated at a great distance from the family residence, that the vendor was unable to make suitable arrangements for its management and there was also a need for money to carry on business which could not have been obtained except by the transfer of the said property. The *khewat* for 1320*F.* filed shows that the *mahal* in which the property sold was situated yielded a gross rental of Rs. 345-14-6 per year (Ex. B), out of which Rs. 139 were payable as land revenue (Ex. 3). It is not clear whether the latter amount included the cesses payable on account of the estate. But even if it did include, the share sold yielded, roughly speaking, about Rs. 69 per year, which would in ordinary circumstances be barely enough for a family consisting of a father and two sons, with such other members as may have been dependent on them, for their support. It is not clear

whether the family possessed at the time any other landed property. The evidence however, goes to show that they had a cloth business which was carried on in the name of Narain and his son Jagmohan, one of the present plaintiffs. Ram Deo states that in *Sambat* 1965 Baijnath and Nageshar had dealings with his shop in connection with the purchase of cloth, and that in *Sambat* 1965, which would correspond with the year 1908, there was a balance of Rs. 183 due by them under the previous account. Baijnath was the father of Narain. He had two sons Nageshar and Narain. Gauri Dat states that in *Sambat* 1966 Narain and Jagmohan took cloth from his shop and that there was an account in their names in his books. He further states that there were similar dealings in *Sambat* 1966-67 and that cloth worth Rs. 847-8-0 was purchased by them from him, out of which Rs. 671 were paid to him, and that in the following year, *Sambat* 1867-68, they again purchased cloth worth Rs. 1,125 from his shop, out of which Rs. 1,101-14-0 were paid by them. Gauri Dat is a wholesale dealer paying an income-tax assessed on an income of Rs. 18,400 per year, and his evidence, supported by the account books to which he refers and read with the statement of Ram Deo, leaves no doubt in our minds that there was a family business in cloth carried on at the time when the sale transaction in question was effected, and that Jagmohan was concerned in or jointly carried on that business with his father. Bandhu Lal, *patwari* of Buzurgwar, states that he was *patwari* of the village for the last 17 or 18 years and knew the plaintiffs to whose place of residence he used to go, and that the sale in question was effected by Narain for carrying on business in cloth which existed from before.

The Court below evidently thought that the business for which the sale was effected was a new business started by Narain. But that is not the effect of the evidence which has been adduced in the case.

The business was evidently a profitable business, for the Income-tax Register for 1918 goes to show that Narain was assessed at an income of Rs. 1 400 per year on his business besides house rent. It does not appear when Narain died and whether that business was continued after his death by his sons, namely, the present plaintiffs. But even if the business eventually failed, that would not affect the validity of the transaction which was entered into in 1910 for the purpose of disposing of property, which yielded a small profit and was difficult to manage and to apply the sale consideration to the extension of the existing family business. The business was not of a speculative nature and the subsequent failure of that business if it did fail affords no criterion for determining whether the transaction was originally a prudent transaction, which the manager of a Hindu family, and specially a father, was entitled to make for the family benefit.

Under the Hindu Law a transfer can be made by the manager of a family either for legal necessity or for the family benefit. In *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (1) their Lordships of the Privy Council said :—

"The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

In *Girdharee Lall* v. *Kantoo Lal* (2) and *Mohanund Mondul* v. *Nafur Mondul* (3) the same principle was extended to the case of sales. The decision in *Krishna Chandra Chowdhury* v. *Ratan Ram Pal* (4) does not apply, because no speculative development of the family estate or business was hereby intended. What was intended was to get rid of an estate which was inconveniently situated, which had no *sir* land attached to it and was not sufficiently profitable, and to substitute for it something that was likely to yield a larger income by an extension of family business then being carried on. The decision in *Ganga Prasad* v. *Ram Sarup* (5) and *Krishnadhan Banerje* v.

(1) 6 M. I. A. 373 at p. 423; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(2) 14 B. L. R. 187; 22 W. R. 56; 1 I. A. 321; 3 Sar. P. C. 380 (P. C.).

(3) 26 C. 820; 3 C. W. N. 770; 13 Ind. Dec. (N. S.) 1125.

(4) 35 Ind Cas. 673; 20 C. W. N. 645 at p. 647; 23 C. L. J. 432.

(5) 60 Ind. Cas. 68.

Sanyasi Charan Mandal (6) are also inapplicable.

The appeal, therefore, fails and is hereby dismissed with costs including fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

(6) 51 Ind. Cas. 597; 29 C. L. J. 280; 23 C. W. N. 500.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 353-B OF 1923.

November 13, 1924.

Present:—Mr. Kinkhede, A. J. C..

NARBADJI—PLAINTIFF—APPELLANT

versus

GOPAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Registered deed, cancellation of, mode of—Oral evidence of agreement or conduct, admissibility of.

A registered deed has to be cancelled by a registered deed and evidence of an oral agreement to rescind it or of conduct relied on as showing that the parties considered the registered transaction at an end is shut out by s. 92 of the Evidence Act. [p. 30 col. 1.]

Kattika Bapanamma v. *Kattika Kristnamma*, 30 M. 231; 17 M. L. J. 30, referred to.

Srinivasa Swami Aiyangar v. *Athmarama Iyer*, 2 Ind. Cas. 612; 32 M. 281 at p. 282; 5 M. L. T. 84; 19 M. L. J. 280, relied on.

Appeal against a decree of the Additional District Judge, Akola, in Civil Appeal No. 41 of 1923, dated 13th July 1923.

Mr. *V. R. Pandit*, R. B., for the Appellant.

Mr. *W. R. Puranik*, for the Respondents.

JUDGMENT.—The plaintiff is a *bataidar* who has taken a lease of the defendants' land for a period of 10 years on terms set forth in the registered *bataikhat* dated 15th March 1918 of which Ex. A-1 is a copy. Plaintiff's case is that he cultivated the fields in the years 1918, 1919 and 1920 and had given the defendant No. 1 his share of the *batai* produce of those years. In spite of the fact that he had done the summer tillings for the year 1921, the defendant forcibly dispossessed him from the land and entered into possession in June 1921. Hence this suit was lodged in the year 1922 for recovery of possession of land for the unexpired term of the lease ending with 1928. The defence was two-fold, that plaintiff voluntarily and of his own accord relinquished the fields in suit, and that the defendant No. 1 entered into possession in exercise of the rights expressly reserved by the terms of the lease. The defendant No. 1 after such dispossession sub-let the land to defendant No. 2 but the latter remained absent despite due service and made no defence.

The Court of first instance held on the evidence that the plaintiff did not prepare the fields in suit in the year 1921 by making the summer tillings, that he did not sow cotton-seed in the fields in suit in 1921, that the defendant No. 1 did not forcibly dispossess him of the fields in suit and lastly that plaintiff surrendered his fields under circumstances pleaded by the defendant No. 1 and that plaintiff was, therefore, estopped from bringing the suit. In this view of the case the plaintiff's claim was dismissed without giving any adjudication as regards the second part of the defence, namely, the reservation of the right of re-entry under the terms of the *bataikhat* as entitling the defendant to resist possession. The appeal preferred by the plaintiff was dismissed by the Additional District Judge. Before him the question of the admissibility of the oral evidence to prove the alleged relinquishment of the lease-hold rights was raised. The Additional District Judge held that oral evidence was admissible to prove the surrender. The Additional District Judge fully realising the distinction made in the case of *Kattika Bapanamma* v. *Kattika Kristnamma* (1), as regards the admissibility or otherwise of evidence to prove an agreement to discharge as distinguished from the discharge itself, held that s. 92 of the Evidence Act did not bar the production of the oral evidence of a surrender or relinquishment. In this view he concurred with the finding of the First Court and held that plaintiff had surrendered his rights as a tenant under the lease as alleged by the defendant No. 1. The plaintiff has come up in second appeal. His contentions are that oral evidence was improperly admitted to prove the alleged relinquishment and that the plaintiff was entitled to continue in possession under the terms of the document and that defendants' possession was forcible and further that the decision was contrary to pleadings and evidence on record.

(1) 30 M. 231; 17 M. L. J. 30.

In my opinion neither of the Courts below seems to have grasped the real point which had to be decided in the case. According to the defendant the alleged talk of surrender took place in November 1920. The statement of the defendant is extremely vague on the question of the actual handing over of possession and the point of time when the land was actually surrendered or put into the defendant's possession. The whole of the evidence relates only to the conversation but not a single witness tells about the land having been actually delivered into the defendant's possession by the plaintiff in token of the alleged relinquishment or surrender. The evidence relied on as evidence of relinquishment or surrender of land is really no legal evidence of the surrender or relinquishment but it at the most proves a preliminary conversation about the readiness or agreement to make or take a surrender of the land. The finding that there was a relinquishment has been thus based on no legal evidence to that effect and does not bind this Court. The time of the alleged relinquishment is also quite unusual; October or November is ordinarily not the month when land would be surrendered; that is the very time when the cotton and *juar* crops are standing and bring income. It is very unlikely that the lands would be surrendered or at any rate made over in that month when the crops are on the land. It is held in *Srinivasa Swami Aiyangar* v. *Athmarama Iyer* (2), that a registered-deed has to be cancelled by a registered-deed and that evidence of an oral agreement to rescind it is shut out by s. 92 (4) of the Evidence Act. Even the conduct relied on as showing that they considered the registered transaction as at an end is equally shut out by the said section. Compare *Mayandi Chetti* v. *Oliver* (3). Here the plaintiff's conduct is just the other way. I, therefore, hold that the case has not been properly dealt with by the lower Courts and that no voluntary surrender is legally proved. The other pleas raised by the defendant have not been adjudicated upon. The case must, therefore, go back to the First Court for the decision of the issues left undecided. If as the result of the decision which may be arrived at by the First Court on the issues left undecided it is found that the plaintiff's lease could not be determined arbitrarily by the lessor, he will be entitled to a decree; but if the findings be that the defendant could at his option re-enter under the terms of the *bataikhat* then the further question whether such a term should or should not be enforced will naturally call for determination by that Court. If the Court holds that such a term is void or unenforceable the plaintiff will be entitled to a decree. The appeal is, therefore, allowed and the case remanded to the First Court with directions to dispose of the case with advertence to the above remarks. Costs throughout will abide the event. The plaintiff will get a refund of Court-fees in both the Appellate Courts as the decrees of both the Courts below are hereby set aside.

Z. K.

Appeal allowed.

(2) 2 Ind. Cas. 612; 32 M. 281 at p. 282; 5 M. L. T. 84; 19 M. L. J. 280.

(3) 22 M. 261; 8 M. L. J. 196; 8 Ind. Dec. (N. S.) 186.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 77 OF 1924.

February 26, 1925.

Present:—Sir Girmwood Mears, Kt., Chief Justice, and Mr. Justice Piggott.

RAJAI SINGH AND OTHERS—DEFENDANTS —APPELLANTS

versus

RANDHIR SINGH AND OTHERS —PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 60—Mortgage—Clog on equity of redemption, what amounts to—Usufructuary mortgage for 95 years—Covenant to pay interest after expiry of period, validity of.

Where a mortgage-deed is drafted with the intention that redemption of the mortgaged property should be practically frustrated, that is to say, made so difficult and so hedged about that there is no likelihood of its ever being redeemed, the covenants contained in the deed must be regarded as clogs on the equity of redemption and the mortgagor is entitled to be relieved from the operation of such covenants. [p. 31, col. 2.]

A usufructuary mortgage contained a stipulation that the mortgage would not be redeemed for a period of 95 years, and that in addition to the rents and profits of the property, the mortgagee would at the expiration of the period of the mortgage be paid interest at a certain rate along with the principal money:

Held, that the stipulation was inequitable and that the mortgagor was entitled to redeem the mortgage

property at any time on payment of the principal and interest at the stipulated rate. [p. 32, col. 1.]

Letters Patent Appeal against a judgment of Mr. Justice Daniels, dated the 11th February 1924.

Messrs. *P. L. Banerji* and *Gadadhar Prasad*, for the Appellants.

Dr. *N. C. Vaish*, for the Respondents.

JUDGMENT.—On the 20th of April 1897 Randhir Singh being then an occupancy tenant of a holding, mortgaged it usufructuarily by two documents of that date receiving Rs. 200, or its equivalent in value in respect of one mortgage and Rs. 500 in respect of the other. The mortgage for Rs. 200 was not to be redeemable for 95 years, the mortgage for Rs. 500 was not to be redeemable for 96 years, and to that there was added a stipulation that inasmuch as the usufructuary return was not sufficient to give the proper amount of interest on the outstanding money, there should at the expiration of the 96 years be paid with the principal sum, interest at the rate of four annas per cent. per mensem. A similar provision is to be found in the second deed. The figures of liability for interest at the end of 95 and 96 years which have been given to us are not disputed and amount to Rs. 1,940 and Rs. 485. The position, therefore, on the 20th of April 1897 was that the mortgagor bound himself not to seek redemption for periods of 95 and 96 years and further to be prepared at that time to provide sums respectively of Rs. 1,940 and Rs. 485 and Rs. 500 and Rs. 200 as well. Randhir Singh brought a suit for redemption and to that suit it was objected that the transaction was really a sale and inasmuch as an occupancy tenant was forbidden by law to sell his holding the parties had designedly cleaked the transaction in this mortgage form. Randhir Singh took the point that the documents were really mortgages and that he was entitled to redeem them disregarding the provisions as regards the 95 years and the 96 years. He seemed also to be of opinion that he could disregard the provision as regards the accumulation of interest because we are told that he tendered the sum of Rs. 200 and the sum of Rs. 500 before commencing the action. We have been shown, we believe, all the authorities bearing on this matter, and broadly they may be taken as falling under two heads. It appears that there is a consensus of opinion amongst all the Courts in India that if a period is fixed prior to the expiry of which redemption cannot be granted and that stipulation is assented to redemption cannot be granted before that period has in fact expired and the cases which have been cited to us were cases in which very long periods of years had been fixed. In one case a period of 150 years was fixed. Then there is another view of the law exemplified by the case of *Sarabdawan Singh* v. *Bijai Singh* (1). In that case there was a considerable period fixed, namely, 40 years. There was also an extraordinary provision, namely. that, unless the mortgage-money was tendered on a particular day, the mortgage would be irredeemable for a further period of 40 years. There was also an unjust and illegal stipulation that the mortgage should not be redeemed with borrowed money. Those being the main facts, this Court consisting of Mr. Justice Chamier and Mr. Justice Rafique had to decide what were the right principles to be applied in considering a case of this nature. Now there is no doubt that if the case under consideration (*Rajai Singh* v. *Randhir Singh*) were decided by English Law the plaintiff would have succeeded on the plain statment of the facts. That is evident from the way in which matters of this kind are treated in England as exemplified by the case of *Morgan* v. *Jeffreys* (2). In the 36 Allahabad case [*Sarbadawan Singh* v. *Bijai Singh* (1)] we see indications of the influence of English authorities and the head-note says: "A Court of Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption, although it may be impossible to lay down any general rule as to what should not be regarded as an improper restraint or fetter on the right of redemption." Now the question that we have got to decide is this. We have got to look at the whole circumstances and to say whether this agreement was drafted with the intention that redemption of this property should be practically frustrated, that is to say, made so difficult and so hedged about that there was no human likelihood of its ever being redeemed. We do not propose to attempt what no Court has hitherto ever attempted, to define what circumstances generally will be deemed to be a clog or fetter on the equity of redemption. Each of these cases has to be looked at individully. Now,

(1) 24 Ind. Cas. 705; 36 A. 551; 12 A. L. J. 927.
(2) (1910) 1 Ch. 620; 79 L. J. Ch. 360; 74 J. P. 154; 26 T. L. R. 324.

what are the matters which make both of these documents striking ones? The first is the enormously long period within which Randhir Singh was unable to tender the money and regain possession of his property. It was a period which was certainly to extend throughout the life of Randhir Singh and probably throughout the life of his son. Then as regards the question of interest; we believe that that stipulation was designedly drafted not because the mortgagee wanted any sum of interest paid into his hands, because if that had been his wish, he would have stipulated for an annual payment of interest so calculated as each year to reimburse him for his outlay; but we believe that it was drafted so that if anybody 95 or 96 years later came forward to redeem the property he would have met with a liability to produce a sum greater than the value of this property or any value it would ever be likely to reach.

It is to be noticed that there has been evidence that Rs. 700 was the full value of this property. If that be true anybody in the year 1922 would have to come forward with a sum more than three times the value of the property as it was in the year 1897. Under these circumstances we hold that there were two fetters, the length of time during which the redemption could not be had and the singular stipulation with regard to the payment of interest and the deferred date of such payment, which make it in our view inequitable that this transaction should be upheld in its literal terms. We consider it equitable and right that this suit should be decreed and that Randhir Singh shall have the opportunity of redeeming the property. We are in this view in agreement with the Munsif the lower Appellate Court and the Single Judge of this Court.

We, therefore, dismiss this appeal with costs and fees on the higher scale subject to the modification mentioned below.

Mr. Peary Lal Banerji has asked us to define what we consider to be the proper terms on which redemption should be had. We are of opinion that redemption should be had only on tendering the two sums of Rs. 200 and Rs. 500 with interest calculated at the agreed rate of four annas per cent. per mensem in one case and Rs. 3 per cent. per annum in the other. Such interest to be calculated down to the date of tender by Randhir Singh.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1322 OF 1922.

December 22, 1924.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Chakravarti.

JNANENDRA MOHUN BHADURI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

HARENDRA KRISHNA DE AND ANOTHER—PLAINTIFFS AND ANOTHER—DEFENDANT—RESPONDENTS.

Bengal Patni Taluks Regulation VIII of 1819, s. 11—Bengal Tenancy Act (VIII of 1885), s. 25—Patni sale—*Occupancy tenants—Purchaser, whether entitled to evict tenants.*

The policy of the law at the time of the enactment of the Patni Regulation was to protect from eviction those actually on the land and cultivating it. [p. 33, col. 2.]

At the time of the enactment of the Patni Regulation occupancy tenants did not exist, those cultivating the lands were either *khudkasht raiyats*, that is, *raiyats* of the village cultivating the lands, or *paikast raiyats* who were cultivators who came from outside the village. Consequently, s. 11 of the Patni Regulation of 1819 extended protection to the only cultivating *raiyats* of the village then known, *viz.*, *khudkasht raiyats* or resident and hereditary cultivators. Since the enactment of Patni Regulation another class of cultivating *raiyats* has grown up, whose occupancy rights after twelve years' possession are recognized and protected by the Bengal Tenancy Act. These tanants also are entitled to protection from eviction under s. 11 of the Regulation. [*ibid.*]

Per *Chakravarti, J.*—Section 11 of the Bengal Patni Taluks Regulation VIII of 1819 provides that the purchaser at a sale for arrears of rent under the Regulation should get the *patni* in the same condition which existed at the time of its creation. [p 34, col. 1.]

The substantive rights created in favour of the *raiyats* by the Bengal Tenancy Act do not in any way affect the provisions of the *Patni* Law. [p. 34, col. 2.]

The right of a *patnidar* is primarily to collect rents from *raiyats* and that right is in no way affected by s. 25 of the Bengal Tenancy Act. [*ibid.*]

A *raiyat* with a right of occupancy now occupies the same position as a *khudkasht raiyat* and should, therefore, have the same protection as a *khudkasht raiyat* had when the Patni Regulation of 1819 was passed. [*ibid.*]

Appeal against a decree of the District Judge, Nadia, dated the 5th of May 1922, affirming that of the Subordinate Judge of that District, dated the 30th of April 1921.

Babus *Shib Chandra Paulit* and *Bijan Kumar Mukerji*, for the Appellants.

Babus *Brojo Lal Chakravarty* and *Satyendra Nath Roy Chowdhury*, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by the defendants against a decision of the District Judge of Nadia modifying a decision of the Subordinate Judge.

The suit out of which the appeal arises

was for recovery of possession of certain land from the defendants. The plaintiffs purchased the land at a sale held under the Patni Regulations and their case was that when they went to take possession of the land they were resisted by the defendants and were compelled to bring the suit.

The case put forward by the defendants was that they or their predecessors-in-interest had been in possession of the land from before the Permanent Settlement or at any rate from before the creation of the *patni* and that they had been recognised as tenants in possession, that their holding was a *raiyati* holding of some 312 *bighas* together with some other lands lying to the east and west of the *raiyati* of 312 *bighas* which other lands they claimed as accretions thereto. A further contention was raised on their behalf that the plaintiffs were purchasers of a part of a *patni* but this contention has no force in view of the finding that the *patni* was of an 8-annas share. The claim to the lands lying to the east and west of the alleged *raiyati* holding of 312 *bighas* is untenable and cannot be maintained, as to these lands the defendants are clearly trespassers the land is outside their holding and is not as to any part thereof in the village of Mohisura as they contended and this claim must fail.

The dispute, therefore, narrows itself to a dispute as to that portion of the 312 *bighas* to which this suit relates.

On the facts as found the tenancy was created in 1298 (1891) after the creation of the *patni* and the main question which falls for our decision is whether the plaintiffs as purchasers at a *patni* sale under the regulations are entitled to eject the defendants or whether the defendants are entitled to remain on the land as tenants under the plaintiffs by virtue of their occupancy. The plaintiffs say that the defendants are not so entitled as they are not *khudkasht raiyats* or resident and hereditary cultivators who are the only persons protected on a *patni* sale by virtue of s. 11 of the Putni Regulations. The plaintiffs further contend that the holding is not *raiyati* but a tenure and that consequently even if rights of occupancy are protected the protection does not extend to the defendants who are not occupancy *raiyats* but tenure holders.

It is curious that if the plaintiffs' contention as to their right to evict is correct they have not been able to produce a single case in which in similar circumstances occupancy *raiyats* have been held liable to eviction.

The policy of the law at the time of the enactment of the Putni Regulations seems to have been to protect from eviction those cultivating the land; at the time of the enactment of the Putni Regulations occupancy rights did not exist, those cultivating the lands were either *khudkasht raiyats*, that is, *raiyats* of the village cultivating the lands; or *paikast raiyats* who were cultivators who came from outside the village. Consequently s. 11 of the Putni Regulations extends protection to the only cultivating *raiyats* of the village then known, namely, *khudkasht raiyats* or resident and hereditary cultivators. Since the enactment of these regulations another class of cultivating *raiyats* has grown up whose occupancy rights after 12 years' possession are recognised and protected by the Bengal Tenancy Act. This clearly shows that it has been the policy of the law throughout to protect those actually on the land and cultivating it.

Moreover, despite the findings of the two lower Courts that the defendants cannot rightfully claim to stand in the same position as the former *khudkasht raiyats* on the land if in fact they were *khdkasht raiyats* we do not think that the lower Courts have drawn the right legal inference from the facts found.

The evidence on the record to our mind establishes that the former tenants of the 312 *bighas* were *khudkasht raiyats*; we think, therefore, that the defendants may well claim to occupy the same position, despite the finding that their tenancy dates from 1891. It was we think a tenancy with the same incidents attaching thereto as formerly attached to the lands in the occupation of the previous tenants, that is to say we think upon the facts of this case the defendants can rightfully claim to be treated as *khudkasht raiyats* with the result that they are protected from eviction by the 3rd proviso to s. 11 of the Patni Regulations.

The claim that this is a tenure and not a *raiyati* holding is clearly not sustainable upon the findings of the Courts below.

The result is that the appellants cannot be evicted from any portion of the 312 *bighas* which forms their occupancy holding, possession of which they are entitled to retain upon payment of rent for the same to the respondents, but the appellants

are not entitled to remain in possession of the other lands claimed in the suit which are outside the 312 *bighas*. The decree of the lower Appellate Court will be varied accordingly. The appeal has succeeded in part and failed in part, so there will be no order as to costs.

And this order will apply in both the Courts below.

Chakravarti, J.—I agree with my learned brother Mr. Justice Greaves in the judgment just delivered by him and wish only to add a few considerations in support of his view. On the main question raised in this appeal, section 11 of the Regulation VIII of 1819 really provides that the purchaser at a sale for arrears of rent under the Regulation should get the *patni* in the same condition which existed at the time of its creation. All interests created by the defaulter are intermediate between the interest of the *zemindar* who created the *patni* and the resident cultivators. The third clause of the section runs as follows: "Provided, nevertheless, that nothing herein contained shall be construed to entitle the purchaser of a *taluk* or other saleable property intermediate between the *zemindar* and the actual cultivator to eject a *khudkasht raiyat* or resident or hereditary cultivators etc." This clause only indicates the limitations to the rights of the purchaser and makes it clear that the purchaser shall have no right to disturb the possession of a *khudkasht raiyat*. The rights of a *putnidar* are limited to a right to collect the rent from all *raiyats*; the *knudkasht raiyats* were the only cultivators who at the time, when this Regulation was enacted, enjoyed such rights: See s. 60, Regulation VIII of 1793, page 24 of Field's Introduction to the Bengal Regulations. The Act X of 1859 called the Rent Act for the first time created a class of *raiyats* with rights of occupancy, and in this class the old *khudkasht raiyats* were included; and the distinction between the *khudkasht* and *paikast raiyats* as mentioned in the Regulations was not recognised. This provision of the Rent Act was retained in Act VIII of 1869 and Act VIII of 1885 known as the Bengal Tenancy Act. It is argued with some plausibility that under s. 11 of the Regulation only the *khudkasht raiyats* were protected but not the *raiyats* with rights of occupancy. The right which the *raiyats* with right of occupancy enjoy under s. 25 of the Bengal Tenancy Act was not available against a purchaser under the *patni* law on the ground that s. 195 of the Bengal Tenancy Act says that "Nothing in this Act shall affect...cl. (*e*) any enactments relating to *patni* tenures in so far as it relates to these tenures." This argument is unsound. The substantive rights created in favour of the *raiyats* by the Bengal Tenancy Act do not in any way affect the provision of the *Patni* Law. As I have indicated before, the right of a *patnidar* is primarily to collect rents from *raiyats* and that right is in no way affected by s. 25 of the Bengal Tenancy Act. A *raiyat* called a *khudkasht raiyat* was protected from eviction by a purchaser under the Regulations, because such *raiyats* were not liable to eviction at the will of the *zemindar*. The *raiyat* with a right of occupancy now occupies the same position as a *khudkasht raiyat*. It seems, therefore, reasonable to hold that an occupancy *raiyat* now should have the same protection as a *khudkasht raiyat* had when the Regulation was passed. An illustration will show the absurdity of the contention that a purchaser at a *patni* sale should be entitled to subject an occupancy *raiyat*. A *zemindar* cannot now eject an occupancy *raiyat* except under the provision of s. 25. Suppose a *zemindar* grants a *patni* of the estate and the *patni* is sold under the Regulation, then, according to the argument of the respondent, the purchaser would have a right to eject the occupancy *raiyats*, right which, as I have shown above, the *zemindar* himself does not possess. This leads to a manifest absurdity. The *patni* sales are frequent, but it does not appear that the purchasers at the sales held under the Regulation have ever successfully established that right. The learned Vakils appearing on either side were unable to produce any direct authority on the point. This shows that such an extravagant claim was never put forward before.

Z. K. *Appeal allowed in part; Decree varied.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 108 OF 1924.

November 10, 1924.

Present:—Mr. Kinkhede, A. J. C.

UDARAM AND OTHERS—PLAINTIFFS —APPELLANTS

versus

GONDU AND OTHERS—DEFENDANTS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 8 —Dismissal of suit for default—Bar of fresh suit—Test—Mortgage-suit—Misjoinder of plaintiffs, effect of.

Order IX, r. 8 of the C. P. C., prohibits the filing of a second suit on the same cause of action. Where, however, there is even a slight discrepancy arising out of a single fact among many other facts common to the two causes of action, that single fact alone makes them different causes of action. [p. 37, col. 1.]

Shankar Baksh v. *Daya Shankar*, 15 C. 422; 15 I. A. 66; 5 Sar. P. C. J. 107; 12 Ind. Jur. 132; Rafique and Jackson's P. C. No. 100; 7 Ind. Dec. (N. S.) 866 (P. C.), *Chand Kour* v. *Partab Singh*, 16 C. 98; 15 I. A. 156; 5 Sar. P. C. J. 243; 12 Ind. Jur. 331; 8 Ind. Dec. (N. S.) 65 (P. C.), *Sakha Ram* v. *Shri Ram*, 10 Ind. Cas. 709; 7 N. L. R. 23 and *Mahadeo* v. *Nago*, 12 Ind. Cas. 357; 7 N. L. R. 130 at pp. 132, 133, referred to. [p. 37, col. 1.]

The misjoinder of plaintiffs in a mortgage-suit, to some of whom the relief claimed cannot be granted is a mere defect of form which is not fatal to the suit. [*ibid.*]

Umabai v. *Bhavu Balvant*, 3 Ind. Cas. 165; 34 B. 358; 11 Bom. L. R. 499, followed.

Appeal against a decree of the District Judge, Hoshangabad, dated the 26th November 1923, in Civil Appeal No. 68 of 1923.

Mr. *S. B. Gokhale*, for the Appellants.

Messrs. *G. L. Subhedar* and *K. M. Dharmadhikari*, for the Respondents.

JUDGMENT.—One Gopiram, his son Udaram and nephew Jairam were the ostensible co-mortgagees under a mortgage-deed dated 7th May 1909 executed by the sons of one Shiva. I say ostensible co-mortgagees because the rights as mortgagees vested in the joint co-parcenary of which they were members, Udaram was one of such co-mortgagees. He alleged that there was a partition in the joint family and that at such partition the mortgage-deed in suit fell to his share. Accordingly he on 18th October 1919 instituted Suit No. 57 of 1919 in his own and sole name for enforcing the mortgage (Ex. III-D-1). His son Ballaram acted as his agent in the former suit. In answer to a defence of the defendants that the then plaintiff had agreed to purchase a portion of the mortgaged property, the said agent replied that he (meaning he himself) had offered to purchase but that the sale was not completed for want of the *malguzar's* consent (Ex. III-D-9) and added that the mortgage-deed had at the partition fallen to the share of Dhanaram and that the latter assigned the same to Udaram by an oral assignment. The defendants in that suit denied that Udaram could have any right to sue in the absence of a deed of assignment and pleaded want of knowledge as regards the alleged partition and assignment: (*vide* Ex. P-5). The question to be tried in that suit was whether there was a valid assignment of the rights of the mortgagees to Udaram alone by virtue of the partition, or partition and assignment by Dhanaram takan together. The Court called upon plaintiff to show authorities that he could maintain the suit on the mortgage sued upon and fixed the case for 30th January 1920 (Ex. III D-8); on that day plaintiff was absent though repeatedly called. Defendants were represented by their Pleader Mr. Dharmadhikari and denied the claim *in toto* and the Court consequently passed an order dismissing the suit in its entirety under O. IX, r. 8, read with O. XVII, r. 2, C. P. C., (*vide* Ex. III-D-2).

On 7th November 1922 the said Udaram and his three brothers and nephew Jairam jointly instituted the present suit on the basis of a copy of the mortgage (the original being filed in Suit No. 57 of 1919) and asserted a joint right of suit and said nothing as regards the partition or assignment or about the previous litigation except that they mentioned that the original mortgage-deed was on the record of the said suit. The defendants amongst other pleas raised by them contended that the present suit was not tenable in view of the bar created by the provisions of O. IX, r. 8, C. P. C. In support of this plea they filed the certified copies of the plaint, proceedings and order sheets in the former suit and contended that at the partition the deed in suit fell to the share of Udaram. The plaintiffs also relied on some of those proceedings. The plaintiffs have admitted in the present suit that there was a partition in the family and that each co-parcener's interest had become distinct and alleged that the mortgage-deed in suit fell to the share of Dhanaram, but there is no admission that he had assigned the same to Udaram orally. These pleadings gave

rise to the following amongst other issues:—

(1) To whose share did the mortgage-deed in suit fall at the alleged partition?

(2) Was the old suit on the same mortgage dismissed under r. 8 of O. IX, C. P. C.? If so what is the effect of the said dismissal on the tenability of this suit?

It is sufficient that neither party relies upon the alleged oral assignment as giving Udaram the sole right to sue.

The Trial Court after a consideration of the evidence on record both oral and documentary held that the allegations contained in Udaram's plaint in the former Suit No. 57 of 1919 as per Ex. III-D-1 were true and have not been disproved by the only oral testimony of Dhanaram as P. W. No. 1 or by the plaintiffs' agent's former statement dated 29th January 1920 (Ex. P-5) recorded by the Judge in the former suit. This necessarily involved the position that Udaram alone was, by virtue of the partition admitted by him, entitled to sue on the mortgage and that the dismissal of his suit barred the present suit.

The plaintiffs' appeal to the District Judge was also dismissed with the remarks that full credence should be given to para. 4 of of the plaint (Ex. III-D-1) and that the subsequent pleadings that Udaram bought the deed from Dhanaram (Ex. P-5) and the oral testimony of Dhanaram was, undoubtedly, false. It was held that Udaram was the sole owner of the mortgage-deed and as his suit was dismissed, no further suit lies on the mortgaged-deed.

These findings are findings of fact and cannot be challenged in second appeal. The plaintiffs complain that the burden of proving the specific allotment was on the defendants and that it was wrongly thrown on them. In my opinion the findings are supported by evidence proper for consideration and the plaintiffs cannot get out of them. I will concede that the initial burden was on the defendants to prove the specific allotment. The present plaintiffs did not make any admissions in the plaint about the fact of the partition but they subsequently admitted that there was a partition. So that, in place of the former joint and indivisible right of suit, there was substituted an individual right of suit of one or more co-parceners to whose exclusive share the mortgage-deed may have gone unless the mortgage rights were by common consent kept joint by all the tenants-in-common for enforcement for the common benefit of all of the co-parceners. That the deed was not reserved as common property is clear from the fact that even according to the plaintiffs' own admissions in the oral pleadings in the present suit the deed had become the exclusive property of Dhanaram at the partition which had taken place in 1910-11. The sole question, therefore, was whether the mortgage-deed was allotted to Dhanaram's share as alleged by the plaintiffs or to Udaram's share as alleged by the defendants. The initial burden being on the defendants to prove the allotment to Udaram's share their evidence must be considered first. In discharge of this onus they file the admission made by Udaram in the former plaint (Ex. III-D-1). This document being admitted in the pleadings by the plaintiffs the defendants' burden was lighter and they discharged it by their cross-examination of Dhanaram whom the plaintiffs put in as their own witness P. W. No. 1.

In view of the admission of Udaram contained in the plaint (Ex. III-D-1) the burden may also be said to have been shifted to the plaintiffs to disprove it [*Sakha Ram* v. *Shri Ram* (1).] The plaintiffs set themselves to the task of disproving it and examined Dhanaram as their witness to show that it was wrong but both the Courts hold that the evidence of Dhanaram was false and that the statement of Balaram dated 29th January 1920 Ex. P-5, was an afterthought. In arriving at these findings the Courts below have taken into consideration as they were legally entitled to take, several other circumstances and probabilities and have drawn inferences which were open to them to draw. I do not think that the appellants can complain of any misplacement of the burden of proof on them. Even if there be any misplacement I do not think that the ultimate decision in the case has been in any way affected thereby. In spite of the admission of Udaram, it was open to the present plaintiffs collectively to show that the deed had not fallen to his share, and thus get over the bar created by O. IX, r. 8, C. P. C., because the cause of action would in that case have been necessarily 'different' from the one sued upon in 1919: Compare *Shankar Baksh*

(1) 10 Ind. Cas. 700; 7 N. L. R. 23.

v. *Daya Shankar* (2) and *Chand Kour* v. *Partab Singh* (3).

All that O. IX, r. 8, C. P. C., prohibits is the filing of a second suit on the *same* cause of action. Where there is even a slight discrepancy arising out of a single fact amongst the many other facts common to the two causes of action, that single fact alone makes them 'different' causes of action. Compare *Mahadeo* v. *Nago* (4). Here if the plaintiffs had succeeded in establishing that single fact, namely, the allotment of the mortgage-deed to the share of Dhanaram, they could certainly have been entitled to sue upon the mortgage and judgment could have been entered in favour of Dhanaram if he had been found entitled to the relief under the authority of the provisions of O. L., r. 4 (*a*) of the C. P. C.

The present suit could not have been defeated simply because other superfluous parties have been joined as co-plaintiffs here. I do not see any reason why Dhanaram alone could not have sued to enforce this mortgage by joining the other co-parceners as co-defendants in this suit (had the suit been so framed). Dhanaram was not a party to the former suit and had not admitted that he had assigned his rights to Udaram. It was open to him to establish here that the right to sue vested in him solely, and that Udaram's previous allegations that it vested in him by virtue of the alleged partition or the subsequent assignment was untrue. In other words, as explained in *Umabai* v. *Bhavu Balvant* (5), the misjoinder of plaintiffs in this suit to some of whom the relief claimed cannot be given, is a mere defect of form which is not fatal to the suit. But, inasmuch as the only circumstance on the strength of which the present suit could have been maintained and the bar created by the dismissal of the suit of Udaram got over, has not been established by the plaintiffs or any of them, here, the Courts below were right in refusing to enter judgment in favour of any of them. On the findings the only person in whose favour the judgment could have been entered was Udaram, but he was precluded from suing again on the same cause of action in view of O. IX, r. 8, C. P. C.

For all these reasons I uphold the decision appealed against and dismiss the appeal with costs. Costs in the lower Courts will be paid as already ordered.

G. R. D.
Z. K. *Appeal dismissed.*

(2) 15 C. 422; 15 I. A. 66; 5 Sar. P. C. J. 107; 12 Ind. Jur. 132; Rafique and Jackson's P. C. No. 100; 7 Ind. Dec. (N. S.) 866 (P. C.).

(3) 16 C. 98; 15 I. A. 156; 5 Sar. P. C. J. 243; 12 Ind. Jur. 331; 8 Ind. Dec. (N. S.) 65 (P. C.).

(4) 12 Ind. Cas. 357; 7 N. L. R. 130 at pp. 132, 133.

(5) 3 Ind. Cas. 165; 34 B. 358; 11 Bom. L. R. 499.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 26 OF 1923.

July 16, 1923.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Kemp.

AHMED SAHEB BAPU SAHEB KAFRE —DEFENDANT—APPELLANT

versus

UBHAIYA HARSI AND OTHERS—PLAINTIFFS —RESPONDENTS.

Evidence Act (I of 1872), s. 92, proviso (3)—Agreement in writing—Condition suspending obligation, whether can be orally proved.

In answer to a suit on a promissory note the defendant pleaded that he had executed a mortgage in favour of the plaintiff and that the promissory note in suit was passed to secure the plaintiff against any claim that might be made by a prior mortgagee who had been paid off but from whom the defendant had failed to obtain a re-conveyance:

Held, that the alleged agreement was not one to postpone an existing liability, but amounted to a suspension of the obligation attaching under the note until the necessity for enforcing the indemnity arose and could be proved orally under proviso (3) to s. 92 of the Evidence Act. [p. 39, cols. 1 & 2.]

Appeal from the judgment of Mr. Justice Marten.

Sir *Chimanlal Setalvad*, for the Appellant.

Mr. *Ghasvalla*, for the Respondent.

JUDGMENT.

Shah, Actg. C. J.—This is an appeal from the judgment of Mr. Justice Marten in a suit filed by the plaintiffs on a promissory note dated May 20, 1920, whereby the defendant promised to pay them Rs. 2,000 and interest thereon at the rate of one and a half per cent. per mensem. The consideration stated in the note is Rs. 2,000

borrowed in cash. The defendant admitted the note but denied receipt of any consideration from the plaintiffs for the promissory note. He further pleaded that the promissory note was passed in the following circumstances:—

"This defendant mortgaged his land known as '*bagicha*' at Koli Kalyan to the plaintiffs by an indenture of mortgage dated May 17, 1920. The said land was formerly mortgaged by this defendant to Hakma Mota & Co., and subsequently redeemed by this defendant on payment of the mortgage moneys but through oversight the re-conveyance was not taken from the then mortgagees. In order to indemnify the plaintiffs against the claims of the said Hakma Mota & Co., this defendant executed the said promissory note dated May 20, 1922, at the plaintiffs' request, pending the execution of the reconveyance by the said Hakma Mota & Co., but no consideration was paid actually to this defendant by the plaintiffs. It was further arranged between the plaintiffs and the defendant when the promissory note was executed that the said promissory note should be returned to the defendant duly cancelled after the execution of the re-conveyance by the said Hakma Mota & Co., in favour of the defendant. As the re-conveyance has not yet been obtained the said promissory note could not be cancelled."

He also pleaded that the Court had no jurisdiction as the promissory note was passed at Kurla.

On these pleadings the following issues were raised:—

(1) Whether the promissory note was executed in Bombay as alleged in plaint and whether the Court has jurisdiction?

(2) Whether there was any consideration?

(3) Whether the promissory note was given by way of indemnity for a contingent liability which has now determined?

(4) Whether the promissory note was passed under the circumstances mentioned in para. 2 of the written statement, and, if so, whether any cause of action has arisen on it?

The learned Trial Judge came to the conclusion that the Court had jurisdiction even if the bond had been executed at Kurla. As regards the second issue, he found in the affirmative, and as regards issues Nos. (3) and (4) he held that oral evidence in respect of it was not admissible under s. 92 of the Indian Evidence Act. As the execution of the note was otherwise admitted and as according to the case as made by the defendant there would be some consideration for the bond, he passed a decree in favour of the plaintiffs as prayed.

In the appeal before us, no question has been raised as to the jurisdiction of the Court, and the finding on issue No. (1) must be accepted.

It is urged, however, with reference to issues Nos. (3) and (4) that the learned Judge was not right in excluding the evidence of the defendant in support of the pleas contained in those issues.

This point has been fully argued before us and several cases have been cited. It seems to me, however, necessary to bear in mind the plea put forward by the defendant and to see whether that is covered by any proviso to s. 92 of the Indian Evidence Act. If the plea of the defendant was merely that there was no cash consideration as stated in the bond, it seems to me that he would be clearly entitled to prove that under the first proviso to s. 92, because the plea of want of consideration is expressly mentioned in that proviso. In that case it would be open to the plaintiffs to show that there was cash consideration or that there was some other consideration. But the matter does not rest there. The plea put forward by the defendant in substance is that there was already a mortgage in favour of Hakma Mota & Co., that that mortgage was satisfied but no formal re-conveyance had been obtained from the mortgagee; that, on May 17, 1920, the defendant mortgaged the land in question to the present plaintiffs, that, on May 20, 1920, that is, three days after this mortgage, the promissory note in question was executed not for cash consideration as stated in the note but merely to indemnify the plaintiffs in case any claim was put forward by Hakma Mota & Co., in respect of this property; and that the promissory note was to be returned to the defendant duly cancelled after the re-conveyance from Hakma Mota & Co., in favour of the defendant was obtained by the defendant. As I understand this plea, it means in substance that there was no liability to arise under this promissory note unless and until any claim was made by Hakma Mota & Co., in respect of this property. In fact he pleads the existence of a sepa-

rate oral agreement constituting a condition precedent to the attaching of any obligation under the promissory note. If that is the true meaning of the defence made by him, it would clearly fall under proviso (3) to s. 92. Whether he will be able to establish this plea or not is quite a different matter; and even if he is able to establish that plea, whether it could be said that there was no consideration for the bond, is a matter upon which it is not possible to express any opinion at this stage. But after considering the arguments on either side, I have come to the conclusion that that really is the true meaning of the plea raised by the defendant.

Considerable stress was laid in the course of the argument on behalf of the respondents on the decision in *Vishnu Ramchandra* v. *Ganesh Krishna* (1). The learned Trial Judge has relied upon this decision in support of the view which he has taken. The distinction sought to be made before us between that case and the present was also pressed upon the attention of the learned Judge, but he did not think that such a distinction could be made. I think, however, that that distinction is a real one. In that case at page 1159* the learned Chief Justice, after referring to the observations of Mr. Justice Sale, observes as follows :

"Those remarks apply equally well to the case before us. It is not suggested that this promissory note was to have no force or effect at all until the plaintiff paid off the incumbrance. It merely provided that the promise to pay on demand was not to be enforced by suit until those incumbrances were paid off."

In the present case it is suggested, that the promissory note was to have no force or effect at all unless and until Hakma Mota & Co, made a claim against the plaintiffs. In the case cited above if it had been alleged that the promissory note was to have no force or effect at all until a particular condition was satisfied, it seems to me that it would have been difficult to take the case out of the scope of proviso (3) to s. 92. I admit that it is not always easy to determine whether a particular plea falls within the scope of a particular proviso to s. 92. In the present case also I do not say that the question is entirely free from difficulty; but after giving my best consideration to the point, I have come to the conclusion that the defendant is entitled to establish this plea under proviso (3). It seems to me that if he is able to make good his plea, it would mean that no liability arises under the promissory note until the condition precedent, *viz.*, the making of a claim by Hakma Mota & Co., comes into existence. This view necessarily involves that the present finding recorded on issue No. (2) as to consideration cannot be accepted. That question must be considered in the light of the merits of the plea raised by the defendant in issues Nos. (3) and (4).

For these reasons I would allow the appeal, reverse the decree appealed from, and remand the case to the Trial Court for disposal on the merits.

Costs throughout in the Trial Court and in appeal to be costs in the cause.

Kemp, J.—Shortly put, the defence is that the promissory note in the suit was passed to secure plaintiffs-mortgagees against any claim that might be made by the prior mortgagees, Hakma Mota & Co., who had been paid off and from whom the defendant had failed to obtain a re-conveyance.

I am of opinion that this alleged agreement amounts to a suspension of the obligation attaching under the note until the necessity for enforcing the indemnity arises. I do not think it is an agreement to postpone payment of an *existing* liability but one by which the note is to have no legal effect until the eventuality to guard against which it was passed arises. Under the circumstances I think this alleged agreement may be proved under proviso (3) to s. 92 of the Indian Evidence Act. I am not at all sure that the agreement may not also be proved under proviso (2) of the same section. I admit the construction of the alleged agreement is not free from doubt.

But if the whole arrangement of the mortgage and the promissory note may, notwithstanding that the latter was passed some days after the former, be regarded as one agreement, part of which was in writing, *e. g.*, the mortgage and the promissory note, then its terms may be proved without the application of s. 92 which only applies to an agreement in writing.

(1) 63 Ind. Cas. 673; 45 B. 1155; 23 Bom. L. R. 488.

*Page of 45 B.—[*Ed.*]

I do not think any difficulty on the question of stamp duty and its evasion necessarily arises because if the whole agreement is not in writing, there is no necessity for affixing a stamp to such documents as form part of it.

I think if such an agreement as the defendant alleges really exists, it would be very inequitable not to allow it to be proved.

The statement in the promissory note that the defendant has received in cash Rs. 2,000 is a mere recital which under the decision in *Sah Lal Chand* v. *Indarjit* (2) may be allowed to be contradicted by showing the real facts.

I agree with the order proposed.

Costs throughout in the Trial Court and this appeal to be costs in the cause.

Z. K. *Appeal allowed.*

(2) 27 I. A. 93; 22 A. 370; 4 C. W. N. 485; 2 Bom. L. R. 553; 7 Sar. P. C. J. 702; 9 Ind. Dec. (N. S.) 1281 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2372 OF 1924.

February 2, 1925.

Present:—Mr. Justice Campbell.

CHANDU LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUKANDI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation by step-mother of minor, validity of—Subsequent alienation by minor after attaining majority—Mortgage by step-mother, whether antecedent debt.

A previous mortgage debt, if it created a good debt due from the mortgagor, would be an antecedent debt which would bind the estate and could form the consideration of a subsequent alienation. [p. 41, col. 1.]

Anantoo Kalwar v. *Ram Prasad Tivari*, 78 Ind. Cas. 619; 46 A. 295; 22 A. L. J. 182; (1924) A. I. R. (A.) 465; L. R. 5 A. 86 Civ. and *Gauri Shanker Singh* v. *Sheo Nandan Misra*, 78 Ind. Cas. 911; 46 A. 384; 22 A. L. J. 369; (1924) A. I. R. (A.) 543; L. R. 5 A. 306 Civ., followed.

The ordinary rule of Hindu Law is that no relation, except the parents, is entitled as of right to the guardianship of a minor and failing the parents another relative must derive his authority from the Court. [*ibid.*]

Under the Hindu Law the right of a *bona fide* encumbrancer who has taken from a *de facto* manager a charge on lands created honestly for the purpose of saving the estate or for the benefit of the estate is not, provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager, affected by the want of union of the *de facto* with the *de jure* title. [p. 41, col. 2.]

A mortgage of property belonging to a Hindu minor executed by his step-mother who is not the *de facto* manager of the property is void, and cannot be subsequently ratified by the minor on attaining majority. If the minor subsequently alienates the property and the amount due under the mortgage executed by his step-mother is included in the consideration for the alienation, the amount represented by the previous mortgage cannot be regarded as an antecedent debt or as in any way justified by legal necessity. [*ibid.*]

Second appeal from a decree of the District Judge, Karnal, dated the 5th May 1924, reversing that of the Subordinate Judge, Fourth Class, Kaithal, District Karnal, dated the 27th August 1923.

Lala *Hargopal* for Lala *Jagan Nath*, for the Appellants.

Dewan *Mehr Chand*, for the Respondents.

JUDGMENT.—This was a suit by the minor sons of Mata Ram for a declaration that a mortgage by their father Mata Ram to the other defendants dated the 20th of August 1918 being of joint ancestral property was invalid against them and that the mortgagees were not entitled to take possession of the mortgaged property under a decree for possession which they had obtained against Mata Ram. The suit has been decreed by the lower Appellate Court and the mortgagees have appealed.

The ostensible consideration for the mortgage was:—

(1) Rs. 100, paid before the Sub-Registrar; and

(2) Rs. 800, due on a previous mortgage, dated the 9th of October 1906.

The lower Appellate Court has found that there was no necessity for the first item and that the previous mortgage of the 9th of October 1906 having been effected by the step-mother of Mata Ram purporting to act as his guardian, whereas she was not his legal guardian, was absolutely void. The learned District Judge also held that there was no evidence to show that this step-mother *Musammat* Dasodhan in mortgaging the property of her step-son acted for his benefit and further that even if this previous mortgage had been one by Mata Ram himself it was not a personal debt, and, therefore, could not be considered an antecedent debt in justifying a mortgage of the family property.

This last finding admittedly overlooked the latest ruling of their Lordships of the Privy Council in *Anantoo Kalwar* v. *Ram Prasad Tivari* (1), according to which the previous mortgage, if it creatsd a good debt due from Mata Ram, would be an antecedent debt which would bind the estate. *Vide Anantoo Kalwar* v. *Ram Prasad Tivari* (1) and *Gauri Shanker Singh* v. *Sheo Nandan Misra* (2).

In second appeal it is argued that the former mortgage was not a void transaction and that it was accepted and ratified by Mata Ram when he transacted the second mortgage.

The first question is, whether the step-mother was a natural or in any way a legal guardian, and this must be answered in the negative. Two rulings have been cited by the learned Counsel for the appellants. The first is *Tirumalai Muthuveera Paramasiva Venkitasami Naicker* v. *Muthusami Pillai* (3), a Madras case, where the learned Judges held a debt to be valid which was contracted for the first defendant by his step-mother acting as his guardian. They observed that the question whether the step-mother was the natural guardian had not been very fully argued and they did not propose to express any opinion upon it, but since she was the sister of the first defendant's own mother they concluded that no valid objection could be raised on the ground that she was not entitled to act as his guardian. The second was a Nagpur case, *Ganpat* v. *Firm of Bissessarlal-Govindram* (4), where it was held that a step-mother was not a legal guardian, but that in that particular case she had actually been a *de facto* guardian. The ordinary rule of Hindu Law as stated in the text books is that no relation except the parents is entitled as of right to the guardianship of a minor, and that failing the father and mother another relative must derive his authority from the Courts. This is stated on page 283 of Mayne's Hindu Law, 9th Edition, and on page 461 of Mulla's Hindu Law, 4th Edition. It was emphasized in *Thayammal* v. *Kuppanna Koundan* (5), a decision of their own Court which does not appear to have been before the learned Judges who dealt with *Tirumalai Muthuveera Paramasiva Venkitasami Naicker* v. *Muthusami Pillai* (3).

There is no finding by the learned District Judge whether or not Mata Ram's step-mother transacted the mortgage as his *de facto* guardian. He held that even if she occupied this position the transaction would be absolutely void, but this conclusion was based on rulings which apply strictly and solely to Muhammadan minors. It was laid down by their Lordships of the Judicial Committee in *Hanoomanpersaud Panday* v. *Babooee Munraj Koonweree* (6), that under Hindu Law the right of a *bona fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly for the purpose of saving the estate or for the benefit of the estate is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title. Consequently I have looked into the evidence and I find no proof that *Musammat* Dasodhan, Mata Ram's step-mother was in fact the manager of his estate or the guardian of his person. The one witness of the defendant mortgagees about the alleged former mortgage is altogether vague on the point, and there is no evidence that *Musammat* Dasodhan ever held possession of, or had any dealings with, the property entered in the mortgage-deed beyond signing that deed, which, according to her own statement, she did under fraudulent coercion. The mortgage of 1906, therefore, was not one by a *de facto* guardian.

In view of the finding that it was not for the benefit of Mata Ram the transaction must be held to be void. It is argued that Mata Ram confirmed the mortgage afterwards, but if it was void from the very start there could be no ratification, and if ratification was possible the debt was not an antecedent one altogether independent of the mortgage of the 9th of October 1906, but came into being and was created at the time of that mortgage. I cannot assume that the learned Judge below, in holding that there was no evidence to show that *Musammat* Dasodhan's mortgage was for the benefit of her step-

(1) 78 Ind. Cas. 619; 46 A. 295; 22 A. L. J. 182; (1924) A. I. R. (A.) 465; L. R. 5 A. 86 Civ.
(2) 78 Ind. Cas. 911; 46 A. 331; 22 A. L. J. 369; (1924) A. I. R. (A.) 513; L. R. 5 A. 306 Civ.
(3) 45 Ind. Cas. 949; 31 M. L. J. 177; 23 M. L. T. 280.
(4) 71 Ind. Cas. 491; (1923) A. I. R. (N.) 230.
(5) 26 Ind. Cas. 179; 38 M. 1125; 27 M. L. J. 285.
(6) 6 M. I. A. 393; 18 W. R. 81*n*.; Sevestre 253*n*.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

son, omittted to consider the facts that Mata Ram took no action to have that mortgage set aside and that in the second mortgage he admitted it.

There can be no interference with the decision of the lower Appellate Court that the mortgage-deed of the 9th of October 1903 did not create an antecedent debt which would bind the estate, and hence I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 526 OF 1922.

November 28, 1924.

Present:—Mr. Justice Krishnan.

LINGA REDDI—PETITIONER

versus

M. CHENGALRAYA REDDI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 4, 9—Hindu Law—Joint family—Partition, suit for—Father, whether competent to act as next friend of minor son.

A member of a joint Hindu family is competent to act as the next friend of his minor son in a suit for partition brought by him on behalf of himself and the minor inasmuch as the interests of the father and the minor in such a suit are identical and not adverse.

Petition, under s. 115 of Act V of 1908 and under s. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif, Sholinghur, dated the 18th January 1922, on I. A. No. 551 of 1921 in O. S. No. 85 of 1921.

Messrs. *V. C. Seshachariar* and *K. V. Sesha Iyengar*, for the Petitioner.

Mr. *V. S. Govindachari*, for the Respondents.

JUDGMENT.—In this case a suit had been brought by a member of a Hindu family on behalf of himself and his minor son for partition against his co-parceners; but, before the suit was ripe for hearing, matters were compromised between the plaintiffs and defendants and an application was made by the defendants to have the compromise recorded in Court and a decree passed in its terms. The question necessarily arose before the Munsif as to whether the compromise was beneficial to the minor or not, for, before the compromise can be enforced, when a minor is involved in the matter, the sanction of the Court is necessary. In the meanwhile, an application was made by the minor's maternal grandfather to have the father removed from his place as next friend of the minor and himself substituted in that position. That petition was also heard by the Munsif along with the petition to record the compromise. Some other petitions were also filed, but it is not necessary to refer to them at present. The Munsif, after a careful and elaborate enquiry, considered that the compromise was beneficial to the minor and that there was no necessity to remove the minor's next friend, his father, and to substitute his grandfather in his place, and he directed that a decree be drawn up in terms of the compromise between the parties. It is against the rejection of that application of the maternal grandfather to be made the next friend of the minor in these proceedings that this civil revision petition is filed.

The argument that has been urged before me is that the minor's father was not a proper next friend of the minor as his interest was adverse to that of the minor in the matter of the enforcement of the compromise, and, therefore, he should not have been allowed to continue as a next friend of the minor. This argument is put in a very ingenious way; first of all, it is said that this compromise amounted to a transfer of property because the compromise had been arrived at in a partition suit; that, it being a transfer, the interest of the father is opposed to that of the son as the property involved included both the father's and the son's shares; and finally that, as the father's interest was in conflict with that of the minor, he was not a proper next friend and, therefore, he should be removed. The fallacy of this argument is in supposing that the father has got any interest adverse to the minor in the suit. The father's interest and the minor's interest are exactly the same in the partition suit. If the minor was getting any property at all, the father will also get an equal share in that property himself. We may, therefore, take it that the father who is interested in securing his own share will be equally interested in securing the minor's share in the property. The argument, therefore, fails altogether that the father's interest is adverse to that of the minor.

The Munsif having found that the compromise itself was beneficial to the minor, a finding which I must accept in revision, there is no ground whatsoever for setting aside the minor's present next friend and introducing a new person in the shape of the maternal grandfather into the record. The petition, therefore, fails and is dismissed with costs.

It may be observed that two preliminary objections were taken to the hearing of this petition, but I have not thought it necessary to consider those objections in the view I have taken of the merits of the case.

V. N. V. *Petition dismissed.*
Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2693 OF 1923.

November 20, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

SATISH CHANDRA NAG AND OTHERS—DEFENDANTS NOS. 1, 3, 4 AND 5—APPELLANTS

versus

HARIPADA DE AND OTHERS—PLAINTIFFS AND DEFENDANT No. 2—RESPONDENTS.

Hindu Law—Alienation by widow—Necessity—Marriage of daughter.

The marriage of the daughter of a deceased Hindu is a duty cast on the estate of the deceased. Where the widow of the deceased has not in her hands enough money from her deceased husband's estate for the purpose of celebrating the marriage of her daughter, she is entitled to sell a sufficient portion of the estate of the deceased to provide funds for the marriage. Even though the widow has in her hands money of her own she is still entitled to employ the money of the estate for the purpose. She is not obliged to spend her own money and only to employ the money of the estate if her own is not sufficient. [p. 44, col. 1.]

Appeal against a decree of the District Judge, Midnapur, dated the 17th September 1923, affirming that of the Subordinate Judge, First Court of that District, dated the 27th of April 1923.

Mr. *Majumdar* and Babu *Indu Prokas Chatterjee*, for the Appellants.

Babus *Mohendra Nath Ray* and *Santosh K. Pal*, for the Respondents.

JUDGMENT.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiff sued for a declaration that a certain deed of sale executed on the 31st May 1922 by defendant No. 2 in favour of defendants Nos. 1, 3, 4 and 5 in the name of the defendant No. 1 for the sum of Rs. 1,400 was a fraudulent and collusive document, that it had been obtained by undue influence and had been made without any legal necessity, and was not, therefore, binding on the plaint, iff who is the reversioner of the son of defendant No. 2. The facts are as follows: Preonath De was married twice. By his first wife he had three daughters and one son. This son Upendra Nath died during his father's life-time leaving a widow but no issue. The plaintiffs are the children of the eldest daughter of the elder wife. Defendant No. 2 is the second wife of Preonath De. She had one daughter Natu Bala and one son Chandra Kanta who is now dead. The plaintiffs are now the reversioners to the estate of Chandra Kanta. The case of the plaintiffs is that the widow had no legal necessity to sell the property.

The case of the defendants is that the money was required for the marriage of her daughter. The Trial Court found for the plaintiff. It found that there was no legal necessity for the widow to sell the property. That the defendant made no proper inquiry to ascertain if there was any legal necessity to sell the property as there was no pressure on the estate. He found that the money was actually spent on the marriage of the daughter and the total amount spent on the marriage was some Rs. 3,000 or Rs. 3,500 of which Rs. 1,400 was raised by the sale of the property and the remainder must have come from the estate of Preonath. Why it must have come from the estate of Preonath is perhaps not very clear. He seems to have found that the sale was a genuine one for consideration. The defendants appealed to the District Judge who dismissed the appeal. He found that the money was spent on the marriage of the daughter but the marriage could have been performed without selling the property and so there was no legal necessity for the sale. Further that the defendants made no proper inquiries to ascertain if the money was really required for the marriage of the daughter of defendant No. 2. The defendants have appealed to this Court.

It is argued on their behalf that there is no evidence that there was any money in the

hands of the widow that could have been used for the marriage of the girl. That the defendants did not know nor is there any reason why they should have known that the widow had sold her own ornaments to defray the marriage expenses. That the widow was quite justified in spending the sum that she did in order to secure a really suitable bridegroom for the girl. Even if the widow had in her hands some money she was not obliged to spend that money on the marriage unless it had come out of the estate. The only money in the hands of the widow was the money that she had realised from the sale of her own ornaments and she had no money in her hands derived from the estate of her deceased husband.

The respondent seems to argue, though I am bound to say that his contention on the point is not very clear, that as the widow had in her hands the money that she had realised from the sale of her own ornaments she was not justified in spending so much on the girl's marriage. The marriage of the other daughters of Preonath had been celebrated for a less sum *viz.*, 800 and so the widow was not justified in spending more on this marriage.

Now what are the facts that have been found. The District Judge has found that the widow was not in affluent circumstances. That her monthly income would be quite insufficient to defray the marriage. Also that the defendant was short of funds because she sold her own ornaments. He held that the sum total spent was more than was required for the marriage and that the defendants did not make proper inquiries and so are not protected.

On these findings of fact I think that the appellant is entitled to succeed. The widow had in her hands no money from her deceased husband's estate that she could utilise for the marriage and it is not disputed that the marriage of the girl is a duty cast on the estate. Even though the widow had in her hands money of her own she would still be entitled to employ the money of the estate for this purpose. She is not obliged to spend her own money and only to employ the money of the estate if her own is not sufficient.

I do not think that there is any force in the argument that the widow has been extravagant in the way in which she has celebrated the marriage. The other girls were married before the war when the price of everything was much lower. At that time some Rs. 800 was expended on each marriage. Rupees 1,400 then cannot be considered as excessive at the present time. The widow is entitled to take this amount from the estate. If she was willing to spend some of her own money in excess of this amount there is nothing to prevent her from so doing. It does not appear that there was really any waste in the way the widow spent the money. The major portion of the money, *viz.*, Rs. 2,101 was spent in the purchase of the bridegroom the widow being anxious and quite rightly to secure a well educated young man for her daughter who would be in a position to support his wife. The evidence would go to show that the young man is a well educated young man being a graduate of the Calcutta University and a B. L. It, therefore, follows that the sale was for legal necessity and is not liable to be set aside.

The appeal must, therefore, succeed and is decreed and the suit of the plaintiff must be entirely dismissed. The appellants are entitled to their costs in all Courts.

Suhrawardy, J.—I agree.

Z. K.

Appeal decreed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 24 OF 1924.

January 9, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir Theodore Caro Piggott, KT.

Musammat RAJ RUP KUNWAR—PLAINTIFF—APPELLANT

versus

GOPI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 51—Alienation by Hindu widow—Improvements by transferee—Transferee, whether entitled to value of improvements.

A person dealing with a Hindu widow would ordinarily be aware that she has only a life-interest, and he is expected to make enquiries, for instance, in the case of a mortgage, as to whether there is any legal necessity for the mortgage and any right in the widow to make the transfer. Section 51 of the Transfer of Property Act has no application to such a case. [p. 46, col. 2.]

Case-law referred to.

Letters Patent Appeal against the judgment of Mr. Justice Kanhajya Lal, dated the 20th November 1923.

Dr. *K. N. Katju*, for the Appellant.

JUDGMENT.—This is an appeal from a decision of a single Judge of this Court, who made an order that possession of a certain property could be recovered by the plaintiff, provided that the plaintiff made a payment of a thousand rupees on account of improvements made by the defendants during the subsistence of a certain lease. The position was this. The lessees had taken what was described as a permanent lease from *Musammat* Asmedh Kunwar. She was a Hindu widow, and the lessees may have believed that she having acquired the property from her father had a right to grant a permanent lease. The matter when enquired into in the lower Courts showed that if investigations had been made by the lessees they would have ascertained that the interest of *Musammat* Asmedh Kunwar was a life-interest only. On the death of *Musammat* Asmedh Kunwar this suit was brought for possession by the plaintiff (reversioner). The question now arises whether the lessees are entitled to receive from the plaintiff the sum of Rs. 1,000 which has been put as a fair figure for the improvements. Section 51 of the Transfer of Property Act IV of 1882 lays down the conditions under which improvements may be compensated for. The section is in these words:—

"When the transferee of immoveable property makes any improvement on the property believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted.....the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid. ....."

The important words which have to be considered in connection with this case are, "believing in good faith that he is absolutely entitled thereto." If we had to construe this section without the aid of any authorities we should be inclined to say that the words "absolutely entitled thereto" meant a justified belief that he had the full proprietary right. In this case it is found that if the lessees had required *Musammat* Asmedh Kunwar to make clear to them the title under which she was acting, it would have been evident at once to them that on the death of the lady they were liable to be evicted. Indeed one may go further and say that even accepting the case as they themselves put it, they had no higher title than that of permanent lessees. In one or two decisions it has been stated in terms that s. 51 does not apply between landlord and tenant and that if there is any limitation of interest, the section does not apply. We might refer in passing to the case of *Rajah of Venkatagiri* v. *Mukku Narsaya* (1). A case very like the present was decided by the Madras High Court in 1914 and is to be found in *Perumal Gramani* v. *Mohammad Kasim Sahib* (2). There in terms it was decided that the right to claim compensation does not extend to the person who is aware that he has got merely a permanent right of occupancy in the premises but that the person must in good faith believe that he is absolutely entitled to the land in question. In that case there was a permanent lease of religious trust property and improvements having been affected and eviction having taken, claimed compensation was sought. It was decided that that case did not come within s. 51 of the Transfer of Property Act. In the case of *Hans Raj* v. *Musammat Somni* (3), Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal had to consider this very case of a transfer by a Hindu widow, and there they took what, in our opinion, was the right ground. The transfer having been made by a Hindu widow those learned Judges decided that s. 51 of the Transfer of Property Act had no application because in the case of a Hindu widow a person dealing would ordinarily know that she had only a life-interest and that he ought also to be expected to make enquiries, for instance, in the case of a mortgage as to whether there was any legal necessity for the mortgage and any right in the widow to make the transfer. The same arguments which satisfied that Bench seem to us sufficient here, and we cannot indeed find any distinction to be drawn between this case of *Hans Raj* v. *Musammat Somni* (3) and the case under consideration by us. We think that in the circumstances this appeal must be allowed and the decree of the lower Appellate Court restored with costs and fees in this Court on the higher scale.

Z. K. *Appeal allowed.*

(1) 7 Ind. Cas. 202; 37 M. 1 at p. 12; 8 M. L. T. 258; (1910) M. W. N. 369.

(2) 28 Ind. Cas. 840.

(3) 67 Ind. Cas. 314; 20 A. L. J. 524; (1922) A. I. R. (A.) 194; 4 U. P. L. R. (A.) 118; 44 A. 665.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1709 OF 1922.
October 31, 1924.
Present:—Mr. Justice Ramesam.
ADINARAYANA AND OTHERS—
DEFENDANTS NOS. 1 TO 6—APPELLANTS
versus
KALAMALLA VENKATA SUBBAYYA
—PLAINTIFF—RESPONDENT.

Grant by Government—Presumption of ownership—Burden of proof.

Merely because Government has issued a *patta* of certain land to some body there is no presumption that Government are entitled to the land of which they have purported to make a grant, and it is always for the grantee to make out that the grantor had a title to the property and was entitled to make a grant of it.

Second appeal against a decree of the District Court, Anantapur, in A. S. No. 71 of 1921, preferred against the decree of the Court of the District Munsif, Anantapur, in O. S. No. 48 of 1920 (O. S. No. 710 of 1919 on the file of the District Munsif, Penukonda).

Mr. *V. S. Narasimhachariar*, for the Appellants.

Messrs. *Krishna Arya* and *Veeraraghavalu*, for the Respondent.

JUDGMENT.—The defendants Nos. 1, 5 and 6 are the appellants in this case. The suit was brought by the plaintiff to eject the defendants from a house-site. The plaintiff obtained a *patta* from Government on the 29th March 1917. Even at the time of the grant by Government, the defendants objected. The plaintiff went to a Criminal Court which dismissed the complaint on the ground that it was of a civil nature. The defendants pleaded that the suit site had been in the possession of themselves and their ancestors for a long time and the plaintiff could obtain no title to the suit land by the mere fact that Government issued *patta* in respect of that and that they did not trespass upon it recently. They also pleaded that a penalty was levied upon them by the Tahsildar for encroachment and that on appeal that encroachment fee was cancelled. The second issue in the case runs as follows:—Whether the said grant is not binding on the defendants and whether the site belonged to them. In my opinion this issue is not properly framed. Merely because Government have issued a *patta* to somebody, there is no presumption that Government are entitled to the land of which they purported to make a grant, and it is always for the grantee to make out that the grantor, Government in this case, has any title. The second issue should have run as follows:—Whether the said grant binds the defendants and whether the plaintiff is entitled to the suit site? The only difference in the frame of the issue is the change in the burden of proof. The onus lies on the plaintiff and not on the defendant. The District Munsif, however, found on this issue that the defendant and their ancestors had been enjoying the suit site for a long time and found the issue against the plaintiff and in favour of the defendants. On appeal the learned District Judge finds that the defendants have not made out a prescriptive title against Government. This finding assumes that the title of Government is either made out or admitted; but the title of Government has never been admitted or has never been made out in the case. The learned District Judge is no doubt right in saying that, as the issue stood, the burden of proof is on the defendants. But, as already pointed out, the issue is not properly framed; but it ought to be framed so as to throw the burden of proof on the plaintiff.

I, therefore, set aside the judgment of the District Judge and remand the suit for disposal according to law. The lower Appellate Court will now find if the plaintiff has made out the title of Government at the time of grant. Only if such a title is made out, the plaintiff would get any title under the issue of *patta* by Government. It must be remembered that the defendants were in occupation for a long time and that itself is *prima faice* evidence of their title; but, even if they have no title to the suit land, the plaintiff cannot succeed in this suit before making out the title of his grantor. Now that the form of the issue is changed, I think it ought to be open to both parties to adduce fresh evidence. The District Judge might either take it himself or direct the District Munsif to record the evidence and send it up.

The appellant will get a refund of the Court-fee paid for this appeal. Costs of this appeal will abide the result.

V. N. V.
Z. K. *Case remanded.*

PATNA HIGH COURT.

MISCELLANEOUS APPEAL No. 128 OF 1924.

November 12, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

NATHUNI NARAYAN SINGH AND ANOTHER —DECREE-HOLDERS—APPELLANTS

versus

Mahanth ARJUN GIR—JUDGMENT-DEBTOR—RESPONDENT.

Execution of decree—Decree against several defendants—Death of one defendant before decree, effect of—Decree, whether nullity—Contract Act (IX of 1872), s. 43.

Where a decree declares that the defendants are all jointly liable for the decretal sum, each defendant is liable by virtue of the provisions of s. 43 of the Contract Act for the whole debt, and it is open to the decree-holder to proceed against one judgment-debtor or all according as he pleases. The fact that one of the defendants happened to be dead at the time the decree was made does not affect the right of the decree-holder to recover the money in execution of the decree from all or any of the survivors.

Jungli Lall v. *Laddu Ram Marwari*, 50 Ind. Cas. 529; 4 P. L. J. 240; (1919) Pat. 105, distinguished.

Per *Miller, C. J.*—A decree passed against a deceased person is a nullity in so far as that deceased person is concerned. Where, however, one of several defendants happens to die before a decree is passed and no one is substituted in his place the whole decree passed in ignorance of his death is not a nullity. The decree is perfectly valid so far as the other defendants in the suit are concerned. [p. 48, col. 2.]

Appeal from an order of the District Judge, Gaya, dated the 15th May 1924, reversing that of the Subordinate Judge, Gaya, dated the 13th November 1923.

Messrs. *S. M. Mullick* and *Kailaspati*, for the Appellants.

Messrs. *H. P. Sinha* and *S. P. Varma*, for the Respondents.

JUDGMENT.

Mullick, J.—The plaintiffs who had been the landlords sued the defendants who were 51 in number for the back rents of a *mukarrari* tenure. As the plaintiffs had at the time of the suit ceased to be the proprietors of the tenure they were not entitled to a rent decree within the meaning of the Tenancy Act. The defendant No. 9 Arjun Gir and defendant No. 15, Muhammad Yusuf Khan, did not file any written statements and on the 21st November 1921 the Subordinate Judge made a money decree with costs jointly against all the defendants. It now appears that at the time when the decree was made the defendant Muhammad Yusuf Khan was dead and when the plaintiffs applied for execution in the Court of the Subordinate Judge the defendant Arjun Gir raised an objection on the ground that as Muhammad Yusuf Khan was dead at the time when the decree was made the decree was a nullity not only against his heirs but against the other defendants in the suit. It was contended that the decree could not be executed.

The Subordinate Judge decided against the objector but on appeal the District Judge held that the whole decree was a nullity and that execution could not proceed.

The present second appeal has been filed by the plaintiffs and it is contended that the view taken by the learned District Judge is incorrect and that there can be no objection to the decree being executed against one or all of the defendants who were surviving at the time when the decree was made. Now there is nothing in the judgment of this Court in *Jungli Lall* v. *Laddu Ram Marwari* (1), upon which the learned District Judge relies which precludes the plaintiffs from executing the decree against the surviving judgment-debtors. Further the Subordinate Judge had jurisdiction to make a decree against the respondent and so long as that decree subsists he cannot be heard to impeach its validity. The decree declared that the 51 defendants were all jointly liable for the decretal sum. Therefore, under s 43 of the Indian Contract Act each defendant was liable for the whole debt and it was open to the plaintiffs, to proceed against one judgment-debtor or all according as he pleased. The fact that one of them happened to be dead at the time the decree was made cannot affect the right of the decree-holders to recover the money in execution from all or any of the survivors. What would have been the position if the decree-holders had sought to sell the entire tenure in execution is not a question that we are concerned with at the present moment. The appeal will succeed and be decreed with costs in this Court and in the Court of the District Judge.

Miller, C. J.—I agree. I merely wish to add as I was a party to the full Bench decision of *Jungli Lall* v. *Laddu Ram Marwari* (1), upon which the learned District Judge relied in support of the decision at which he arrived that that decision cannot be taken as an authority for the broad proposition which the learned District Judge appears to think it laid down. The

(1) 50 Ind. Cas. 529; 4 P. L. J. 240; (1919) Pat. 105.

only question in that case was whether the property of one of two defendants in the suit who had died before the decree was passed and against whom, before the decree was passed, the suit had abated, was liable to be taken in execution of that decree. It was contended on behalf of his representatives that the decree was a nullity in so far as the deceased was concerned. This Court accepted that argument and held that a decree passed against a deceased person was a nullity in so far as that deceased person was concerned but the Court never laid down the broad proposition that if one of several defendants happens to die before a decree is passed and no one is substituted in his place, the whole decree passed in ignorance of his death is a nullity even against the other defendants in the suit. I entirely agree with the judgment just pronounced by my learned brother.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 76 OF 1922.

October 13, 1924.

Present:—Mr. Justice Devadoss.

MADAM PILLAI—PLAINTIFF—APPELLANT

versus

ATHINARAYANA PILLAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 87—Pro-note executed by one person—Name of another person added as security—Pro-note, whether vitiated—Illegal contract.

No Court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court and if the person invoking the aid of the Court is himself implicated in the illegality. If the contract in itself is illegal, the plaintiff would not be entitled to enforce his remedy against any one who is a party to the contract. But where the contract is legal and as evidence of the contract something illegal is done, it cannot be said that the whole contract is void. [p. 50, cols. 1 & 2.]

If after the execution of a negotiable instrument or any other document, the parties thereto alter it, such alteration does not vitiate the document; if, however, the alteration is made without the consent of the party against whom it is sought to be enforced, the document is vitiated. It is immaterial whether or not the alteration is beneficial to the person against whom the document is sought to be enforced. [p. 49, col. 1.]

Section 87 of the Negotiable Instruments Act has reference only to an alteration after execution and has no application to anything done at the time of the execution. [p. 50, col. 2.]

First defendant executed a promissory-note in favour of the plaintiff and for the purpose of giving additional security to the plaintiff the name of the second defendant was added to the pro-note. It was found that there was no intention to cheat or to deprive second defendant of her property. In a suit to enforce the pro-note:

Held, (1) that the pro-note could not be enforced against the second defendant; [p. 50, col. 1.]

(2) that so far as the first defendant was concerned the pro-note was not vitiated inasmuch as no alteration had been made in the pro-note after execution and without the knowledge or consent of the first defendant; the pro-note itself was legal and was consequently enforceable against the first defendant. [p. 49, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in Appeal Suit No. 35 of 1921, preferred against the decree of the Court of the District Munsif, Tuticorin, in Original Suit No. 365 of 1919.

The Advocate General, for the Appellant.

Messrs. *T. V. Muthukrishna Iyer* and *A. Swaminatha Iyer*, for the Respondents.

JUDGMENT.—The plaintiff's suit is on a pro-note alleged to have been executed by the 1st defendant's father and the 2nd defendant. Both the defendants pleaded that the note was a forgery. The District Munsif held that the note was a forgery, and dismissed the suit. On appeal the Subordinate Judge of Tuticorin recorded a finding that the 1st defendant's father alone executed the pro-note and the 2nd defendant's mark was affixed to the note without her permission and dismissed the appeal on the ground that the note being a forged document so far as the 2nd defendant was concerned, it could not be enforced even against the 1st defendant. The plaintiff has preferred this second appeal. The learned Advocate-General for the appellant contends that the Subordinate Judge should have given a decree against the 1st defendant and that s. 87 of the Negotiable Instruments Act is no bar as the 2nd defendant's mark was affixed to the pro-note with the consent of the 1st defendant if not by him. His argument is that if the plaintiff and the 1st defendant agreed that the 2nd defendant's mark should be affixed to the pro-note there is no material alteration within the meaning of s. 87 of the Negotiable Instruments Act. He concedes that if the 1st defendant had undertaken to be a party to the pro-note only in case the 2nd defendant was a party thereto, and if the plaintiff had forged the signature

of the 2nd defendant, then he could not get a decree against the 1st defendant, for the contract was that the 1st defendant should be a party to the transaction only in case the 2nd defendant was also a party. Where a person enters into a contract on the stipulation that some one else also is a party thereto, it is unenforceable against him if the other person who was to have been a party is not a party thereto. In this case if the agreement was that the 1st defendant's father should execute it, the failure of the 2nd defendant to execute the pro-note would stand in the way of the plaintiff enforcing his remedy under the pro-note against the 1st defendant.

It cannot be said in this case that there is a material alteration within the meaning of s. 87 of the Negotiable Instruments Act; for, under the section a negotiable instrument is void if there is any material alteration without the consent of the party against whom it is sought to be enforced unless the alteration was made to carry out the common intention of the original parties. If, after the execution of a negotiable instrument or any other document, the parties thereto alter it, such alteration does not vitiate the document; but it does if the alteration is made without the consent of the party against whom it is sought to be enforced. It is immaterial whether or not the alteration is beneficial to the person against whom it is sought to be enforced.

In *Gour Chandra Das* v. *Prasanna Kumar Chandra* (1) it was held that the introduction of the names of two persons into a document after it was executed without the consent of the executant vitiated the document. As observed by the learned Judges: "The test is not necessarily, however, whether the pecuniary liability of one of the parties has been increased by the change; it is of no consequence, whether the alteration would be beneficial or detrimental to the party sought to be charged on the contract. The important question is whether the integrity and identity of the contract has been changed."

Mr. Muthukrishna Iyer who appears for the respondents supports the judgment of the lower Court on the ground that if a document is a forgery it could not be enforced against any of the parties thereto and urges that s. 87 can only apply to a document which has been properly executed and not to a document which in its inception is a forgery. His argument is that if the plaintiff and the 1st defendant's father agreed that the 2nd defendant's signature or mark should be forged, the whole document is a forgery and cannot be enforced against the 1st defendant, though he was consenting party to the forgery. He relies upon the observation of Mr. Justice Sadasiva Iyer in *Amirtham Pillai* v. *Nanjah Goundan* (2): "A material portion of the promissory note being a forgery, it seems to come within the principle of the decisions which hold that a material alteration invalidates the whole note." This observation is only *obiter* for in that case, it was intended that two persons should be jointly liable on a pro-note and the finding was that the 1st defendant did not join in its execution. The Subordinate Judge's decree against the 2nd defendant was reversed by the learned Judge on the ground that "the 2nd defendant could not be made liable as he agreed to be liable only if the 1st defendant was jointly made liable." In C. R. P. No. 601 of 1912, the District Munsif found that of the three alleged executants only two signed the pro-note and the 3rd executant's signature was not genuine and gave a decree only against the two executants. Miller, J., relying on *Gour Chandra Das* v. *Prasanna Kumar Chandra* (1) reversed the decree and dismissed the suit on the ground that there was a material alteration which nullified the instrument. The respondent was not represented in the High Court in that case. These two cases are distinguishable from the present on two grounds:—

(1) there was no finding that the executants either consented or were parties, to the affixing of the signatures of the persons who did not join in the execution of the pro-notes;

(2) it was assumed that there was an agreement that all the persons whose names appeared on the promissory notes should join in executing it.

If the two learned Judges intended to lay down the broad proposition that where a document is alleged to be executed by two persons, if the signature of one of them is found to be a forgery, it is enforceable against the other irrespective of the knowledge and intention of the parties, with all respect, I am unable to agree with them.

(1) 33 C. 812; 3 C. L. J. 363; 10 C. W. N. 783.

(2) 23 Ind. Cas. 464; 26 M. L. J. 257; 15 M. L. T. 204; (1914) M. W. N. 250; 1 L. W. 243.

If in this case the intention of the plaintiff and the 1st defendant's father was to deprive the 2nd defendant of her property or to proceed against her alone it might be said that the plaintiff and the 1st defendant conspired to deprive the 2nd defendant of her property by the commission of an offence, namely, forgery. If such an intention is found as a matter of fact the suit pro-note would be unenforceable even against the 1st defendant for as observed in *Scott* v. *Brown* (3), "no Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality." Where the primary intention is not to cheat or to deprive the 2nd defendant of her property but where her name is introduced for the purpose of giving an additional security to the plaintiff, I do not think the plaintiff should be denied his remedy against the 1st defendant.

Mr. Muthukrishna Iyer contends that it is opposed to public policy to allow the plaintiff to get his remedy against one executant when he was a party to the forgery by which he sought to make a person, not a party to the document liable on it and relies upon *Holman* v. *Johnson* (4). In that case Lord Mansfield held that the plaintiff who was a party to an illegal or immoral contract was not entitled to get back the money paid under an illegal contract. The learned Lord observed: "If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted."

But the case has no application to the present, for here the contract itself was not an illegal or immoral one. It was an ordinary loan transaction evidenced by a pro-note. But to evidence the loan or as part of the contract itself the pro-note was executed; and in executing it the mark of a person not a party to the document was forged. If the contract in itself is illegal, the plaintiff would not be entitled to enforce his remedy against any one who is a party to the contract. But where the contract is legal, and, as evidence of the contract, something illegal is done it cannot be said that the whole contract is void. In the absence of any finding that the contract evidenced by the pro-note was for the purpose of cheating or depriving the 2nd defendant of her property, the contract cannot be said to be invalid. If the intention and object of the plaintiff and the 1st defendant were to deprive the 2nd defendant of her property, the contract evidenced by the promissory note would be illegal. But where the plaintiff lends money to the 1st defendant's father and asks for additional security and the 1st defendant's father forges the mark of the 2nd defendant with the consent and approval of the plaintiff, it cannot be said that the whole transaction is void.

Granting that s. 87 applies to such a transaction, isasmuch as the alteration was made with the consent of the executant, the document is not void. But I hold that s. 87 has no application to a case like this, as it has reference only to an alteration after execution and not anything done at the time of the execution.

In this view the decree of the Subordinate Judge so far as the 1st defendant is concerned cannot be supported. I reverse his judgment, and give a decree against the 1st defendant with interest at 6 per cent. on 923 as per date of plaint, but as the plaintiff was a party to a forgery I disallow his costs throughout.

It is not necessary in the view I have taken, to consider the argument of the learned Advocate-General that his client is entitled to sue on the original cause of action. Even if he is entitled to sue on the original cause of action, considering the conduct of the plaintiff, I am not prepared to give him leave to amend his plaint and sue on the original cause of action. The second appeal is not pressed against the 2nd defendant and it is dismissed with her costs.

This second appeal having been set down to be spoken to this day, the Court delivered the following

JUDGMENT.--The decree is against the assets of the father in 1st defendant's hand.

V. N. V. *Appeal dismissed.*

Z. K.

(3) (1892) 2 Q. B. 724; 61 L. J. Q. B. 738; 4 R. 42; 67 L. T. 782; 41 W. R. 116; 57 J. P. 213.

(4) (1775) 1 Cowp. 341 at p. 343; 98 E. R. 1120.

ALLAHABAD HIGH COURT.
FULL BENCH.

FIRST CIVIL APPEALS NOS. 455 OF 1923 AND 165 OF 1924

AND

FIRST APPEAL FROM ORDER NO. 77 OF 1924.

January 8, 1925.

Present:—Mr. Justice Lindsay, Mr. Justice Kanhaiya Lal and Mr. Justice Daniels

ABDUL RAHMAN SON OF ISMAIL—PETITIONER—APPELLANT

versus

ABDUL RAHMAN SON OF ZAHURI—PLAINTIFF AND *Qazi* MUHAMMAD AMIR AND ANOTHER—DEFENDANTS—RESPONDENTS.

U. P. Municipalities Act (II of 1916), ss. 19 to 27—Government of India Act, 1915, (5 & 6 Geo. V, c. 61), ss. 79, 107—Letters Patent (All.), cl. 11—Local Legislature, powers of legislation of, extent of—Municipal election—Election tribunal, creation of, whether ultra vires—*Election tribunal, whether subordinate to High Court—Appeal, Reference, Superintendence, powers of—Election dispute, decision of—Jurisdiction of Courts—Procedure.*

The language of s. 79 of the Government of India Act, conferring Legislative power on a Local Legislature, is very wide. Such Legislatures have been given a general power to make laws for the peace and good government of the territories for the time being constituting the province; and this power includes the power to direct that disputes of a particular kind shall be decided in a particular way and before a tribunal specially created for the purpose. The provisions of the U. P. Municipalities Act, therefore, which provide a special Court or tribunal for the exclusive trial of election cases are not *ultra vires* of the U. P. Local Legislature. [p. 52, col. 1.]

The right of appeal is not an inherent right of the subject but only exists where it is expressly conferred by a Statute. [p. 53, col. 2.]

The term "Civil Courts" in cl. 11 of the Letters Patent of the Allahabad High Court was not intended to cover a tribunal created under a particular Statute for a particular purpose, for instance, the election tribunal created under s. 22 of the U. P. Municipalities Act. Nor is such an Election Court subject to the "superintendence" of the High Court within the meaning of that expression in cl. 11 of the Letters Patent. [p. 54, col. 1.]

There is a radical difference between a right of appeal and a power of reference. A right of appeal is a right conferred on the suitor. The power of reference is a power vested in the Court. It lies in the sole discretion of the Court to exercise such power or not to exercise it. An appeal pre-supposes a decree or order already passed against which the appeal is directed. The power of reference is exercised while the case is still pending in order to enable the Court to arrive at a correct decision. [*ibid.*]

However widely a power of superintendence may be construed, it does not extend to conferring a right of appeal in cases where an appeal is expressly barred by Statute. [p. 54, col. 2.]

The whole scheme of ss. 19 to 27 of the U. P. Municipalities Act implies an intention that the election of any person as a member of a Board shall only be challenged by an election petition presented in accordance with the Act. The enquiry held by the Commissioner is not a mere summary enquiry subject to the result of a suit. The Commissioner is armed with all the powers of a Civil Court and his decision is intended to be a final settlement of the question in dispute. [p. 55, col. 1.]

Where a Statute which creates a right also prescribes a specific remedy with respect to that right a person aggrieved is limited to the remedy so prescribed. [*ibid.*]

Case-law discussed.

First appeal from a decree of the Commissioner, Agra Division, dated the 3rd July 1923.

Mr. *Gopinath Kunzru*, for the Appellant.

Mr. *Mushtaq Ahmad*, for the Respondents.

JUDGMENT.—This judgment relates to three connected appeals which have been laid before a Full Bench because of the extreme importance of the questions involved. The appeals challenge the validity of certain sections of the U P. Municipalities Act. All three arise out of a contested election for seats on the Municipal Board of Muttra which was held in the early part of 1923. There were four candidates for three seats. A poll was held and the appellant Abdur Rahman son of Ismail was one of the persons declared to be elected. Section 22 of the U. P. Municipalities Act, 1916, provides a special tribunal for the decision of disputes arising out of a Municipal election. Under the provisions of that section the respondent Abdur Rahman son of Zahuri presented a petition against the election of the appellant, urging that it was vitiated by various corrupt practices. This petition was heard and determined by the Commissioner as an Election Court under the provisions of the Act. The Commissioner upheld the petition, unseated the appellant, and under the powers vested in him by s. 25 declared the respondent duly elected in his place. The appellant Abdur Rahman son of Ismail presented a petition for review to the Commissioner under s. 23 (2) (*f*) and that application was rejected. He then filed the present appeal from the Commissioner's decision to this Court, notwithstanding the fact that by s. 23 (2) (*e*) of the Act it is declared that there shall be no appeal from the Commissioner's order either on a question of law or fact and that no application in revision against or in respect of that decision shall be entertainable. That ap-

peal is First Appeal No. 455 of 1923. Besides filing this appeal he also filed a suit in the Court of the Subordinate Judge of Muttra for various reliefs the principal of which were a declaration that he had been duly elected as a member of the Municipal Board and an injunction to restrain the respondent from acting as such member.

After that suit had been filed he applied for an adjournment which was granted on condition of paying Rs. 125 costs of the adjournment to the opposite party. He failed to pay these costs and his suit was dismissed for default, an application for further time being rejected. He subsequently applied to the Subordinate Judge for restoration of the case and that application was rejected.

He has now filed First Appeal No. 165 of 1924 from the order dismissing his suit for default, treating that order as a decree and has also filed a first appeal from the order refusing to restore the suit. The latter appeal is First Appeal from Order No. 77 of 1924. The appellant was doubtful whether his relief lay by way of appeal or by way of application for restoration and to be on the safe side pursued both remedies.

The grounds of appeal in Appeal No. 455 of 1923, which is the principal appeal, so far as it is necessary for us to consider them, are :—

1. That it is *ultra vires* of the U. P. Local Legislature to appoint any Court or tribunal for the trial or the exclusive trial of election cases or to appoint the Commissioner as the election tribunal.

2. That at any rate it is *ultra vires* of the U. P. Local Legislature to take away or restrict in any manner the powers of appeal or revision of this Court and to make the decision of the Commissioner final.

The plea that it is *ultra vires* of the Local Legislative Council to create a Court for the decision of election cases or indeed as the appellant's learned Counsel argued for any purpose whatsoever does not require any lengthy discussion. It is admitted that the words conferring legislative power on a Local Legislature under s. 79 of the Government of India Act, 1915, are very wide. That Legislature has been given a general power to make laws for the peace and good government of the territories for the time being constituting the province. The only limitation imposed on the extent of this power is that the Legislature must not make any law affecting any Act of Parliament. For certain kinds of legislation the previous sanction of the Governor-General is required, though failure to apply for previous sanction is by sub-s. (5) of s. 79 cured, if the Act when passed is duly assented to by the Governor-General in pursuance of the Act. No question of assent arises in this case. The previous sanction of the Governor-General was obtained to the passing of the U. P. Municipalities Act, and that Act was duly assented to by the Governor-General after it was passed. If a wide general power to legislate for the peace and good government of the province does not include a power to devise means for deciding on the validity of a disputed election to a seat on a Municipal Board, it is difficult to know what it does include.

The appellant's learned Counsel laid stress on the difference between the language of s. 79 and that of s. 65 of the same Act, which provides for the Legislative power of the Governor-General in Legislative Council. He argues that because the words "for all persons, for all Courts and for all places and things" contained in that section are not reproduced in s. 79, it follows that the Local Legislature has no power to legislate for any Court. He might equally have argued from the omission of the words "for all persons" that the Local Legislature has no power to pass laws affecting any person. The words "to make laws for the peace and good government of the territories for the time being constituting that province" have been given a very wide construction in various cases, not only with reference to India but also to other portions of the Empire where similar words occur [*cf.* *Ashbury* v. *Ellis* (1)]. The Local Legislature has in a number of instances both under the Indian Councils Act of 1861 and under the Government of India Act created tribunals for particular purposes or excluded the jurisdiction of the Civil Courts in particular cases. The enactments containing these provisions have repeatedly come before the Courts, and it has never hitherto been suggested that there was any doubt as to their validity. Village Courts were created by an Act of the Local Legislature in 1892.

(1) (1893) A. C. 339; 62 L. J. P. C. 107; 1 R. 388; 69 L. J. 159.

Special Judges to adjudicate on the indebtedness of encumbered proprietors were appointed under the Bundelkhand Encumbered Estates Act of 1903; and under the Bundelkhand Land Alienation Act of the same year the enforcement of certain classes of decrees was taken away from the Civil Courts and vested in the Collector. The Oudh Civil Courts Act has been twice amended by the Local Legislature. If the Local Legislature has no power to create Courts it can equally have no power to modify the constitution or powers of Courts already existing. Finally by a Local Act of 1920 Village *Panchayats* were established and were vested with both civil and criminal powers.

Other instances might be given from other provinces, but these are sufficient to show that the power which is now challenged has been exercised and treated as valid by the Courts through a long series of years. We have no doubt whatever that a power to make laws for the peace and good government of the province includes a power to direct that disputes of a particular kind shall be decided in a particular way and before a tribunal specially created for the purpose.

The appellant's main argument, however, was that the provisions of ss. 19 to 27 of the U. P. Municipalities Act derogate from the powers conferred on the High Court at Allahabad by cl. 11 of the Letters Patent and are, therefore, invalid. He originally suggested that they were invalid as interfering with the prerogative of the Crown, but in view of the fact that the amendment of s. 84 of the Government of India Act, 1915, effected by the Government of India Act, 1916, expressly provides that no law of a Local Legislature shall be invalid solely because it affects the prerogative of the Crown, and that by s. 2 of the latter Act this amendment was made retrospective, that position could no longer be maintained and he has frankly abandoned it. He has, however, argued that the powers of the High Court under the Letters Patent are declared by s. 106 of the Government of India Act, 1915, and that any attempt by a Local Legislature to derogate from those powers is an infringement of an Act of Parliament and, therefore, invalid under the express provisions of s. 79 (4) of the Government of India Act, 1915. It is unnecessary to consider this position because it is quite clear that the legislation which is impugned in no way interferes with the powers of the High Court under the Letters Patent. Clause 11 of the Letters Patent runs as follows:—

"And we do further ordain that the said High Court of Judicature for the North-Western Provinces shall be a Court of Appeal from the Civil Courts of the North-Western Provinces, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force."

The appellant wishes to treat the words "shall be a Court of Appeal from the Civil Courts of the North-Western Provinces" as meaning that an appeal shall lie from any order passed by any Civil Court. This is an untenable position. It was held as far back as 1820 that the right of appeal is not an inherent right of the subject but only exists where it is expressly conferred by Statute [*King* v. *Henson* (2)]. That view has been more than once affirmed by the Privy Council, *e.g.*, *Minakshi Naidu* v. *Subramanya Sastri* (3) and *Rangoon Botatong Company* v. *Collector, Rangoon* (4). The words cited lay down that the High Court is to be the supreme appellate tribunal (subject of course to any further appeal which may be allowed to His Majesty in Council) from the Civil Courts of the province and from the Courts under the superintendence of the High Court, and the concluding words of the clause state the cases in which an appeal can be brought. It is pointed out that no provision was made in cl. 11 for rights of appeal which might be thereafter conferred. This was probably considered to be sufficiently provided for by cl. 35 which makes the Letters Patent subject to the legislative powers of the Governor-General in Council. In the Letters Patent of the more recent High Courts the omission has been supplied by the insertion of the words "or as may after that date be declared subject to appeal by competent legislative author-

(2) (1821) 4 B. & Ald. 519; 106 E. R. 1027.

(3) 14 I. A. 160; 11 M. 26; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18 (P. C.).

(4) 16 Ind. Cas. 188; 39 I. A. 197; 16 C. W. N. 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J 276; 14 Bom. L. R. 833; 10 A. L. J. 271; 5 Bur. L. T. 205; 40 C. 21; 6 L. B. R. 150 (P. C.).

ity." It may be added that the appellant's argument breaks down at the outset unless the term "Civil Courts" used in the Letters Patent can be held to include such a Court as that created by s. 22 of the U. P. Municipalities Act. It is not strictly necessary to decide the point but in the opinion of the majority of us these words were never intended to cover a tribunal created under a particular Statute for a particular purpose.

There is equally little foundation for the contention that the Commissioner sitting as an Election Court is subject to the superintendence of this Court. The power of superintendence rests on s. 107 of the Government of India Act, which extended it to all Courts subject to the High Court's Appellate Jurisdiction. There is no other provision of law to which appeal can be made as conferring a power of superintendence in this case. It is very difficult to argue that the Election Court is under the Appellate Jurisdiction of the High Court when the Act which creates it expressly declares that there shall be no appeal from any of its decisions. The appellant relies on the fact that by s. 23 (e) of the Municipalities Act the Commissioner is empowered to refer a question of law to the High Court. He relies on expressions in certain decisions which speak of a power of reference as being a modified form of Appellate Jurisdiction, *e. g.*, *Sheo Nandan Prasad Singh* v. *Emperor* (5). With all respect to the learned Judges who are responsible for these decisions there is a radical difference between the two things. A right of appeal is a right conferred on the suitor. A power of reference such as is given in this case is a power vested in the Court. It lies in the sole discretion of the Court to exercise it or not to exercise it. An appeal presupposes a decree or order already passed against which the appeal is directed. The power of reference is exercised while the case is still pending in order to enable the Court to arrive at a correct decision. It is beside the mark to urge that when a reference is made the Court making it is bound to abide by the decision of the Court of Reference. This is merely the natural corollary of allowing a reference. It would be absurd to ask the highest Court in the province to adjudicate on a question of law if the Court which made the reference were to be at liberty to disregard the decision. In the case of *In re Rattansee Purshottum* (6), the Bombay High Court held that it had no revisional jurisdiction over the proceedings of the Consular Court of Muscat, even though it was obligatory on the Consul to refer his proceedings for the order of the High Court in certain cases. A familiar illustration of the power of reference is that contained in the Kumaun Rules. Under r. 17 of those Rules the Local Government can refer for the opinion of this Court any final decision of the High Court of Kumaun; but this certainly does not make either the Local Government or the Kumaun Courts subject to the superintendce of this Court.

It was further argued that if the Commissioner as an Election Court sanctions a criminal prosecution for perjury or a kindred offence an appeal might lie to this Court under s. 476B of the Cr. P. C. It has already been held by this Court in *Ram Nath* v. *Emperor* (7) that no revision lies from the Commissioner's order in such a case. Whatever doubts may be entertained as to whether the Commissioner acting as an Election Court is a Civil Court within the meaning of cl. 11 of the Letters Patent he is certainly not a Civil Court within the meaning of the C. P. C. or of s. 476 of the Cr. P. C.

Even, however, if a power of superintendence existed this would not suffice to give a right of appeal such as is claimed in this case. However widely the power of superintendence may be construed it clearly does not extend to conferring a right of appeal in cases where an appeal is expressly barred by Statute.

It is hardly necessary to consider the last portion of cl. 11 of the Letters Patent. No such things as Municipal elections were known in the province at the time when the Letters Patent were issued, so the right of appeal now claimed clearly had no existence.

In support of the two remaining appeals it is argued that even if ss. 19 to 27 of the Municipalities Act are valid they do not exclude the right of suit. Section 9 of the C. P. C. declares that Civil Courts shall have jurisdiction to try all suits of a civil nature except suits of which their cognis-

(5) 46 Ind. Cas. 977; 3 P. L. J. 581; 19 Cr. L. J. 833; (1919) Pat. 1; 5 Pat. L. W. 324.

(6) 24 B. 471; 1 Bom. L. R. 840; 12 Ind. Dec. (N. S.) 845.

(7) 83 Ind. Cas. 654; 22 A. L. J. 497; 10 O. & A. L. R. 581; 46 A. 611; (1924) A. I. R. 684; 26 Cr. L. J. 94.

ance is either expressly or impliedly barred. It is quite true that it is not stated in so many words that here shall be no right of suit. It is also true that in two places in the Act, ss. 164 and 321, there are provisions expressly barring the right of suit in particular matters. But the whole scheme of ss. 19—27 clearly implies an intention that the election of any person as a member of a Board shall only be challenged by an election petition presented in accordance with the Act. The inquiry held by the Commissioner is not a mere summary inquiry subject to the result of a suit. The Commissioner is armed with all the powers of a Civil Court and his decision is intended to be a final settlement of the question in dispute.

The ordinary rule is that where the Statute which creates the right also prescribes a specific remedy the person aggrieved is limited to the remedy so prescribed. As this Court observed in *Sham Lal* v. *Bindo* (8) with reference to a similar contention under the Guardians and Wards Act a separate suit, if permitted, might result in two opposite decisions equally final and equally binding one declaring an election valid and the other declaring it invalid. The matter was well put by Sir Lawrence Jenkins, Chief Justice of Bombay High Court in *Bhaishanker Nanabhai* v. *Municipal Corporation of Bombay* (9):—

"But under s. 33 the Chief Justice has jurisdiction to determine the validity of a contested election, and so he is the tribunal appointed by the Act for that purpose.

"But where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive.

"It is an essential condition of those rights that they should be determined in the manner prescribed by the Act to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any; there is no change of the old order of things a new order is brought into being."

The case of *Ashby* v. *White* (10) which is the foundation of the judgment in *Municipal Board of Agra* v. *Asharfi Lal* (11) relied on by the appellants has no application here. In that case Ashby, as a burgess of the borough of Aylesbury, was awarded damages on the ground of awrong done to him by the refusal of the defendants to allow him to record his vote at a parliamentary election. The judgment of Chief Justice Holt which was affirmed by the House of Lords, was based on the principle that where a legal right has been infringed the law must provide a remedy, and the only remedy open to the plaintiff was by means of an election at law. That case cannot be cited as an authority for the proposition that a right of suit must lie in all cases notwithstanding that a special remedy is provided by Statute.

We are, therefore, clearly of opinion that there is no right of suit in the present case.

These findings are sufficient for the disposal of all three appeals. We may note in conclusion that one contention of the appellant was that the respondent was illiterate and, therefore, ineligible for election. This was no part for the appellant's original case before the Commissioner though it was pressed on the application for review. The respondent was present in the Court and it was found on examining him that he can both read and write Urdu. The appellant's case is in fact like a house of cards which collapses at whatever point it is touched.

For the reasons already given we dismiss all three appeals with costs including in this Court fees on the higher scale. In F. A. No. 455 of 1923 we allow a special fee of Rs. 200, the receipt of which has been certified.

Z. K. *Appeals dismissed.*

(8) 26 A. 594; 1 A. L. J. 266; A. W. N. (1904) 135.
(9) 31 B. 604 at p. 609; 9 Bom. L. R. 417.
(10) (1703) 2 Ld. Raym. 938; 1 Sur. L. C. (11th Ed.) 240; 14 How St. Tr. 695; 92 E. R. 126.
(11) 65 Ind. Cas. 984; 20 A. L. J. 1; (1922) A. I. R. (A.) 1; 44 A. 202.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 753 OF 1923.
January 9, 1925.
Present:—Mr Justice Lindsay and Mr. Justice Kanhaiya Lal.

UMAR DARAZ AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
SRI RAM DAS—DEFENDANT—RESPONDENT.

Pre-emption—Pre-emptor associating stranger in suit, effect of.

It is fatal for a plaintiff in a pre-emption suit to

associate with him in that suit any person who is not entitled to pre-empt.

Bhawani Prasad v. *Damru*, 5 A. 197; A. W. N. (1882) 217; 3 Ind. Dec. (N. S.) 161 and *Bhupal Singh* v *Mohan Singh*, 19 A. 324; A. W. N. (1897) 72; 9 Ind. Dec. (N. S.) 212, followed.

Abdulla v. *Wahid-un-nissa*, 1 O. C. 308, distinguished.

Second appeal from a decree of the District Judge, Saharanpur, dated the 1st of February 1923.

Mr. *S. A. Haidar*, for the Appellants.

Mr. *Nehal Chand*, for the Respondent.

JUDGMENT.—We are of opinion that this case has been rightly decided in the Courts below. The decision, no doubt, has been on technical grounds, but as the learned Judge of the lower Appellate Court has observed, the law of pre-emption is a highly technical law.

The suit for pre-emption which was filed by two plaintiffs Umar Daraz and his minor son Rafiq Ahmad, failed on the ground that Umar Daraz, being a person who was entitled to bring a claim for pre-emption with regard to the sale in question, associated in his claim his minor son, who had no such interest as entitled him to claim pre-emption. In fact the Courts below have treated the son as a stranger and consequently applying the law, which has always been followed in this Court and as it has been expounded in *Bhawani Prasad* v. *Damru* (1), they have dismissed the suit.

When the case came up here, Mr. Haidar, who appears on behalf of the appellants, in order to cure the defect in the suit, has asked us to remove the name of the minor Rafiq Ahmad from the appeal and allow the appeal to be continued only by the first plaintiff, Umar Daraz.

To begin with, the mere removal of Rafiq Ahmad's name from the array of the appellants will not cure the defect in the suit. Again we do not think we are entitled to resort to any powers of amendment which we have under the C. P. C. in order to allow an amendment in a case of this kind when the rule of law is that it is fatal for a plaintiff in a pre-emption suit to associate with him in that suit any person who is not entitled to pre-emption. We may refer in this connection to the case reported as *Bhupal Singh* v. *Mohan Singh* (2).

(1) 5 A. 197; A. W. N. (1882) 217; 3 Ind. Dec. (N. S.) 161.

(2) 19 A. 324; A. W. N. (1897) 72; 9 Ind. Dec. (N. S.) 12.

We have not so far touched on the facts but they are very simple. The property which was sold under the sale-deed in suit consisted of two items, namely, some land in a village called Karondi and some other land in a village called Wahabpur. The first plaintiff lives in Karondi and has a share in that village. By virtue of his being a co-sharer in the village he had no doubt a right of pre-emption so far as Karondi was concerned.

In Wahabpur it appears that some time before the sale sought to be pre-empted was carried out, a share had been acquired by Umar Daraz in the name of his minor son Rafiq Ahmad. Rafiq Ahmad's name appears in the *khewat* of *Mauza* Wahabpur while the name of Umar Daraz does not. But in the witness-box Umar Daraz himself admitted that his son Rafiq Ahmad was a mere *benamidar* for him. So far as the property in Wahabpur is concerned he stated distinctly that it belonged to himself and that he had bought it with his own money. As the Wahabpur property was purchased when Rafiq Ahmad was six years of age, it is not the least likely that Rafiq Ahmad had the money to purchase this property. On the facts, therefore, as admitted by the first plaintiff himself he is out of Court. He has associated with him in this suit for pre-emption, his son Rafiq Ahmad who, for the purposes of this case, must be treated as a stranger. Mr. Haidar who has argued the case on behalf of the appellants has referred us to a ruling of the Oudh Court to be found in *Abdulla* v. *Wahid-un-nissa* (3). There the Oudh Court refused to follow the law as laid down in *Bhawani Prasad* v. *Damru* (1). It is to be noted here that pre-emption cases in Oudh are dealt with under the special provisions of the Oudh Laws Act and in any case we must follow the decision of our own Court. So far as we are aware this case of *Bhawani Prasad* v. *Damru* (1) has been consistently followed here The result is that the appeal fails and is dismissed with costs, which will include fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

(3) 1 O. C. 308.

MADRAS HIGH COURT.

CIVIL APPEAL No. 348 OF 1921

AND

APPEAL AGAINST ORDER No. 137 OF 1922.

October 10, 1924.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Srinivasa Iyengar.

P. BALAMANI AMMAL—DEFENDANT No. 1 —APPELLANT

versus

K. N. RAMA IYER AND OTHERS—DEFENDANTS NOS. 2 TO 8 AND PLAINTIFF—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 65, O. IX, rr. 6, 13—Mortgage suit—Mortgaged property purchased by mortgagee during pendency of suit, effect of—Procedure · Bona fide *belief that case would not be taken up on date fixed for hearing—Adjournment, whether should be granted*—Ex parte *decree, application to set aside.*

During the pendency of a mortgage suit the mortgagee purchased the right, title and interest of the mortgagor in the mortgaged property in a Court auction in execution of a money-decree :

Held, that the purchase operated to discharge the mortgage and that the mortgage suit ought to be dismissed. [p. 58, col. 2.]

On the date fixed for the hearing of a suit the defendant's Counsel applied for an adjournment and on the adjournment being refused he stated that he had no instructions and the Court thereupon passed an *ex parte* decree against the defendant. It appeared that the defendant and his Counsel *bona fide* believed that owing to the pendency of a certain application the case would not be heard on the date to which it was posted. Defendant made an application to set aside the *ex parte* decree, but the application was rejected. On appeal :

Held, that under the circumstances of the case the adjournment prayed for by the defendant should have been granted and that, therefore, the *ex parte* decree must be set aside and the case remanded for trial to the lower Court. [p. 58, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in O. S. No. 109 of 1919 and appeal against the order of the Court of the Subordinate Judge, Kumbakonam, dated the 28th October 1921, in Interlocutory Application No. 517 of 1921, in O. S. No. 109 of 1919.

Mr. *T. K. Rangaswamy*, for the Appellant.

Mr. *T. M. Krishnaswamy Iyer*, for the Respondents.

JUDGMENT.—The plaintiff brought the suit to enforce two mortgages which he alleged were executed by the first defendant in favour of certain third parties from whom he obtained assignments of those mortgages. The first defendant filed a written statement denying that any part of the sum of Rs. 31,921-7-8 for the recovery of which the suit was filed, was due and making various charges of gross fraud against the plaintiff. On the 6th of August 1922 the case came on for hearing when the first defendant's Vakil applied for an adjournment on certain grounds to which we shall presently refer, but the adjournment was refused. The Vakil then said he had no instructions and the Subordinate Judge passed an *ex parte* decree for the sum claimed against the first defendant. We are not concerned with the other defendants ; but we may mention that the second and third defendants were impleaded as subsequent mortgagees and that the 9th defendant obtained an assignment subsequent to the suit of the second defendant's mortgage. The first defendant has filed this appeal.

Mr. T. M. Krishnaswamy Iyer, the Vakil for the plaintiff-respondent has taken an objection *in limine* to the maintainability of the appeal. He contends that his client has become the purchaser of the first defendant's interest in the property and that as the effect of it would be that besides being a respondent his client takes also the place of the appellant, the appeal cannot go on and must be dismissed.

Before examining the contention, we shall first deal with the appeal as if no such event has taken place. The present suit was filed on the 10th of December 1919 and during its pendency, the plaintiff purchased in Court auction held in execution of a money decree passed against the first defendant, the right, title and interest of the first defendant in the suit properties. The purchase by him was on 3rd of March 1921. The first defendant thereupon made an application to the District Munsif's Court, Kumbakonam which held the auction, to set aside the sale on certain grounds. This application was pending on the 6th of August 1921 when the present suit came on for hearing. The first defendant's Vakil applied for an adjournment on the ground that he was led to believe that the suit would not go on till the petition to set aside the sale was finally disposed of, that, as a matter of fact, the application before the District Munsif's Court came on for hearing on the 3rd of August 1921, but was adjourned to the 31st of August in order that the parties might take the necessary steps to get the application transferred to the Sub-Court, Kumbakonam, so that the suit and the application might be heard together, and that for these reasons his client who was ready to proceed with the suit on previous occasions had not taken the necessary steps to be ready with her evidence on that day. The

first defendant was not in Court, the Judge refused the application for adjournment and passed an *ex parte* decree. The first defendant thereupon made an application to set aside the *ex parte* decree. That application was again refused. The first defendant has not only filed an appeal against the decree itself (A. S. No. 343 of 1921), but she has also filed an appeal against the order refusing to set aside the *ex parte* decree (A. A. O. No. 137 of 1922). We are clearly of the opinion that the Subordinate Judge ought to have granted the adjournment prayed for. The Vakil for the plaintiff as well as the Vakil for the 1st defendant gave evidence when the application to set aside the *ex parte* decree was heard and the first defendant's Vakil deposed that the Vakil for the plaintiff had represented to the Court at a previous hearing that the suit might be adjourned pending the disposal of the execution application in the District Munsif's Court. This statement was, no doubt, denied by the plaintiff's Vakil. But without deciding which of the two conflicting versions is correct, we are satisfied that the defendant's Vakil *bona fide* believed that the case would not be heard on the 6th of August and had sufficient grounds for entertaining the belief. When the petition to set aside the sale was taken up on the 3rd of August 1921 by the District Munsif, it is clear that it was adjourned to the 31st August in order to enable the parties to get the petition transferred to the Sub-Court. Whether this suggestion regarding the transfer emanated from the first defendant's Vakil or was made by the Court is immaterial. These facts show that the first defendant could have honestly and *bona fide* come to the conclusion that it was not necessary to be ready to proceed with the case on the 6th of August. If nothing further has transpired we would have no hesitation in reversing the decision and remanding the suit for trial.

But Mr. Krishnaswami Iyer contends that inasmuch as he himself became the purchaser of the equity of redemption the appeal must be dismissed. The Court sale was on the 3rd of March 1921; it was confirmed by the Munsif on the 25th October 1921. It is unnecessary to refer to the subsequent history of this dispute, for it is sufficient to say that the result of all that happened was, that the confirmation made by the Munsif was allowed to stand. Order XXI, r. 92, C. P. C., says that where an application to set aside a sale is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute. Under s. 65 of the Code where immoveable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. The property, therefore, became vested in the plaintiff on the 3rd of March 1921. Now let us see, what the argument of Mr. Krishnaswami Iyer leads to. He says that his client became the purchaser of the first defendant's interest and the appeal should be, therefore, dismissed. In other words, he says that his mortgage has become satisfied, by reason of the purchase. The logical deduction from this would be, that if on the 3rd of March 1921, his mortgage became satisfied and he had no claim to prosecute, the suit ought to have been dismissed on the 6th of August 1921 when the Sub-Judge delivered judgment. The plaintiff contends that during the pendency of the suit as the result of an event that happened, the mortgagor's interest in the property passed to him which operated to discharge the mortgage and, in our opinion, the result of this contention will be not that the appeal but that the suit itself should be dismissed. When the plaintiff comes to the Court and says his claim has been satisfied we have no alternative, but to dismiss his suit. That is what had happened here, and the only course open to us is to allow the appeal and dismiss the suit. We must here observe that the plaintiff states that he has entered into some arrangements with the defendants Nos. 3 and 9 and does not desire to have in this suit any relief against them.

In these circumstances, however, we make no order as to costs, but as the 1st defendant has filed the appeal in *forma pauperis* we direct that the Court-fees payable to the Government shall be paid by the plaintiff and the first defendant in equal moieties. The reason for making both the parties bear equally the said Court-fee is this. We cannot now assume that the allegations made by the defendant in her written statement are true and that the suit at its very inception was bad nor can we assume that the plaintiff purchased the interest of the first

defendant in the suit properties with a view to stifle her defence. Though we are allowing the appeal, we cannot, in the circumstances, adjudge the plaintiff liable for the entire amount of the Court-fees payable to the Government.

V. N. V. | *Appeal allowed.*
Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 94 OF 1923.
June 20, 1924.
Present:—Mr. Justice Mukerji.

GAJRAJ SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
RAM ANJORE SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Joint possession, decree for.

Where a party is entitled to joint possession, he should be granted the relief, and to entitle him to it, it is not necessary that he should have been in possession before and should have been dispossessed later on. But from this it does not follow that in every case where there are joint claimants and joint owners it is the duty of the Court to grant a decree for joint possession. In certain cases a Court would be entitled to refuse a decree for joint possession, for instance, where a co-sharer has been in peaceful possession of certain plots of land as his *khudkasht* for a number of years before the suit is instituted, the other co-sharers will ordinarily be not entitled to a decree for joint possession.

Jagan Nath Ojha v. *Ram Phal*, 13 Ind. Cas. 79; 8 A. L. J. 1312; 34 A. 150, *Watson and Company* v. *Ramchund Dutt*, 18 C 10; 17 I. A. 110; 5 Sar P. C. J. 535; 9 Ind. Dec (N. S.) 7 (P. C.), *Bhola Nath* v. *Buskin*, A. W. N. (1894) 127 and *Phani Singh* v. *Nawab Singh*, 28 A. 161; A. W. N. (1905) 233, referred to.

Second appeal against the decree of the Subordinate Judge, Jaunpur, dated the 27th October, 1922.

Mr. *A. Sanyal*, for the Appellants.
Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This appeal is connected with S. A. No. 95 of 1923. The facts of the two cases out of which these connected appeals have arisen are practically the same.

An occupancy tenant Bhagwanta Singh died before the year 1884. On his death Bhagwan Singh the predecessor-in-title of the respondents, took possession of the holding. There was a litigation between him and the widow of Bhagwanta, *Musammat* Newasi, which ended in a compromise effected on the 17th of June 1884. By that compromise the widow really handed over the entire holding to Bhagwan Singh. Later on, the daughter of Bhagwanta Singh brought a suit of her own, but it was held that the compromise held good during the lifetime of her mother. *Musammat* Newasi died in April 1910. Some time after, her daughter brought another suit to recover the holding, but she was again unsuccessful. After that suit had been dismissed, the two suits out of which these appeals have arisen were brought by co-sharers of the *mahal* against the descendants of Bhagwan Singh for obtaining joint possession over the holding. Let it be mentioned here that Bhagwan Singh was and the respondents are also co-sharers in the village. The defence was that the respondents were co-sharers in the village and were in peaceful possession, and the plaintiffs, whose title to the land was not denied, were not entitled to obtain joint possession, though they might sue for partition, or for profits.

The Court of first instance gave a decree for joint possession, but it made it clear that that decree did not entitle the plaintiffs to obtain physical possession by ousting the respondents from any portion of the plaint land. Both the plaintiffs filed appeals. The learned Subordinate Judge who heard them found no reason to grant a decree for joint possession. He held that, although the learned Munsif had pointed out that the decree for joint possession did not really mean anything but a declaratory decree, yet, having regard to the peculiar features of the people of the district, it would be in the interest of the parties themselves not to grant an ambiguous decree but a pure declaratory decree. Evidently the learned Subordinate Judge means that as soon as the plaintiffs come to know that they have got a decree for joint possession, they would ignore the word "joint" and understand that they have been awarded possession to the extent of their share and would then use force to obtain actual physical possession on the spot.

In this Court it has been urged that the learned Subordinate Judge was wrong, and the appellants are entitled to a joint decree.

Reliance has been placed on behalf of the appellants on the case of *Jagan Nath Ojha*

v. *Ram Phal* (1). In this case it was held that, where a party is entitled to joint possession, he should be granted the relief and to entitle him to it, it is not necessary that he should have been in possession before and should have been dispossessed later on. This remark was made in view of the fact that for some time it was thought improper to grant decrees for joint possession unless a party who had been in such possession had been ousted. In the case before their Lordships a lady, who was the owner of a certain *zemindari* share, died and the parties to the suit became entitled to that share. The defendants alone were in possession, and the plaintiffs, who were as much entitled to the share as the defendants, asked for joint possession. The learned Judges held that, in the circumstances joint possession might be decreed. They, however, did recognize the fact that in certain cases a Court would be entitled to refuse a decree for joint possession, and they cited the cases of *Watson and Company* v. *Ramchund Dutt* (2) and *Bhola Nath* v. *Buskin* (3) as instances, in which the prayer for joint possession had been properly refused. The learned Judges expressed their dissent from the case quoted by the learned Subordinate Judge, namely, *Phani Singh* v. *Nawab Singh* (4).

There cannot be the least doubt that the ruling in *Jagan Nath Ojha* v. *Ram Phal* (1) still holds good and is binding on me. But the question is whether in the circumstances of this particular case, I should grant a decree for joint possession or should content myself with the decree for declaration which the lower Court has granted. Apart from the fact that, in my opinion, too, the learned Subordinate Judge was right in his remark that, having regard to the nature of the population of the district of Jaunpur, it was expedient that there should not be given any ambiguous decree, I am clearly of opinion that this particular case is covered by the cases which were distinguished by the learned Judges in the case in *Jagan Nath Ojha* v. *Ram Phal* (1). I have already pointed out that the case before their Lordships was that of a *share in a zemindari*. Possession over such a property does not necessarily mean physical possession over all the lands comprised in the share. In this particular case the subject-matter of dispute consists of a few particular plots of land. These lands are in the actual cultivation of the defendants-respondents. They have been in possession thereof as tenants till the widow of Bhagwanta Singh died. They obtained possession to start with as relations of Bhagwanta Singh, the original tenant. But since the death of the widow of Bhagwanta Singh, they have been in possession as *zemindars*, and they resisted the suit of Bhagwanta Singh's daughter as such. Thus the defendants had been in peaceful possession of the lands as their *khudkasht* for well nigh twelve years before the present suit was instituted. As co-sharers jointly owning the lands the defendants are as much entitled to cultivate these particular plots as the plaintiffs themselves. The case is, therefore, parallel to the cases of *Watson and Company* v. *Ramchund Dutt* (2) and *Bhola Nath* v. *Buskin* (3) quoted above. In the former case the defendants were peacefully cultivating the lands in respect of which the relief was asked for. In the latter case certain co-sharers had granted a lease without the consent of the plaintiff co-sharer, and the lessee was in peaceful physical possession of the lands in respect of which the lease had been granted. Their Lordships of the Privy Council and this Court refused to grant a decree for joint possession.

It is no doubt the case that the C. P. C., as it was enacted in 1882 did not provide for the execution of a decree for joint possession and the Code of 1908 does provide a mode as to how a decree for joint possession is to be executed. But from this it does not follow that in every case where there are joint claimants and joint owners it is the duty of the Court to grant a decree for joint possession.

In my opinion the decree of the Court below is not only expedient but right in law. I dismiss the appeals with costs which will include Counsel's fees in this Court on the higher scale.

Z. K. *Appeals dismissed.*

(1) 13 Ind. Cas. 79; 8 A. L. J. 1312; 34 A. 150.
(2) 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 535; 9 Ind. Dec. (N. S.) 7 (P. C.).
(3) A. W. N. (1894) 127.
(4) 28 A. 161; A. W. N. (1905) 233.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 51 OF 1923.

November 20, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

AMULYA RATAN BANERJI AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

BANKU BEHARI CHATTERJI—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 183—Civil Procedure Code (Act V of 1908), O. XXI, rr. 22, 23 "Revivor", what amounts to—Transmission of decree, order for, whether revivor—Dismissal of execution application for default—Notice of assignment and substitution.

An order directing the transmission of a decree is an administrative act which does not judicially determine the enforcibility of the decree. Neither an application for transmission nor an order for such transmission does, therefore, amount to a "revivor" within the meaning of Art. 183 of Sch. I to the Limitation Act. [p. 62, col. 1; p. 63, col. 2.]

In order to constitute a "revivor" within the meaning of Art. 183 of Sch. I to the Limitation Act, there must be a determination, either in express terms or by implication, that the decree is still capable of execution. An order dismissing an application for execution for the decree-holder's default does not amount to a "revivor" of the decree. [p. 63, col. 1.]

The mere issue or service of a notice under O. XXI, r. 22 of the C. P. C., is not sufficient to declare that the decree is capable of execution so as to constitute "revivor" within the meaning of Art. 183 of Sch. I to the Limitation Act. A further order by the Court under r. 23 of O. XXI is necessary for the purpose of determining that the decree may be executed or is capable of execution. [p. 63, col. 2.]

Chutterput Singh v. *Sait Soomari Mal*, 36 Ind. Cas. 602; 43 C. 903; 20 C. W. N. 889; 23 C. L. J. 645, *Kamini Debi* v. *Aghore Nath Mookerjee*, 4 Ind. Cas. 402; 11 C. L. J. 91; 14 C. W. N. 357, *Monohar Das* v. *Fulteh Chand*, 30 C. 979; 7 C. W. N. 793 and *Suja Hussein* v. *Monohur Das*, 22 C. 921; 11 Ind. Dec. (N. S.) 610, referred to.

Appeal against a decree of the Subordinate Judge, Second Court, Hooghly, dated the 1st of December 1921.

Babus *Ram Chandra Mazumdar* and *Kali Kinkar Chakerbutty*, for the Appellants.

Mr. *S. C. Maiti*, Babu *Apurba Charan Mukerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a proceeding in execution of a decree passed in the Original Side of this Court. It is necessary to give a short history of the litigation. The decree was passed on the 25th July 1904. In 1905, it was transmitted to the Hooghly Court for execution which ended on the 16th November 1905, according to the Court below, but on the 20th January 1906 according to the certificate issued by this Court and printed at page 34 of Part II of the paper-book. On the 19th November 1917 the respondent-decree-holder again applied for execution and notice was served upon the appellants on the 19th December 1917 and the execution case was struck off on the 21st December 1917 with a remark "dismissed for want of prosecution." The application for the present execution was presented on the 7th February 1921 and it was prayed that certain properties belonging to the appellants' father might be attached in execution of the decree. The appellants who are the present judgment-debtors raised various objections to the execution of the decree. The learned Subordinate Judge in the Court below overruled all those objections and held that the decree was capable of execution and ordered attachment of some of the properties mentioned in the application for execution and released some other properties holding that they were not in the occupation of the judgment-debtors.

The judgment-debtors have appealed and two points have been taken by them. They urge, in the first place, that the execution is barred by limitation under Art. 183 of the Second Schedule to the Limitation Act of 1908; and, in the second place, it is contended that the decision of the Court below that the properties which it has ordered to be attached as belonging to the appellants' father is wrong. There is also a cross-objection by the respondent with reference to the properties released by the lower Court.

We have heard both the parties on the first question raised in the appeal, namely, that of limitation and we think that this plea ought to succeed. We do not think it necessary to enter into the second point raised before us. The learned Subordinate Judge has, according to both the parties, misconceived the facts of this case so far as they relate to the objection on the ground of limitation. He has further fallen into error in confusing the provisions of Arts. 182 and 183 of the Limitation Act; or, in other words treated the expression "step-in-aid of execution" as used in Art. 182 as co-extensive in meaning with the term 'revivor' under Art. 183. He found that the execution case of 1905 was finally dismissed on the 16th November 1905. The second execution case of 1917 was started on the 19th November 1917 and so the execution of 1917 was clearly barred by limitation. But as the decree-holder applied to the High Court for transmission of the decree to the

Court at Howrah in October 1917, which act of the decree-holder the learned Judge considers to be a step-in-aid of execution he holds that the execution in 1917 was not barred by limitation. He has not considered whether the present execution was affected by limitation. Both sides have been unable to support the reasoning of the learned Subordinate Judge. The appellants do not challenge the execution in 1917 because it appears from the documents filed in the case that the previous execution was finally disposed of on the 20th January 1906. But their main contention is that the execution taken in 1917 did not operate as a revivor within the meaning of Art. 183, Limitation Act and that the execution taken in 1921 (the present execution) was beyond 12 years from the date of the last effective execution and, therefore, barred. That Article provides a period of 12 years within which execution should be taken of a decree or order of any Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction; and the time is to be reckoned from the date when a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right. There is no dispute that the right to execute the decree accrued immediately it was passed, namely, in July 1904. The first execution was disposed of finally in January 1906 and the present execution was started in 1921. It is plain that the present execution is barred by limitation unless the respondent succeeds in proving that some act done by him in the meantime by operation of law constituted revivor within the meaning of that Article. The respondents' case is that the proceeding taken in connexion with the execution in 1917 did operate as revivor. It is, therefore, necessary to examine closely the whole proceedings. On the 19th November 1917 the decree-holder filed an application for execution in the Court of the Subordinate Judge at Hooghly in which he prayed that the present appellants might be substituted in place of Hira Lal, the original judgment-debtor who had died before that date and also for further execution. On that application notices were issued upon the present appellants under O. XXI, r. 22, cls. (*a*) and (*b*), C. P. C., as the application for execution was made more than one year after the date of the decree and also because it was prayed that the appellants might be substituted in place of the deceased judgment-debtor. The notices were served on the appellants on the 19th December 1917. There is no evidence that any further step was taken in the matter till the 21st December 1917 on which date an order was passed which is entered in the certificate of execution as "dismissed for want of prosecution on the 21st December 1917." The actual order that was passed has been placed before us by the respondent. It is in the following words: 21st December 1917. Notice has been duly served and proved by an affidavit. No further steps taken to-day. Execution "case is dismissed for want of further prosecution." We have, therefore, two circumstances to take into consideration in determining whether the execution proceedings of 1917 amounted to a revivor. The first is the application to this Court made in October 1917 for transmission of the decree to the Hooghly Court; and the second is with reference to the notice on the appellants under O. XXI, r. 22, C. P. C. The learned Vakil for the appellants has argued that none of these circumstances would amount to revivor within the meaning of Art. 183 of the Limitation Act; and he has relied on the Full Bench decision of this Court in the case of *Chutterput Singh* v. *Sait Soomari Mal* (1). We think that this contention ought to prevail. The learned Counsel appearing for the respondent has not questioned the proposition of law that an application for transmission of decree does not operate as revivor within the meaning of Art. 183 though it may be a step-in-aid of execution under Art. 182; but he has maintained that service of notice under O. XXI, r. 22, C. P. C., operates as revivor of the decree under Art. 183. He has further contended that the order passed by the Court on the 21st December 1917 dismissing the execution case for want of prosecution virtually implies that the decree was capable of execution and, therefore, it was an order by the Court determining that the decree is enforcible. This latter argument may be summarily dismissed. The definition or explanation of 'revivor' is to be found in certain observations made in the case of *Kamini Debi* v. *Aghore Nath Mookerjee* (2) and adopted by the

(1) 36 Ind. Cas. 602; 43 C. 903; 20 C. W. N. 889; 23 C. L. J. 645.

(2) 4 Ind. Cas. 402; 11 C. L. J 91; 14 C. W N. 357.

learned Chief Justice in his judgment in the Full Bench case. The dictum is to the following effect: "The essence of the matter is that to constitute a revivor of the decree there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it." It must, therefore, be taken as settled that in order to operate as revivor there must be a determination either in express terms or by implication that the decree is still capable of execution. We are unable to go the length of holding with the learned Counsel that an order dismissing a proceeding can imply that the decree is capable of execution. In the present case the appellants did not appear after the service of the notice under O. XXI, r. 22. But supposing that they had appeared and objected to the execution on the ground that the decree was barred by limitation, it would not be consonant with common sense holding that the objection of the judgment-debtor that the execution was barred by limitation was impliedly overruled and the decree was held capable of execution. To give such an interpretation to these words is to hold that an order dismissing a case or a proceeding may in some cases be tantamount to decreeing it.

The next question relates to the effect of service of notice under O. XXI, r. 22. This point was, no doubt, not directly under consideration in the Full Bench case of *Chatterput Singh* v. *Saita Soomari Mal* (1), but it was observed in the course of the judgments delivered by the learned Judges, and we think rightly held, that it would not constitute revivor. In that case an application for transmission of the decree was made before the Registrar of this Court under a certain rule framed in the Original Side of the Court. By virtue of that rule the Registrar issued notices on the judgment-debtors under O. XXI, r. 22. It was held in that case that the Registrar had no jurisdiction to issue the notices under that order. It was also held that even if the notices were rightly issued by him, the mere service of notice under O. XXI, r. 22 was not sufficient to revive the decree. We have, however, a direct authority on this point in the case of *Monohar Das* v. *Futteh Chand* (3). That case is sought to be distinguished on the ground that no notice was served in that case. That circumstance, in our opinion, makes no difference. As has been pointed out by Mr. Justice Mookerjee in the Full Bench case the provisions of O. XXI, r. 22 clearly indicate that the mere issue or service of notice under that rule cannot be sufficient to declare a decree capable of execution so as to constitute revivor under Art. 183, Limitation Act. The object of that notice is to invite the person on whom it is served to show cause on a date to be fixed why the decree should not be executed against him. The absence of any objection on his part or his non-appearance would not amount to a determination that the decree is enforcible. A futher act has to be done by the Court and it must be at the request of the decree-holder and that is mentioned in r. 23 of that Order. It runs as follows: "Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed." This further order is necessary for the purpose of determining that the decree may be executed or is capable of execution. Admittedly no such order was passed in this case. We are accordingly of opinion that the mere issue and service of notice under O. XXI, r. 22 do not amount to a revivor of the decree.

The other ground on which revivor was claimed in the Court below was the transmission of the decree. The learned Counsel for the appellant, it will be observed, has not pressed this point, but there is sufficient authority for the proposition that it does not. It is said to be an administrative act which does not judicially determine the enforcibility of the decree. This was a point which was directly in issue in the Full Bench case of *Chutterput Singh* v. *Sait Soomari Mal* (1), where it has been held following the case of *Suja Hussein* v. *Monohur Das* (4) that an application for transmission of a decree is not an act that revives a decree within the meaning of Art. 183, Limitation Act. In this view of the law we hold that the view taken by the Court below that execution is not barred by limitation is wrong.

The result is that this appeal is allowed, the order of the lower Court allowing

(3) 30 C. 979; 7 C. W. N. 793.

(4) 22 C. 921; 11 Ind. Dec. (N. S.) 610.

execution to proceed against all the properties except properties Nos. 1 to 11 of the Schedule should be set aside and the execution case dismissed with costs in both Courts. The cross-objection has not been pressed and it is accordingly dismissed. We assess the hearing-fee in this Court at five gold *mohurs*.

Z. K. *Appeal allowed; Cross-objection dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 751 OF 1923.

December 1, 1924.

Present:—Mr. Justice Mukerji.

PEERJI MOHIB ALI SHAH—PLAINTIFF—APPELLANT

versus

RAM CHANDER—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 88—Occupancy tenant, whether entitled to plant trees—Trees planted on occupancy holding, whether can be alienated—Appeal, second—Inference of law from admitted facts, whether can be questioned.

Trees are mere improvements, but an occupancy tenant cannot plant trees on his holding without the consent of the *zemindar*. Even when he plants trees with the permission of the *zemindar* he is not entitled to sell them. [p. 65, col. 2.]

Where a grove is planted on an existing occupancy holding the character of the holding is not thereby affected and the tenant is not entitled to mortgage or sell the trees. [*ibid.*]

Where an inference of law drawn by a lower Appellate Court from admitted facts is erroneous, it is liable to scrutiny by the High Court in second appeal. [p. 65, col. 1.]

Second appeal against a decree of the District Judge, Bulandshahr, dated the 31st of January 1923.

Messrs. *P. N. Sapru* and *K. N. Laghate*, for the Appellant.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—The question involved in this second appeal is what is the character of the grove in suit and whether the same is saleable in execution of a mortgage decree obtained by the respondent No. 1 against one Toria's widow, the defendant No. 2.

The plaintiff's case was that he was the *zemindar* and *lambardar* of the village, that Toria was an occupancy tenant of 8 and odd *bighas* of land within his *zemindari*, that the grove in question was a part of Toria's said occupancy holding, that Toria made a simple mortgage of the grove in favour of the respondent who obtained a decree for sale, that Toria died and his widow re-married, that the widow was ejected from the entire holding except the grove and that the grove was excepted from the ejectment suit because the plaintiff was in possession of the same. The plaintiff asked for a declaration that in execution of the decree obtained by the respondent the grove was not liable to be sold.

The Court of first instance decreed the suit, but the learned District Judge on appeal has reversed the decree and dismissed the plaintiff's suit.

In this Court it is urged that the lower Court was wrong in law in coming to the conclusion that the grove was not saleable.

The learned District Judge has not found whether the grove was planted on a portion of an existing occupancy holding or whether the grove was planted on a piece of land expressly leased to Toria or his ancestor for the purpose of planting a grove. He said that there was no evidence on the point. The appellant's contention is that the learned Judge has overlooked the admission of the parties and the actual evidence that is there on the record. I have accordingly looked into these matters and have come to the conclusion that the grove was planted on a plot of what was already an occupancy holding of Toria or his ancestor. Briefly the reasons are these.

In paragraph 1 of the plaint the plaintiff stated that Toria was an occupancy tenant of 8 *bighas* and 17 *biswas* of land. This statement was admitted in paragraph 1 of the written statement. In paragraph 2 of the plaint the plaintiff expressly stated that during the subsistence of the occupancy tenancy Toria planted mango trees on the plot in question. The respondent stated as to this paragraph of the plaint that it was not admitted "as set forth." He added that on the other hand the grove was planted by the ancestors of Toria. Although the respondent stated that the statement in paragraph 2 of the plaint was not admitted as set forth he made no statement in the 'additional statements' contained in the written statement to show that the land was taken by Toria's ancestor for the express purpose of planting a grove. Indeed, this was not a part of the respondent's case

at all. The respondent was examined in the Court below and he stated that the grove in question stood in the occupancy holding of Toria. In addition to these pleadings and statement of the respondent there is the evidence of the *patwari* and other documentary evidence to show that the grove has all along been treated as a portion of the occupancy holding.

Then the fact is that the grove was planted on a portion of an occupancy holding.

The learned District Judge thought that, although he did not find that the land had been obtained for the express purpose of planting a grove, he had sufficient material before him to find that the grove had been planted in such circumstances as to entitle the tenant Toria to mortgage the trees. On behalf of the respondent it has been contended that this is a finding of fact. But I cannot agree with this contention. If the learned District Judge had not stated the admitted facts from which he drew his inference, the matter might have been different. If from admitted facts, his logical inference, which is an inference of law and not of mere fact, be wrong it cannot be claimed from his finding the immunity from scrutiny by this Court. The learned Judge drew the inference that the trees had been planted with the permission of the *zemindar* from the fact that the *wajib-ul-arz* of the year 1268 contains certain provisions. I shall consider the provisions later on, but I am not at all disposed to differ from him in this that the grove must have been planted with the *zemindar's* express or implied permission. The very fact that the grove was allowed to stand and the *zemindar* did not contest the right of the tenant to plant the trees would go to show that he was agreeable to the planting of the trees. Then the learned Judge infers from the entries in the *wajib-ul-arz* that there was a grant of a permission to the planter of trees to transfer the grove. The *wajib-ul-arz* relating to the trees planted by tenants is to the following effect. It states what particular groves planted by tenants stood at its date in the village. Against the list of these trees occurs the remark that the rents paid for those groves were entered in the *jamabandi* and the planters had a right either to cut or to sell the trees. Then comes a statement that in future tenants would be entitled to plant trees only with the permission of the *zemindars*. Now, it is nobody's case that the grove in question finds a mention in the *wajib-ul-arz* of 1268*F*. The statement, therefore, contained in the *wajib-ul-arz* that particular tenants had a right to sell or cut their trees do not apply to any of the trees in suit. The provision that tenants would be entitled in future to plant trees with the *zemindar's* permission does not, by any stretch of reasoning, amount to a grant by the *zemindars* a right to occupancy tenants to sell trees standing on the occupancy holding. Under the present law (Tenancy Act, 1901) trees are mere improvements. But an occupancy tenant cannot plant trees without the consent of the *zemindar*. Under the old law also trees could be planted on occupancy holdings by the tenants with the permission of the *zemindars*. But I am not aware of any rule of law by which the tenant could sell the trees which he planted with the permission of the *zemindars* on his occupancy holding. The provisions of the *wajib-ul-arz*, therefore, do not justify an inference that the implied permission of the *zemindar* to plant trees gave, by itself, to Toria a right to mortgage them. The next matter on which the learned Judge has relied is the fact that in the ejectment suit brought against Toria's widow the grove was not included. But the plaint did mention the grove and the statement was made that the grove was in the occupation of the *zemindar* himself. It was not the case that the grove was omitted from the suit for ejectment simply because it had ceased to be a part of the occupancy holding. It is clear, therefore that the learned Judge had no material whatsoever from which to draw the inference that the character of occupancy holding had changed by mutual agreement between Toria and the landholder and what was once part of an occupancy holding had become a separate tenure, *viz.*, a grove-holder's tenure.

The finding being that the grove was planted on an occupancy holding, the character of the holding would continue. This was held by a Single Judge of this Court and his decision was upheld by two other learned Judges of this Court [see the case of *Daya Kishen* v. *Muhammad Wazir Ahmad* (1).] The learned District Judge has relied on the case of *Jalesar Sahu* v. *Raj Mangal* (2). In that case Walsh, J.,

(1) 20 Ind. Cas. 565; 13 A. L. J. 838.
(2) 63 Ind. Cas 137; 19 A. L. J. 616; 43 A. 606.

summarised the existing law and on the facts found came to the conclusion that the original occupancy holding had been converted into something else, *viz.*, a grove-holder's tenure. The learned District Judge thought that the materials before him were sufficient to justify him to come to a conclusion that the character of the original holding had been changed. But he came to that conclusion on facts from which the inference he wanted to draw could not be drawn.

If the grove stands on an occupancy holding and is a part of it, it follows that Toria had no right to make a simple mortgage of it. The mortgage was indeed made before the passing of the Tenancy Act of 1901. But the mortgage is a simple one. If the mortgage had been with possession the mortgagee would have been entitled to continue in possession till the mortgage was redeemed. But those considerations do not arise here. The result is that the plaintiff-appellant must have his declaration that Toria had no right to make the mortgage and the grove is not saleable in execution of the decree which the respondent obtained against the defendant No. 2.

I allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance. The appellant will have his costs throughout and the costs will include Counsel's fees in this Court on the higher scale.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 32 AND 33 OF 1924.

September 16, 1924.

Present :—Mr. Wazir Hasan, A. J. C. and Mr. Neave, A. J. C.

PARTAB SINGH—DEFENDANT—APPELLANT

versus

SHAMSHER BAHADUR SINGH—PLAINTIFF AND CHAUHARJA SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Mortgage by co-parcener—Minor co-parcener, whether bound by mortgage—Previous mortgage by father, paid off by subsequent mortgagee, effect of.

Plaintiff was a minor co-parcener in a joint Hindu family. His mother, acting in the capacity of his guardian, joined with his uncle in executing a mortgage of family property. The mortgagee redeemed a previous mortgage on the property which had been effected by the father of the minor. In a suit by the minor it was held that the mortgage executed by his mother and uncle was not binding on the minor, and it was not shown that the money borrowed under the mortgage effected by the minor's father, which had been paid off by the subsequent mortgagee, was borrowed for any legal necessity or to satisfy any antecedent debt :

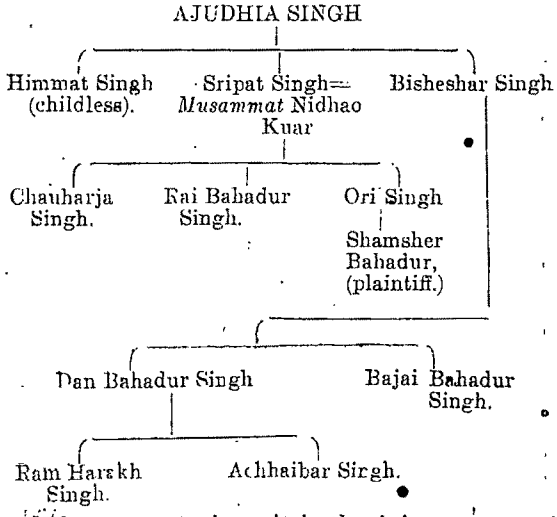
Held, that the minor was not liable for the amount of the mortgage-money due under the mortgage effected by his father which had been paid off by the subsequent mortgagee. [p. 67, cols. 1 & 2.]

Appeals against a decree of the Subordinate Judge, Fyzabad, dated the 8th October 1923, preferred against that of the Munsif, Sultanpur, dated the 3rd April 1923.

Mr. *M. Wasim*, for the Appellant.

Mr. *A. P. Sen*, for Respondent No. 1.

JUDGMENT.—These are the appeals by the defendant No. 1, Partab Singh, in a suit for possession by the plaintiff-respondent, Shamsher Bahadur Singh, of certain shares in three villages Kachhaura, Nekha and Resulpur, *Pargana* Baraunsa, in the District of Fyzabad. The following pedigree will elucidate the facts of the case:—



The property in suit is the joint ancestral property. The plaintiff and the defendant No. 2, Chauharja Singh, owned one-half undivided share in the same and the present suit is to recover that share.

On the 14th June 1916 Chauharja Singh and the plaintiff's mother acting in the capacity of his guardian mortgaged the property in suit under a deed of that date and the mortgage was made irredeemable for a

term of 50 years. The consideration for the transfer was stated to be a sum of Rs. 2,000. The plaintiff seeks to avoid this mortgage. The Courts below have rightly treated as an alienation made by the manager of the family, Chauharja Singh and have tested its validity from that point of view. The lower Appellate Court has come to the conclusion that the mortgage fails altogether and in consequence of this finding has granted a decree for possession to the plaintiff-respondent.

When these appeals first came before one of us for decision they were referred to a Bench of two Judges as involving points of general importance. Since then, however, their importance has vanished on account of the authorized report of the decision of their Lordships of the Privy Council in the case of *Brij Narain Rai* v. *Mangla Prasad Rai* (1) having been received.

The appeals were argued with admirable fairness by Mr. Muhammad Wasim on one side and Mr. A. P. Sen on the other with the result that only one small point remains in controversy which we are called upon to determine.

The invalidity of the mortgage of the 14th June 1916 is accepted and it is also accepted that the plaintiff is entitled to a decree for a half share as he has claimed. The sole ground urged in support of the appeal is that the plaintiff should be put on terms by being directed to pay a sum of Rs. 541 to the defendant-appellant. The learned Counsel for the plaintiff-respondent accepts the contention in respect of Rs. 416 but disputes his client's liability for the additional sum of Rs. 125. This is the only point for decision in the appeal.

It appears that on the 24th July 1913 Ori Singh, the father of the plaintiff, executed a deed of mortgage in respect of two plots of land in favour of one Munni Singh in consideration of a loan of Rs. 100. The mortgage was usufructuary and the mortgagee was consequently put in possession. The property was admittedly the joint family property. It is proved that the defendant-appellant redeemed this mortgage on payment of Rs. 125. This amount of money he now claims. We are of opinion that he is not entitled to get it. It is not shown that Ori Singh borrowed this money for any legal necessity or to satisfy any antecedent debt, nor is any such necessity recited in the mortgage of the 14th June 1916. There is also no independent evidence of any representation as to such necessity made by Ori Singh and accepted in good faith by the creditor.

The result is that we allow these appeals, set aside the decree of both the Courts below and grant a decree to the plaintiff in terms of his plaint provided he deposits in Court within six months from this date the sum of Rs. 416 to the credit of the defendant-appellant, Partab Singh. In the event of default the suit shall stand dismissed. In either case having regard to the circumstances of the case we direct that the parties shall bear their own costs throughout.

Z. K. *Appeals allowed.*

(1) 77 Ind. Cas. 689; 51 I. A. 129; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 P. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500; 11 O. L. J. 107 (P. C.).

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION No. 614 OF 1923.

July 23, 1923.

Present:—Mr. Justice Mulla.

STEEL BROS. & Co. LTD.—PLAINTIFFS

versus

DAYAL KHATAV & Co.—DEFENDANTS.

C. I. F. contract, incidents of—Obligations of buyer and seller—Documents of title, delivery of—Insurance—Bill of lading and delivery order, difference between—Repudiation, what is—Refusal to take delivery on wrong ground—Valid ground, whether can be subsequently urged—Evidence Act (1 of 1872), s. 92—Written contract—Evidence to vary incidents of contract, admissibility of—Conduct of parties.

Under an ordinary contract on C. I. F. terms the seller has, firstly, to ship at the port of shipment goods of the description contained in the contract; secondly, to produce a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly, to arrange for an insurance upon the terms current in the trade which will be available to the buyer; fourthly, to make out an invoice and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. [p. 68, col. 2; p. 69, col. 1.]

Ireland v. *Livingston*, (1872) 5 H. L. 395; 41 Q. B. 201; 27 L. T. 79, and *Biddell Brothers* v. *E, Clemens Horst Co.*, (1911) 1 K. B. 214 at p. 220; per Hamilton, J. and on Appeal (1911) 1 K. B. 934 at p. 952 per Kennedy, L. J., approved in (1912) A. C. 18; 81 L. J. K. B. 42; 17 Com. Cas. 55; 105 L. T. 563; 12 Asp. M. C 80; 56 S. J. 50; 28 T. L. R. 42, relied on.

The bill of lading represents the goods in law and in fact and its possession places the goods at the disposal of the purchaser. [p. 69, col. 1.]

Sanders v. *Maclean*, (1883) 11 Q. B. D. 327 at p. 341; 52 L. J. Q. B. 481; 49 L. T. 462; 31 W. R. 698; 5 Asp. M. C. 160, relied on.

While a transfer of a bill of lading operates as a delivery of the goods a transfer of the delivery order or a dock warrant operates only as a token of authority to take possession and not as a transfer of possession. [*ibid.*]

M'Ewan v. *Smith*, (1849) 2 H. L. C. 309; 13 Jur. 265; 6 Bell. 340; 9 E. R. 1109; 18 R. R. 166, relied on.

But it is open to the parties to a C. I. F. contract to substitute by agreement a delivery order for a bill of lading. Such a variation, however, does not affect the essentials of a C. I. F. contract so as to relieve the seller from the obligation of tendering a policy of insurance to the buyer. [p. 69, col. 2.]

In re Denbigh Cowan & Co., and Alcherley & Co., (1921) 90 L. J. K. B. 836; 125 L. T 388, relied on.

The goods comprised in a C. I. F. contract must be covered by an effective policy of insurance; an open cover taken out by the seller protecting all goods shipped by him is not sufficient and the policy must be tendered even if the goods arrive safely. [*ibid.*]

Manbra Saccharine Co. v. *Corn Products Co.*, (1919) 1 K. B. 198; 88 L. J. K. B. 402; 120 L. T. 113; 24 Com. Cas 89; 35 T. L. R. 94, and *Orient Co.* v. *Brekke*, (1913) 1 K. B. 531; 82 L. J. K. B. 427; 108 L. T. 507; 18 Com. Cas. 101, relied on.

A C. I. F. contract is not a mere sale of documents. It is still a contract for the sale of goods, though it is to be performed by transfer of proper documents. [*ibid.*]

Karbery & Co. v. *Blythe Green, Jourdain & Co.*, (1916) 1 K. B. 495; 85 L. J. K. B. 665; 114 L. T. 152; 21 Com. Cas. 174; 13 Asp. M. C. 235; 60 S. J. 156; 32 T. L. R. 186 and *Johnson* v. *Taylor Brothers & Co.*, (1920) A. C. 144; 89 L. J. K. B. 227; 122 L. T. 130; 25 Com. Cas. 69; 64 S. J. 82; 36 T. L. R. 62, relied on.

The documents must be tendered as soon as possible after the seller has destined the cargo to the buyer. If there is a mail, the seller must transmit the documents by mail. The contract is performed in fact, and the date of its performance is the date, when the documents would come forward, the seller making every reasonable effort to forward them. In case of non-delivery, the contract is broken at the time when the documents ought to have been tendered, and not when the goods arrive, and damages must be estimated accordingly. [*ibid.*]

Sharpe & Co. v. *Nosawa & Co.*, (1917) 2 K. B. 814; 87 L. J. K. B. 33; 22 Com. Cas. 286, relied on.

The buyer is bound to pay on tender of the shipping documents, and he is not entitled to refuse payment until he is given an opportunity for inspecting the goods. [*ibid.*]

Bindell Brothers v. *E. Clemens Horst Co.*, (1911) 1 K. B. 214 at p. 220; per Hamilton, J., and on Appeal (1911) 1 K. B. 934 at p. 952 per Kennedy, L. J., approved in (1912) A. C. 18; 81 L. J. K. B. 42; 17 Com. Cas. 55; 105 L. T. 563; 12 Asp. M. C. 80; 56 S. J. 50; 28 T. L. R. 42, relied on.

Where in a contract for the sale of goods, the buyer clearly shows his intention not to be bound by and to repudiate the contract, it amounts to a breach of the contract. In such a case the seller may treat the notice of intention as inoperative, in which case he keeps the contract alive for the benefit of the seller as well as his own; or, he may treat the repudiation as a wrongful putting an end of the contract, and may at once bring his action as on a breach of it. In the latter case, the repudiation operates as a waiver of conditions precedent to be performed by the seller; the buyer cannot, after repudiation, set up as a defence to the action for damages that the goods were not in conformity with the contract. Nor can he, in the case of a C. I. F. contract, raise the defence that the seller had not the proper documents to tender. But the repudiation which absolves the seller from the performance of conditions precedent must have been made before the due date for the performance of the contract. This date, in the case of a C. I. F. contract, is the date on which the documents ought to have been tendered. A repudiation made after that date does not operate as a waiver of the performance of conditions precedent on the part of the seller. [p. 70, col. 1.]

Frast v. *Knight*, (1872) 7 Ex. 111 at pp. 112, 113; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471, and *Braithwaite* v. *Foreign Hardwood Co.*, (1905) 2 K. B. 543; 74 L. J. K. B. 688; 92 L. T. 637; 10 Com. Cas. 189; 10 Asp. M. C. 52; 21 T. L. R. 413, relied on.

A buyer who rejects goods on a wrong ground is not thereby precluded from relying on a valid ground which in fact exists. Thus a buyer under a C. I. F. contract who refuses to take delivery on the ground that the goods are of an inferior quality is not precluded from proving at the trial of the action that the proper documents were not tendered to him by the seller. [*ibid.*]

Taylor v. *Okes, Roncoroni & Co.*, (1922) 38 T. L. R. 349; reversing on 38 T. L. R. 517; 127 L. T. 267; 27 Com. Cas. 261; 66 S. J. 556, relied on.

To constitute a repudiation, one of the parties to the contract must make quite plain his intention not to perform the contract. [*ibid.*]

Consorzio Veneziano Di Armanento E. Navigazone v. *Northumberland Shipbuilding Co.*, (1919) 88 L. J. K. B. 1194; 121 L. T. 628, relied on.

Incidents which are impliedly contained in a written contract, whether by construction of the terms or by implication of law, cannot be varied by extrinsic evidence. [p. 70, col. 2.]

Evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract, where such meaning is doubtful; but not where the meaning is plain: nor is it admissible to enlarge or vary the terms of the contract. [*ibid.*]

Evidence of the course of previous dealings between the parties to show that though the contract between the parties was on C. I. F. terms the buyer was not entitled either to a bill of lading or to a policy of insurance, and was bound to pay against the delivery telegram, is inadmissible under s. 92 of the Evidence Act, as its effect would be to vary the incidents of a C. I. F. contract. [*ibid.*]

Mr. *Kanga*, Advocate-General (with him Mr. *Daphtary*), for the Plaintiffs.

Mr. *Coltman*, (with him Mr. *Engineer*), for the Defendants.

JUDGMENT.—[After dealing with the facts and contentions of the parties his Lordship proceeded:—]

Under an ordinary contract on C. I. F. terms the seller has, "firstly, to ship at the port of shipment goods of the description

contained in the contract; secondly to produce a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly, to arrange for an insurance upon the terms current in the trade which will be available...to the buyer; fourthly, to make out an invoice as described by Blackburn, J. in *Ireland* v. *Livingston* (1) or in some similar form and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage." *Biddell Brothers* v. *E. Clemens Horst Co.* (2).

The bill of lading represents the goods in law and in fact and its possession places the goods at the disposal of the purchaser, Bowen, L. J. in *Sanders* v. *Maclean* (3) said:—

"A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. . . . . it is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

The common law drew a distinction between bills of lading and other documents of title, for while a transfer of a bill of lading was always held to operate as a delivery of the goods, a transfer of the delivery order or a dock warrant operates only as a token of authority to take possession and not as a transfer of possession: *M'Ewan* v. *Smith* (4); Blackburn on Sale, p. 302. This distinction still remains, except in cases under the Factors Act in England, and in cases under ss. 108 and 178 of the Contract Act in India. But though this is the case, it is open to the parties to a C. I. F. contract to substitute by agreement a delivery order for a bill of lading. Such a variation, it has been held does not affect the essentials of a C. I. F. contract so as to relieve the seller from the obligation of tendering a policy of insurance to the buyer: *In re Denbigh Cowan & Co. and Atcherley & Co.* (5).

The goods comprised in a C. I. F. contract must also be covered by an effective policy of insurance; an open cover taken out by the seller protecting all goods shipped by him is not sufficient: *Manbre Saccharine Co.* v. *Corn Products Co.* (6). The policy must be tendered even if the goods arrive safely: *Orient Co.* v. *Brekke* (7).

A C. I. F. contract is not a mere sale of documents. It is still a contract for the sale of goods, though it is to be performed by transfer of proper documents: *Karberg & Co.* v. *Blythe Green, Jourdain & Co.* (8) and *Johnson* v. *Taylor Brothers & Co.* (9). The documents must be tendered as soon as possible after the seller has destined the cargo to the buyer. If there is a mail, the seller must transmit the documents by mail. The contract is performed in fact, and the date of its performance is the date when the documents would come forward, the seller making every reasonable effort to forward them. In case of non-delivery, the contract is broken at the time when the documents ought to have been tendered, and not when the goods arrive, and damages must be estimated accordingly: *Sharpe & Co.* v. *Nosawa & Co.* (10). The buyer is bound to pay on tender of the shipping documents, and he is not entitled to refuse payment until he is given an opportunity for inspecting the goods: *Biddell Brothers* v. *E. Clemens Horst Co.* (2).

A good deal was said on both sides as to the rule of "anticipatory breach" in its relation to C. I. F. contracts. It is now elementary law that where in a contract for the sale of goods, the buyer clearly shows his intention not to be bound by and to repudiate the contract, it amounts to a breach of the contract: Indian Con-

(1) (1872) 5 H. L. 395; 41 Q. B. 201; 27 L. T. 79.
(2) (1911) 1 K. B. 214 at p. 220; per Hamilton, J., and on appeal (1911) 1 K. B. 934 at p. 952 per Kennedy, L. J., approved in (1912) A. C. 18; 81 L. J. K. B. 42; 17 Com. Cas. 55; 105 L. T. 563; 12 Asp. M. C. 80; 56 S. J. 50; 28 T. L. R. 42.
(3) (1883) 11 Q. B. D. 327 at p. 341; 52 L. J. Q. B. 481; 49 L. T. 462; 31 W. R. 693; 5 Asp. M. C. 160.
(4) (1849) 2 H. L. C. 309; 13 Jur. 265; 6 Bell, 340; 9 E. R. 1109; 18 R. R. 166.
(5) (1921) 90 L. J. K. B. 836; 125 L. T. 388.
(6) (1919) 1 K. B. 198; 88 L. J. K. B. 402; 120 L. T. 113; 24 Com. Cas. 89; 35 T. L. R. 94.
(7) (1913) 1 K. B. 531; 82 L. J. K. B. 427; 108; L. T. 507; 18 Com. Cas. 101.
(8) (1916) 1 K. B. 495; 85 L. J. K. B. 665; 114 L. T. 152; 21 Com. Cas. 174; 13 Asp. M. C. 235; 60 S. J. 156; 32 T. L. R. 186.
(9) (1920) A. C. 144; 89 L. J. K. B. 227; 122 L. T. 130; 25 Com. Cas. 69; 64 S. J. 82; 36 T. L. R. 62.
(10) (1917) 2 K. B. 814; 87 L. J. K. B. 33; 22 Com. Cas. 286.

tract Act, s. 120. In such a case the seller may treat the notice of intention as inoperative, in which case he keeps the contract alive for the benefit of the seller as well as his own; or, he may treat the repudiation as a wrongful putting an end of the contract, and may at once bring his action as on a breach of it: Indian Contract Act, s. 39; *Frost* v. *Knight* (11). In the latter case, the repudiation operates as a waiver of conditions precedent to be performed by the seller; the buyer cannot, after repudiation, set up as a defence to the action for damages that the goods were not in conformity with the contract: *Braithwaite* v. *Foreign Hardwood Co.* (12), nor can he, in the case of a C. I. F. contract, raise the defence that the seller had not the proper documents to tender. But the repudiation which absolves the seller from the performance of conditions precedent must have been made before the due date for the performance of the contract. This date, in the case of a C. I. F. contract, is the date on which the documents ought to have been tendered. A repudiation made after that date does not operate as a waiver of the performance of conditions precedent on the part of the seller.

I now proceed to examine the contentions of the parties by the light of the principle set forth above.

It was admitted by the plaintiffs that there was neither a bill of lading nor a policy of insurance in the present case. To get over the difficulty caused by the absence of these documents, Counsel for the plaintiffs sought to prove that by the usage of the trade in Bombay, delivery telegrams passed from hand to hand by endorsement and delivery as did bills of lading and also that telegrams intimating that a specified shipment was insured was treated as a policy of insurance. But as no such usage was pleaded and no issue was raised upon it, I did not allow evidence to be led of the alleged usage.

The plaintiffs also offered to prove that though the contract was a C.I. F. contract the defendants had on previous occasions paid the price against delivery telegrams only. This was objected to by Counsel for the defendants and I held that it was inadmissible. No doubt evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract where such meaning is doubtful but not where the meaning is plain nor is it admissible to enlarge or vary the terms of the contract. To admit it in the latter case would be to contravene the provisions of s. 92 of the Indian Evidence Act, 1872: *Haji Mahomed Haji Jiva* v. *Spinnar and Co.* (13), *Ford* v. *Yates* (14) and *Bourne* v. *Gatliff* (15). In *Ford* v. *Yates* (14) there was a written contract for the sale of hops. The contract did not specify any time for payment of delivery. Such a contract imports by construction of law a sale for ready money. Evidence was tendered to show on behalf of the buyers that by the usual course of dealings between the parties, the price was not payable until after six months from the date of sale, but it was held that the evidence was inadmissible. This case is an authority for the proposition that incidents which are impliedly contained in a written contract, whether by construction of the terms or by implication of law, cannot be varied by extrinsic evidence: Leake on Contract, 6th Edition, p. 122. In the present case the plaintiffs sought to rely on the previous course of dealings to show that though the contract was on C. I. F. terms, the defendants were not entitled either to a bill of lading or to a policy of insurance and that they were bound to pay against the delivery telegram. This would be to vary the incidents of a C. I. F. contract, and the evidence would, therefore, be inadmissible under s. 92. But though the plaintiffs were not allowed to lead this evidence their Counsel brought out in the cross-examination of the defendant what the course of dealings between the parties was. The defendant said that on previous occasions he paid the price against delivery telegrams but he added that he did not pay until after he had examined the goods. Even, if, therefore, the evidence was admissible it would not help the plaintiffs. I, therefore, hold that the defendants were not bound to pay against the delivery telegram.

But it was contended for the plaintiffs

(11) (1872) 7 Ex. 111 at pp. 112, 113; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471.

(12) (1905) 2 K. B. 543; 74 L. J. K. B. 688; 92 L. T. 637; 10 Com. Cas. 189; 10 Asp. M. C. 52; 21 T. L. R. 413.

(13) 24 B. 510; 2 Bom. L. R. 691; 12 Ind. Dec. (N. S.) 871.

(14) (1841) 2 Man. & G. 549; 2 Scott. (N. R.) 645; 10 L. J. C. P. 117; 58 R. R. 471; 133 E. R. 866.

(15) (1844) 11 C. & F. 45; 8 Scott. (N. R.) 604; 7 Man. & G. 850; 44 R. R. 723; 8 E. R. 1019.

that the defendants did not at any time object to pay on that ground, that the only ground on which they refused to pay was that the goods were of inferior quality and that they could not be allowed at the hearing of the suit to raise that objection. I do not think there is any substance in this contention. A buyer who rejects goods on a wrong ground is not thereby precluded from relying on a valid ground which in fact exists. Thus a buyer who refuses to accept further deliveries on the ground that his sub-purchaser would not take them owing to previous commitments is not precluded from proving at the trial of the action that the goods were not of the contract description: *Taylor* v. *Oke & Rancoroni and Co.* (16).

It was also urged on behalf of the plaintiffs that the defendants repudiated the contract by their letter of December 13, or, in any event, by their letter of December 19, and that the plaintiffs were, therefore, absolved from proving that they were ready and willing to perform their part of the contract. I do not think that either of these two letters amounts to a repudiation of the contract. Atkin, L. J., in *Consorzio Veneziano Di Armanento E. Navigazione* v. *Northumberland Shipbuilding Co.* (17) said:—

"A repudiation has been defined in different terms, by Lord Selborne as an absolute refusal to perform a contract, by Lord Esher as a total refusal to perform, by Bowen, L. J., as a declaration of an intention not to carry out the contract when the time arrives, by Lord Haldane as an intention to treat the obligation as altogether at an end. All these definitions come to the same thing, and make it clear that to constitute a repudiation one of the parties to the contract must make quite plain his intention not to perform the contract."

To the same effect are the provisions of s. 39 of the Indian Contract Act. That section provides that "when a party to a contract has refused to perform, or disabled himself from performing his promise *in its entirety*, the promisee may put an end to the contract, unless he has signified, by words or conduct his acquiescence in its continuance." The defendants did not by their letter of December 13, refuse to perfrom the contract in its entirety. They only asked for a survey to *enable them to take immediate delivery*. Nor did the letter of December 19, amount to a total repudiation of the contract. But even if it did, the repudiation was after the breach of the contract on the part of the plaintiffs. The plaintiffs ought to have tendered a bill of lading and a policy of insurance long before December 19, and failure to do so amounted to a breach of the contract on their part. Moreover, if there was a repudiation, the plaintiffs did not accept it as a breach of the contract until December 20 when they threatened to sell the goods. I, therefore, hold that the plaintiffs were not absolved from tendering the proper documents. It does not make any difference that payment was to be made before delivery. In either case they must show that they were ready and willing to perform their part of the contract. This it was impossible for them to do as they had neither a bill of lading nor a policy of insurance.

There is yet another ground on which the defendants rely. They say that though the plaintiffs received the survey report on December 7 or 8, it was not shown to them until after the institution of this suit, and that they were not bound to pay unless it was shown to them. I think there is considerable force in this contention. The contract being on C. I. F. terms, the buyers were bound to pay against the documents even before the arrival of the goods, and the report was a sort of guarantee that the goods shipped were contract goods. The report was to be considered as final until the arrival of the goods. After their arrival it was open to the buyers to make their objection as to the quality of the goods provided the objection was raised within twenty-four hours after they were landed. The plaintiffs alleged that they showed the report to the defendants on December 15 or 16, and they called their manager Chunilal to prove it. Chunilal said in his evidence that on December 15 or 16 some one on behalf of the defendants came to inquire about the goods, when he showed him the survey certificate. He was asked in cross-examination why it was that this interview was not referred to anywhere in the correspondence, to which his only answer was, "Because I took it that the defendants would make the payment." The defendant denied in his evidence that he sent any man

(16) (1922) 38 T. L. R. 349; reversing on 33 T. L. R. 517; 127 L. T. 267; 27 Com. Cas. 261; 66 S. J. 556.
(17) (1919) 88 L. J. K. B. 1194 at p. 1200; 121 L. T. 628.

to the plaintiffs' office on December 15 or 16. I do not believe Chunilal, and I accept the defendants' evidence. I hold that the survey report was not shown to the defendants before the suit was filed. Chunilal admitted that the defendants were entitled to see it before they made the payment. As it was not shown to the defendants, they were not bound to pay for the goods.

I dismiss the plaintiffs' suit with costs.

Z. K. *Suit dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 435 OF 1923.

July 25, 1924.

Present:—Mr. Kinkhede, A. J. C.

DURGAPRASAD AND ANOTHER—APPELLANTS

versus

THAKURPRASAD AND ANOTHER—RESPONDENTS.

Execution of decree—Power of Executing Court to question decree—Interpretation of Statutes—New Act, whether can affect validity of decree passed before commencement—C. P. Tenancy Act (XI of 1898), s. 45, cls. (1) and (5), Exp.—Sir *land—Lease—Transfer by* malguzar, *without sanction of Deputy Commissioner—Position of lessee—"Lessee," meaning of.*

An objection to the validity of a decree cannot be entertained by an Executing Court. [p. 72, col. 2.]

An Act cannot affect the validity of a decree passed before it came into operation, nor can an Act be made applicable to the case of such a decree, simply because an application for its execution is made after the commencement of the Act. [p. 73, col. 1.]

The rights of an ordinary tenant in *sir* land held by him remain unaffected by the accrual of the occupancy tenant right in the *sir* land under s. 45 (1) of the C. P. Tenancy Act. [*ibid.*]

The occupancy rights in *sir* land of the original proprietor are compatible with the existence of ordinary tenants on the same land. [*ibid.*]

In other words *sir* rights and occupancy rights may often exist side by side. [*ibid.*]

The Tenancy Act contemplates leases to ordinary tenants of *sir* lands apart from transfers of the kind provided for in s. 45 (1), which applies only to leases or other transfers of proprietary rights in *sir* fields and does not apply to agricultural leases which do not affect the proprietary rights and, therefore, do not require Deputy Commissioner's sanction. [p. 73, col. 2.]

A "lease," within the meaning of the Explanation to s. 45 of the C. P. Tenancy Act, is a transfer of only the proprietary rights in the *sir* lands and does not as such require the sanction of the Deputy Commissioner. [*ibid.*]

Appeal against a decree, of the District Judge, Hoshangabad dated the 6th July 1923, in Civil Appeal No. 26 of 1923.

Mr. *N. G. Bose*, R. B., for the Appellants.

Mr. *S. B. Gokhale*, for the Respondents.

JUDGMENT.—The only question which I am called upon to decide in this appeal is whether the decree dated 30th September 1919, passed on the basis of the lease dated 7th January 1913, in Civil Suit No. 14 of 1916 has become incapable of execution because the judgment-debtors have become ex-proprietary occupancy tenants of the *sir* fields and the decree-holders, the landlords thereof, by virtue of the final decree for foreclosure dated 20th November 1918, passed in favour of these very decree-holders in another suit based on a mortgage of 1909. That was Suit No. 24 of 1915 decided on 7th January 1916 and the final decree for foreclosure was passed in it on 20th November 1918, and possession of the proprietary rights was lost by the judgment-debtors on 27th July 1919, in execution of the decree. It is admitted that the mortgage was without the sanction of the Deputy Commissioner and consequently on a foreclosure taking place on its basis the judgment-debtors lost their rights to occupy *sir* lands as proprietors, and at the date of such loss, became occupancy tenants of the *sir* lands under s. 45 (1) of the Tenancy Act, 1898.

The suit which the decree-holders instituted for recovery of possession of the *sir* lands (for 20 years) on the basis of the said lease dated 7th January 1913, was filed on 14th September 1916, and was still pending at the date of the foreclosure on 20th November 1918 and even when possession of the proprietary rights was lost by the judgment-debtors under the aforesaid foreclosure decree. The decree enforcing the sub-lease being passed on 30th September 1919, *i. e.*, subsequently to the final foreclosure decree dated 20th November 1918 cannot be said to have *become incapable of execution by reason of the foreclosure*, because the loss caused by foreclosure and the accrual of occupancy tenant right was not subsequent but prior in point of time to the date of the decree sought to be executed. No question of the decree being rendered incapable of execution by the accrual can, therefore, be said to arise strictly speaking in this case. The objection urged really speaking amounts to an objection to the validity or the passing of the decree itself because it challenges the very foundation of the decree. Surely such an objection, as held by me in *Bihari-*

singh v. *Newalsingh* (1), cannot be enquired into by the Executing Court. Both these decrees were, however, passed before the new Tenancy Act came into operation on 1st May 1920. The new Act could not, therefore, be applicable to this case, simply because the application for the execution of the decree dated 30th September 1919 was made after the commencement of that Act. The new Act could not effect the validity of the decree passed before the date of its coming into operation. So the case has to be decided with reference to the provisions of the old Tenancy Act of 1898.

Sub-section 5 of s. 45 of the Tenancy Act of 1898, which must govern this case, declares that the rights of an ordinary tenant in the *sir* lands held by him remain unaffected by the accrual of the occupancy tenant-right under sub-s. 1 of the said section. In *Dhondba* v. *Vishwanath* (2), Ismay, J. C., observed that *sir* rights and occupancy rights may often exist side by side. In *Gopikisan* v. *Kulpat* (3) Batten, A. J. C., while meeting the objection that there cannot be an occupancy tenant and an ordinary tenant of the same lands observed at page 172* as follows:—

"This no doubt is the ordinary rule. But sub-s. 5 of s. 45 shows that the occupancy rights in *sir* land of the original proprietor, which s. 45 is designed to protect, are compatible with the existence of ordinary tenants on the same land."

He ultimately held in that case that "By reason of sub-s. 5 of s. 45 of the C. P. Tenancy Act, the relations between the proprietor and the ordinary tenant of *sir* land are not altered when the proprietor becomes the occupancy tenant of the *sir* land under sub-s. (1) of the section; the ordinary tenant, does not become a sub-tenant and is liable to ejectment, by the ex-proprietary occupancy tenant, on the ground specified in sub-s. (*c*) of s. 69 of the Act."

It is argued on behalf of the appellants that the lease is a transfer of the proprietor's right to occupy *sir* land as a proprietor and, therefore, required the sanction of the Deputy Commissioner for its validity. The contention, therefore, is that the lessees could not claim to deprive the lessors of their right to cultivate the *sir* land as an ex-proprietor. If the Explanation given at foot of s. 45 of the Act of 1898 be looked at, this argument appears at first sight to be plausible, because it says "For the purposes of this section a transfer includes a mortgage and a lease." In view, however, of the express reservation of the rights of an ordinary tenant of *sir* land made in s. 45 (5), and of the interpretation put upon the word 'lease' as used in the Explanation by Batten, A. J. C., in *Bhagirathi Bai* v. *Anyaji Kunbi* (4), it is clear that the Tenancy Act contemplates leases to ordinary tenants of *sir* lands apart from transfers of the kind provided for in s. 45 (1) which applies only to leases or other transfers of proprietary rights in *sir* fields and does not apply to agricultural leases which do not affect the proprietary rights. If this contention of the judgment-debtors appellants were upheld, it would go not only against the clear import of the lease deed but also against the spirit of the section and the interpretation put upon it. It would further restrict the scope and operation of the decree passed in the present case, and to entertain it would at this stage, be beyond the jurisdiction of the Executing Court which has to execute the decree as it is. The judgment-debtor's contention, therefore, that the lease is a transfer of only the proprietary rights in the *sir* lands and the decree, therefore, clothes the decree-holders with only that right and not also with the right to cultivate *sir* lands, is untenable. The decree dated 30th September 1919, directs delivery of possession of the *sir* fields Nos. 80 and 102 to the respondents from the beginning of the agricultural year next following, and entitles them to hold such possession for a period of 20 years as lessees. This necessarily gives them cultivating possession of the land in fulfilment of their leasehold rights and they must, therefore, be put in such cultivating possession of the lands covered by the decree.

The appellants' further contention that as soon as the decree dated 30th September 1919 was passed they became the ex-proprietary occupancy tenants of the land on the date of that decree by virtue of that decree as if the proprietary right in the *sir* was lost only that day and not before, and that they cannot, therefore, be ousted from possession by execution of that decree, needs

(1) 78 Ind. Cas. 136; 20 N. L. R. 24; (1924) A. I. R. (N.) 81.
(2) 15 C. P. L. R. 143 at p. 145.
(3) 31 Ind. Cas. 170; 11 N. L. R. 170.
*Page of 11 N. L. R.—[*Ed.*]
(4) 3 N. L. R. 159.

no separate treatment in the view I have taken above.

The argument based on the wording of s. 49 of the new Tenancy Act of 1920, and the lapsing of the tenant-right provided for in sub-s. 1 of that section and the effect of the saving clause inserted in sub-s. 3 of that section as regards certain documents referred to therein raised a very difficult question of law. The point is not quite so clear and settled as it is thought to be by the respondents' Counsel. Although had the matter come to me on the regular side, it may have been open to me to discuss it independently, unfettered by the interpretation upon the new section by this [illegible] other decided cases: *Hindusingh* v. *Mangal* (5) and *Champalal* v. *Kunjilal* (6) I no not think I need or can decide that question in connection with an appeal arising out of the execution of a decree passed before the new Act came into force, for the simple reason that the Executing Court cannot go behind the decree. The question how for a document of lease creating a tenant-right for a longer term than 5 years, registered after 21st October 1898, and before 1st May 1920, is saved from the operation of s. 49 of the new Act, need not, therefore, be decided for the purposes of this appeal.

The decree as it stands must, therefore, be executed by the Executing Court. All that I need say in order to leave no room for ambiguity hereafter is that the new Tenancy Act recognises in s. 3 only three classes of tenants. There is no such class as "ordinary tenant." Consequently who-[illegible] an ordinary tenant under the old Act became entitled to be classed as an occupancy tenant and the present decree-holders who had become under the terms of the lease ordinary tenants of the *sir* lands became entitled to be classed as occupancy tenants for the term of their lease, under the rights declared by the decree. But s. 37 of the new Act intervenes and brings "a person who holds *sir* land as a tenant" in the category of "a sub-tenant" so that the judgment-debtors who had become the ex-proprietary occupancy tenants by the decree-holders instead of being called ordinary tenants of the *sir* land became liable under the new classification to be called "*sub-tenants*" entitled to hold on the terms agreed upon between them and their judgment-debtors and declared by the decree. The judgment-debtors became their landlords so far as the *sir* lands were concerned by the operation of the law.

Here the decree gives the decree-holders the right to hold possession for 20 years as *lessees*, which, as I interpret the word, means "*sub-tenants*," with effect from 1st May 1920, and further directs them to pay the rent of the land for that period; so the decree-holders will be cultivating the land as sub-tenants of the judgment-debtors and paying the rent of the land in that capacity to themselves as the proprietors of the holding which must continue to stand in the name of the judgment-debtors as the occupancy tenants thereof. The occupation of the land as also the payment of rent thereof by them to themselves shall be deemed to be the occupation and payment by or on account of the judgment-debtors, so that the latter could not be sued for recovery of rent, by them, in their capacity as proprietors and landlords of the village or *patti* in which the holding is situate and no decree for ejecting them from the land could be obtained by them. As the law has carved out in favour of the judgment-debtors the status of an ex-proprietary occupancy tenant and as the result of the working out of the rights created by the mortgage and the lease has been to vest the proprietary rights absolutely, and also the cultivating rights in the *sir* land for a term of 20 years from 1st May 1920, in the same persons, namely, the present decree-holders, I thought it necessary to make this position clear, in order that advantage may not be taken hereafter of getting the lands recorded as the proprietor's own *sir* or home-farm lands freed of the ex-proprietary occupancy tenure exsisting in the name and for the benefit of the judgment-debtors. This will necessarily mean that the ex-proprietary occupancy tenant-right, which entitles the judgment-debtors to enjoy the present actual cultivating possession of the *sir* lands, being subject to the rights created by the them under a prior valid sub-lease granted by themselves to the decree-holders, shall remain in abeyance during the whole term of 20 years ending with the end of the agricultural year 1939-40 on 30th April 1940, and that the same would be enforcible at their instance as against the decree-holders on the expiry of the aforesaid period of the

(5) 72 Ind. Cas. 438; 19 N. L. R. 110; (1923) A. I. R. (N.) 227; 6 N. L. J. 227.
(6) 83 Ind. Cas. 752; (1925) A. I. R. (N.) 249.

sub-tenancy. The deed of lease declares that the lease shall determine on 1st June 1932 but that date must be considered to be superseded by the express directions contained in the decree that the 20 years' period shall be counted from 1st May 1920. The decree whether right or wrong must be executed as it is. With these remarks, I dismiss the appeal with costs. Costs in the Courts below will be paid as already ordered.

S. D. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION No. 365 OF 1921.

March 22, 1923.

Present:—Mr. Justice Fawcett.

MARY LENNON—PLAINTIFF

versus.

PERCY FISHER—DEFENDANT.

Negligence—Invitee, duty towards—Injury by dog—Damages.

A man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it. [p. 78, col. 1.]

Plaintiff went to the defendant's house on lawful business, and not finding any servant or any other means of announcing her visit, to the defendant proceeded towards the dining room door with the intention of entering that room and waiting there till the defendant came to her. Before she could enter the room she was bitten by a ferocious dog that had been chained behind the door. She sued the defendant for damages:

Held, that the plaintiff was in the position of an invitee and defendant was guilty of negligence in keeping a fierce dog in the room at a time when it was possible that a person coming to him on lawful business might go to the room, and that, therefore, the plaintiff was entitled to recover damages for the injury done to her. [p. 78, cols. 1 & 2.]

Mr. *Campbell*, for the Plaintiff.

Mr. *Binning*, for the Defendant.

JUDGMENT.—[His Lordship after dealing with the facts of the case proceeded:—] Now coming to the main question of negligence. First of all, I may refer to the general statement of the law by Tindal, C. J. in *Sarch* v. *Blackburn* (1):—

"If a man puts a dog in a garden, walled all around, and a wrong-doer goes into that garden, and is bitten, he cannot complain in a Court of Justice of that which was brought upon him by his own act..... Undoubtedly, a man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it." And the law is similarly stated in Halsbury's Laws of England, Vol. I, Art. 818, page 375. The case just cited also deals with the point of a notice being put up where a dog was kept, and it was held that it was not enough since the person bitten might not be able to read. That of course is not in point here, except that the same thing applies in regard to the defendant's shouting. The mere fact of his shouting would not be enough, if it was not actually heard by the person to whom the shout was addressed. The plaintiff undoubtedly was going to the defendant's on a lawful business and at a reasonable hour, and there is clear authority for saying that she was in the position of an "invitee" as the law phrases it. On this point it is enough to refer to Halsbury's Laws of England, Vol. XXI, Art. 655, at page 388, and to the case of *Pritchard* v. *Peto* (2). That was the case of a person going to collect a debt at another's house, and it was there held that he was an invitee. Coming to the law applicable in a case like the present, it seems to me that there is no better statement of the principles applicable than the law laid down in the leading case of *Indermaur* v. *Dames* (3). That no doubt primarily deals with what are called "trap cases," but a case like this is really on all fours. Putting a dangerous dog behind the door in a room is just as much a trap to an innocent passer-by as if there were a hole or man trap which might cause him injury. This particular passage in Mr. Justice Willes' judgment is referred to by Lord Atkinson in *Fairman* v. *Perpetual Investment Building Society* (4) as one which has for the last fifty-six years been accepted as a full and accurate statement of the law. It runs as follows:—

"The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such

(1) (1830) 4 Cor. & P. 297 at p. 300; Moo. & Mul. 505; 34 R. R. 805.

(2) (1917) 2 K. B. 173; 86 L. J. K. B. 1292; 117 L. T. 145; 15 L. G. R. 860.

(3) (1866) 1 C. P. 274.

(4) (1922) 39 T. L. R. 54 at p. 57; 92 L. J. K. B. 50.

that danger may be considered as bargained for, but who go upon business which concerns the occupier, upon his invitation, express or implied. And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall upon his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know, and that where there is evidence of neglect the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer must be determined by a Jury as matter of fact."

Accepting that as the law applicable, really there are three subsidiary questions. First, did the plaintiff herself use reasonable care, or, in other words, was she in any way guilty of contributory negligence? Secondly, did the defendant use care against the unusual danger which he knew or ought to have known of? That involves the third question, whether he knew of the danger, a point which I have already found in the affirmative. So really the main question boils down to this, whether the limits of the invitation to the plaintiff to come to the defendant's premises were exceeded or not. Thus, as stated in Halsbury's Laws of England, Vol. XXI, Art. 657, page 390:—

"The liability of the occupier is only commensurate with the extent of the invitation. Where, therefore, the occupier of premises has placed a notice warning persons of the existence of danger, and a person disregards the notice, or the circumstances show that the limits of the invitation have been otherwise exceeded, the liability is limited in a corresponding degree, and if the invitee wanders about in such a way as to be unable to see if there is danger or not, or if he knows of the danger and undertakes the risk, the occupier of the premises is not liable."

Now, in the present case I have held that the plaintiff did not actually go into the dining-room, but, on the other hand, according to the plaintiff's own case in the plaint and on the facts as I hold them she did turn and move from this door window towards the dining-room with the object of entering that room, and, therefore, to that extent the question does arise, whether the circumstances are such that the limits of the defendant's invitation were exceeded. I think that is the clearest way to put the point of law that arises. Now, I am far from saying that different views might not be taken of that point. But the consideration that I have given to the subject has clearly led me to the view that it cannot be said that those limits were exceeded. Mr. Binning for the defendant contended that the plaintiff had no business to go anywhere beyond the part of the varandah opposite the steps and the centre door of the defendant's sitting room. That, I think, is a position which is not justified by the circumstances in this particular case. Admittedly there was no servant on duty to whom the plaintiff could apply in order to obtain an interview with the defendant. The defendant's own evidence is that all the servants were given leave to go away temporarily from about six in the evening, and it is also admitted that when Mrs. Fisher called for a servant after she had taken the plaintiff into her bed-room, there was some delay in the servant arriving. Then again, as Mr. Campbell pointed out, there was no bell or knocker provided, by which a visitor could obtain attention without moving from a position opposite the steps. It is the case of both sides that there was a screen in front of this general sitting room which was used as a sort of club by people coming there to play cards and billiards, and it is certainly reasonable that the plaintiff should hesitate to go into that particular room; nor do either the defendant or his wife say that she should have done so. What Mrs. Fisher says is that the plaintiff should have called out or knocked at the door, or otherwise done something to get a servant or draw attention to her having come. But she did what I think was quite natural; she went to one of the side door windows and looked in, and even according to the defendant's case, she managed by that means to attract attention. The verandah was not screened off in any way it was quite open; so that it is not a case where it could be said that there was a clear indication to a visitor that he or she should not go behind the screen put there. And it seems to me that the invitation given to the plaintiff as an invitee would certainly extend to her going to the door window where she did go. Then going a step further, was she justified in going towards the dining-room door

with the intention of entering it and there waiting until the defendant came? Here again two views are possible, but I think that the circumstances are such that the plaintiff might reasonably consider herself entitled to go and wait in the dining room. No chairs, so far as the evidence shows, were provided in the verandah ; she might have had to wait for a very considerable time so far as she knew, and there was no other room available for her to wait in. It was at an hour when the dining room would not be wanted for meals or for other purposes, so that her presence might be regarded as an undesirable intrusion. The plaintiff is a lady of a similar social standing, so far as I am aware, to that of the defendant and had herself been previously taken into this room ; having regard to the ordinary social amenities which govern Europeans of the class to which the parties belong, there was good reason for her thinking that the defendant would have no objection to her waiting there. But for the fact of this dog being there, I have not the slightest doubt that the defendant really would have had no objection whatever to her going into the room. There is no suggestion that she went there with any dishonest or malicious purpose, and as a lady who had come there on lawful business, I am prepared to hold that she was justified in desiring to go into that room and wait. But as a matter of fact in this particular case she did not actually enter the room, so that her position is stronger than that relied upon by the defendant. Other reported cases necessarily have different facts from those of the present case, but I think there are clear authorities in support of the view I take. It will suffice to refer to two cases. In *Butts* v. *Goddard* (5) the plaintiff, a needlewoman on lawful business, entered certain premises otherwise than by the usual entrance. When she got through the outer door she came to a landing having offices on both sides. Crossing the hall she reached the folding door with fluted glass on the top so that she could not see through. She pushed this open and immediately came upon a flight of steps leading down to a cellar. She fell and had injuries. She brought an action to recover damages, and Manisty, J. in summing up (according to the report in this case) says :—

"The Jury would have to deal with the fact whether she was reasonably right in that impression (that she was entering in at the proper door). If they thought that the defendants had these premises, and had them so that a person might reasonably suppose he should go in there, then an invitation was held out to go there, and the defendants were bound to have that access reasonably safe."

The Jury found for the plaintiff. That is a case where it certainly might have been contended that the plaintiff had no business in entering by the door she did. I think also that the case of *Stiles* v. *Cardiff Steam Navigation Co.* (6) although it is not quite on all fours with the present case, is one that supports the view that the mere fact of the plaintiff going beyond the actual entrance to the defendant's house is not enough to bar her claim.

Again, take a case like that of *Walker* v. *The Midland Railway Company* (7) where an inn-keeper was held not to be under a duty to his guests to keep those places safe where visitors are not entitled to go, and where they cannot be reasonably expected to go by mistake : thus where there was a well-lighted and properly indicated lavatory accommodation it was held that a guest, who went about looking for the lavatory in the dark through a service-room, and was injured, could not recover damages. That case is of course a very different one to this, but it may be noted that the view that the plaintiff could not recover in that case was dissented from by two of the Law Lords as against the majority of three. The Earl of Selborne in his judgment held that the general duty of an innkeeper must be limited to those places into which guests may reasonably be supposed to be likely to go in the belief, reasonably entertained, that they are entitled or invited to do so ; and I mainly refer to that case because it shows that this question of reasonable belief can legitimately be taken into consideration in a case of this kind. I hold that, apart from any express invitation, there was in the circumstances of this case an implied invitation or permission by the defendant to the plaintiff to enter this particular dining-room. That being so, there can, I think, be no doubt that he did not exercise reasonable care to prevent damage from the unusual

(5) (1887) 4 T. L. R. 103.

(6) (1864) 33 L. J. Q. B. 310; 10 Jur. (N. S.) 1199; 10 L. T. 844; 12 W. R. 1080; 144 R. R. 740.

(7) (1885) 2 T. L. R. 450.

danger afforded by the presence of the dog. There was no guarding of the room by a servant, no notice about the dog being there, and bad lighting. I think the dog, to use the words of the defendant in one of his letters, "pounched upon" her, without her being able to see it before it actually attacked her. It is true that the defendant shouted out, but that shout was not heard by the plaintiff and in any case was too late.

Then as regards the question whether there was contributory negligence by the plaintiff, that has in fact not been urged by defendant's Counsel and there is no evidence to show she did not exercise reasonable care in proceeding along the verandah. No doubt, it was not fully lit, but (so far as the evidence goes) there was sufficient light for the plaintiff to be justified in walking towards the dining room as she did, being unaware that this dog was there on guard. The defendant was no doubt entitled to keep his dog there on guard to protect his property, as he says he did, but he was certainly negligent in allowing this to be done at the time when it was quite within ordinary possibilities that a visitor like the plaintiff coming to him on business might go to that room. He could not reasonably assume that the only persons who would go there would be thieves, or servants or others whom the dog knew and would not attack.

On the issues raised I answer as follows:—(1) Whether the plaintiff was bitten in defendant's verandah or in his dining-room? Answer. In the verandah, but near the dining room door. (2) Whether the plaintiff had been authorised by the defendant to enter the dining-room on this occasion? Answer. There was no express authorisation, but the circumstances were such as to give an implied invitation to the plaintiff to enter. (3) Whether the dog was ferocious? Answer. The dog was ferocious to this extent that it was apt to bite human beings when chained and on guard as he did in this case, and the defendant was aware of the danger arising therefrom. (4) Whether there was any negligence on the part of the defendant? Answer. Yes.

The only remaining issue is the fifth, whether the plaintiff is entitled to any and if so what damages? On this point Mr. Binning for the defendant did not contest the plaintiff's claim in regard to charges for her going to Kasauli for anti-rabis treatment and for the *Ayah* that she engaged to attend to her at about that time. There is also the authority of the case of *Prakash Kumar Mukerji* v. *Harveys* (8) for holding such charges in a case like the present to be reasonable. The expenses in question are sufficiently proved to amount to Rs. 538-14-0 as stated in Ex. C to the plaint. To this should be added the expenses incurred in connection with the *Ayah*, whom plaintiff says she engaged for six or seven days and to whom, she paid Rs. 2 per day. Then also, I think may be added minor expenses not specifically mentioned, so that the total may be taken to be Rs. 600. The plaintiff says that she had to incur medical expenses afterwards in consulting no less than six doctors, whose charges amount to Rs. 370. But I am not satisfied that those charges can be properly allowed as damages naturally arising from dog bite, for there is no evidence given by any of the doctors in question to justify the Court in holding that proved. The only thing that does help the plaintiff on this point is the certificate of Dr. Nunan given on February 8, 1923, Ex. I, and his testimony that the present condition of her left thigh is due to the dog bite. But, on the other hand, the plaintiff is able to go about her ordinary business and has in fact got a Government appointment, and I cannot say that there is sufficient evidence to show that these expenses were due mainly to the dog bite. I think any such compensation would more properly come under the general discretion which the Court has to award the plaintiff damages, under the general head of pain and suffering. In such a case it is obviously impossible to assess the plaintiff's loss at a precise money value, and the only limit which is imposed is that the amount shall not be unreasonable. There is no doubt that the plaintiff has suffered considerably, but on the other hand the Court must be careful not to award an excessive amount, having regard to the defendant's means. I allow another Rs. 600 under this head which I think will suffice to compensate the plaintiff. The result is, I pass a decree in plaintiff's favour to recover Rs. 1,200 as damages from the defendant with costs of the suit and interest on judgment at six per cent.

Z. K. *Suit decreed.*

(8) 3 Ind. Cas. 785; 36 C. 1021; 13 C. W. N. 1123.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1491 OF 1922.

November 18, 1924.

Present:—Mr. Justice Ramesam.

THE BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY LTD., —DEFENDANT No. 2—APPELLANT

versus

FIRM NATTAJI PRATAPCHAND—PLAINTIFF—RESPONDENT.

Railway Company—Risk Note Form "B"—Suit for damages for loss of goods—Burden of proof—Duty of Company—"Wilful neglect," meaning of—"Robbery," whether theft—Loss occasioned by failure of guard to stop train—Liability of Company.

In a suit to recover damages for the loss of goods consigned to a Railway Company for carriage under Risk Note Form "B" the onus lies on the plaintiff to prove that the loss was due to theft or to the wilful neglect of the Company's servants. The Company must give *prima facie* or formal evidence that so far as they know, the Company or its servants through whose hands the goods have passed are not keeping back the goods. For this purpose they must tender their servants for cross-examination, and it is for the plaintiff, if he can, to prove by such cross-examination wilful neglect of, or theft by, the railway servants. It is not necessary for the plaintiff to show that there is no other possible explanation for the loss. It is enough if the facts proved strongly preponderate in favour of the theory which fixes the Company with liability. [p. 80, col .2; p. 81, col. 2.]

Negligence is really the absence of such care as it was the duty of the defendant to use. [p. 81, col. 1.]

The word "wilful" ordinarily implies nothing blameable, but merely that the person of whose action the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. [p. 81, col. 2.]

The word "robbery" in Risk Note Form "B" is equivalent to theft. [p. 80, col. 2.]

Where the loss is found to have been due to the failure of the guard to stop the train, after he had noticed that the doors of the wagon containing the goods were open, the Company must be held to have been guilty of "wilful neglect". [p. 81, col. 1.]

Case-law referred to.

Second appeal against the decree of the Court of the Subordinate Judge, Bezwada, in Appeal Suit No. 148 of 1921, preferred against the decree of the Court of the District Munsif, Bezwada, in Original Suit No. 166 of 1920.

Messrs. *Morseby* and *Taylor*, for the Appellant.

Mr. *L. A. Govindaragava Iyar*, for the Respondent.

JUDGMENT.—Ten bales of yarn were consigned on behalf of the plaintiff at Sidhapur Railway Station on the B. B. & C. I. Railway to Bezwada. Only nine bales were delivered at Bezwada. The suit is for the price of the missing bale. The plaintiff got a decree against the B. B. & C. I. Railway, Co., and the Company files the second appeal.

The facts so far as they appear from D. W. No. 2 (which was accepted by the Courts below) may be stated. The wagon (No. 7365) containing the ten bales passed through Dadar Junction (the junction connecting the B. B. & C. I. Railway and the G. I. P. Railway) when it was checked and the goods found correct. From there the train passed *ex* Waribunder to Kalyan. There was shunting at Matunga on the way. The seals of the wagons were intact then. The train next stopped at Kurla for shunting. It also stopped at Galeopoor, Thana and Mumbra. When the train got in motion at the Mumbra Station, the Guard (D. W. No. 2) noticed the doors of two wagons (No. 7365 and another) open. But the train was not stopped. It next reached Kalyan where he reported the matter. D. W. No. 5 took up the matter and reported to the Assistant Station Master (D. W. No. 1) and the shunting Master (D. W. No. 4). They got the wagon re-sealed and the wagon was shunted to the tranship shed. D. W. No. 3 checked the contents of the wagon and found one bale missing. As I understand the evidence of D. W. No. 2, there was nothing wrong with the wagon until the train left Mumbra Station.

The Risk Note Ex. I is in the Form B. Under it the Company is not liable except "for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said railway or other railway lines working connection therewith or by any other transport agency or agencies employed by them respectively, for the carriage of the whole or any part of the said consignment provided the term "wilful neglect" be not held to include fire, robbery from a running train or any other unforeseen event or accident." The question of burden of proof was very much discussed before me. On this point I agree with the observations of Macleod, C. J., and Crump J. in *G. I. P. Railway* v. *Himatlal Jagjivandas* (1). "In this country a Railway Company should produce before the Court for examination those of their

(1) 73 Ind. Cas. 606; 25 Bom. L. R. 350; (1923) A. I R. (B.) 389.

servants who were in a position to be acquainted with the facts relating to the disappearance of their customer's goods' (at page 354*). "The onus lies upon the plaintiffs to prove that loss was due to theft by or to the wilful neglect of the Company's servants" (at page 352*). See also *Narayana Iyer* v. *South Indian Railway Co., Ltd.* (2) and *East Indian Railway Company* v. *Nathmal Behari Lal* (3). There is often a difficulty in proving wilful neglect because the only evidence of wilful neglect is the evidence which can be extracted in cross-examination from the witnesses for the defence." [*B. B. & C. I. Railway* v. *Dayaram Bechardas* (4)]. This conclusion seems to be in accordance with common sense and sound principles of law. It is also in accordance with the conclusion in *Ghelabhai Punsi* v. *East Indian Railway Co.* (5), *East Indian Railway Co.* v. *Firm, Kishen Lal Tirkhamal* (6) and *East Indian Railway Co.* v. *Jagpat Singh* (7). I observe that the conclusion of Daniels, J., in *East Indian Railway Co.*, v. *Firm, Kishen Lal Tirkhamal* (6) was arrived at after relying on *Secretary of State for India* v. *Firm Jiwan and Abdullah* (8) where Lindsay, J., held that the Company is not liable if the case is one of deterioration of the goods and the plaintiff can recover for 'loss' only if they are lost by the Railway Administration and not following *Hill, Sawyers and Company* v. *Secretary of State* (9) and distinguishing *Smith Ltd.* v. *Great Western Railway* (10) similar reasoning about 'loss' was used by Page, J., in *East Indian Railway Co.* v. *Jagpat Singh* (7). In the Bombay case [*G. I. P. Railway* v. *Himatlal Jagjivandag* (1)] the case of *Smith Ltd.* v. *Great Western Railway* (10) was applied to Risk Notes in Form-B. On the question as to whether plaintiff can recover only for goods lost by the Company or recover for deterioration of goods I agree with the decision of this Court in *Madras and Southern Maharatta Railway Co.* v. *Mattai Subba Rao* (11). But, I do not quite see how the question as to what kind of loss plaintiff can recover for, has any bearing on the question what the Company must prove and what the plaintiff must prove. The case in *Ghelabhai Punsi* v. *East Indian Railway Co.* (5) rests on *Curran* v. *Midland Great Western Railway Co. of Ireland* (12) the weight of which is somewhat shaken by *Smith Ltd.* v. *Great Western Railway* (10). Possibly they are distinguishable. It seems to me that the Company to whom the goods are delivered must give *prima facie* or formal evidence that, so far as they know, the Company or their servants through whose hands the goods passed are not keeping back the goods, which is at least a possibility. [See *East Indian Railway Co.* v. *Firm Sukhdeo Das Gobardhan Das* (13)]. For this purpose, they tender their servants for cross-examination and it is for the plaintiff, if he can, to prove by the cross-examination wilful neglect or theft by the railway servants.

In the present case I am glad to say that the conduct of the Company is perfectly straightforward and they complied with the requisites of *G. I. P. Railway* v. *Himatlal Jagjivandas* (1) by examining D. Ws. Nos. 1 to 5. The plaintiffs have been able to elicit by the cross-examination of D. W. No. 2 that there was neglect of the guard in not stopping the train. As the door was found open as soon as the train started, the bale would have been probably found on the line and there is little scope for 'theft in the running train." I assume robbery in the Form B is equivalent to theft, [*Great Indian Peninsular Railway Co.* v. *Firm Bhola Nath Debi Das* (14)]. The facts in *B. B. & C. I. Railway* v. *Daya ram Bechardas* (4) are different. There it was found that a thief could enter either while the train was standing there (Narbada bridge Cabin) or while the train was approaching the Narbada bridge and that it was pitch-dark night and the train would be going very slowly before reaching the station. Here the loss was in the morning

(2) 75 Ind. Cas. 260; 18 L. W. 322; (1923) M. W. N. 731; (1924) A. I. R. (M.) 388.
(3) 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321.
(4) 64 Ind. Cas. 4; 23 Bom. L. R. 583 at p. 585; 46 B. 11; (1922) A. I. R. (B.) 189.
(5) 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525.
(6) 73 Ind. Cas. 986; 45 A. 530; 21 A. L. J. 438; 9 O. & A. L. R. (A.) 531; (1924) A. I. R. (A.) 7.
(7) 79 Ind. Cas. 126; 51 C. 615; 28 C. W. N. 1001; (1924) A. I. R. (C.) 725.
(8) 71 Ind. Cas. 609; 45 A. 380; 21 A. L. J. 220; (1923) A. I. R. (A.) 426.
(9) 61 Ind. Cas. 926; 2 L. 133; 3 L. L. J. 297.
(10) (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com Cas. 247; 38 T. L. R. 359.
(11) 55 Ind. Cas. 754; 43 M. 617; (1920) M. W. N. 198; 11 L. W. 358; 38 M. L. J. 36; 28 M. L. T. 49.
(12) (1896) 2 Ir. R. 183; 2 Ir. L. R. 739.
(13) 74 Ind. Cas. 431; 4 P. L. T. 443; (1924) A. I. R. (Pat.) 25.
(14) 70 Ind. Cas. 854; 45 A. 56; (1923) A. I. R. (A.) 79.

*Pages of 25 Bom. L. R.—[Ed.]

before 9 A. M. and the probability of a thief stealing a bale of yarn is far less on the facts. The question is one of fact and as I think the inference of the Courts below is right, I accept their finding that the loss was due to the neglect of the guard in not stopping immediately he saw the doors open. Mr. Numbiar argued that this conduct does not amount to wilful neglect. In *Forder* v. *Great Western Railway Co.* (15) there was no neglect. The consignment of sheepskins was placed in truck of wood chips, but there was no notice to the Company of the nature of the consignment. The case of *Buckton & Co.* v. *London and North Western Railway* (16) is also peculiar. It was held that sending a wagon of three ton capacity though asked to send a wagon of five ton capacity on account of a mistake did not amount to wilful neglect. It was believed by the defendants' foreman that the wagon was a wagon of a capacity of five tons. It had been standing between two wagons belonging to other Railway Companies which were five ton wagons and it was believed to be of the same strength and capacity. I do not see how these cases can help the appellant.

The case in *Waklein* v. *L. & S. W. R* (17) is a case of collision and *Pomfret* v. *Lancashire and Yorkshire Ry. Co.* (18) is a case under Workman's Compensation Act. In *Grill* v. *General Iron Screw Collier Co.* (19), Willes, J. at page 612* said: "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. A bailee is only bound to use the ordinary care of a man, and so the absence of it is called gross negligence. Gross, therefore, is a word of description, and not a definition, and it would have been only introducing a source of confusion to use the expression 'gross negligence,' instead of the equivalent, a want of due care and skill." In *In re Young and Harston's Contract* (20) Bowen, L. J., said: "The term 'wilful default' is not a term of art, and to pursue authorities with a view to defining for all time what is its meaning in a contract like this appears to me to press citation far beyond the point at which it ceases to be useful:..... The other word which it is sought to define is 'wilful.' That is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in Courts of Law, implies nothing blameable, but merely that the person of whose action.....the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will." Similar remarks are used about 'wilfully neglecting' by Lord Coleridge, C. J. [*Reg.* v. *Downes* (21)]. I think wilful neglect has been proved in this case. I think on the facts, the Courts below were right in thinking that the loss is probably due to it. It is not necessary to show that there is no other possible explanation for the loss. It is enough if "the facts proved strongly preponderated in favour of the theory" which fixed the Company with liability [*Central India Spinning and Weaving Co.* v. *G. I. P. Railway Co.* (22)].

The second appeal fails and is dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

(15) (1905) 2 K. B. 532; 74 L. J. 871; 53 W. R. 574; 93 L. T. 344; 21 T. L. R. 625.

(16) (1918) 87 L. J. K. B. 234; 117 L. T. 556; 34 T. L. R. 119.

(17) (1887) 12 App. Cas. 41; 56 L. J. Q. B. 229; 55 L. T. 709; 35 W. R. 141; 51 J. P. 404.

(18) (1903) 2 K. B. 718; 72 L. J. K. B. 729; 52 W. R. 65; 89 L. T. 176; 19 T. L. R. 649

(19) (1866) 1 C. P. 600; 35 L. J. C. P. 321; 12 Jur. (N. S.) 727; 14 L. T. 711; 14 W. R. 893.

(20) (1886) 31 Ch. D. 168 at p. 173; 54 L. J. Ch. 1144; 53 L. T. 837; 34 W. R. 84; 50 J. P. 245.

*Page of (1881) 1 C. P.—[*Ed.*]

(21) (1876) 1 Q. B. D. 25 at p. 30; 45 L. J. M. C. 8; 33 L. T. 675; 25 W. R. 278; 13 Cox. C. C. 111.

(22) 67 Ind. Cas. 162; 47 B. 155; 24 Bom. L. R. 272; (1922) A. I. R. (B.) 46.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 36 OF 1923.

September 6, 1924.

Present:—Mr. Baker, J. C.

RAGHO AND OTHERS—DEFENDANTS—APPELLANTS

versus

R. M. DOYE—PLAINTIFF—RESPONDENT.

C. P. Land Revenue Act (II of 1917), s. 80—Settlement entry recording villagers' right—Suit for cancellation of entry, whether maintainable—Order passed by Settlement Officer—Presumption—Burden of proving contrary—Order not produced—Presumption, whether arises.

A suit for the cancellation of the Settlement entry of a *mouza* in respect of the right, recorded therein of the villagers, to water their cattle at the plaintiff's tank, and for an injunction against the villagers to

prevent their doing so is maintainable under s. 80 of the C. P. Land Revenue Act. [p. 82, col. 1.]

Every order passed by a Settlement Officer must be presumed to have been passed after due enquiry, and the burden of proving that it was not so passed lies on the person who alleges it. [p. 82, col. 2.]

Where, however, the order has not been produced, no presumption arises as to whether it does or does not contain any reference to any particular matter as being passed after enquiry. [*ibid.*]

Appeal against the decree of the Additional District Judge, Bhandara, dated the 20th December 1923, in Civil Appeal No. 6 of 1923.

Mr. *D. T. Mangalmurti*, for the Appellants.

Mr. *G. L. Subhedar*, for the Respondent.

JUDGMENT.—The only question in this appeal is one of limitation. The plaintiff-respondent who is the *malguzar* of *Mouza* Basipur, in the Bhandara District, sued the Secretary of State for India and the villagers of Chirchalbandh for cancellation of the Settlement entry of Basipar, in respect of the right, recorded therein, of the Chirchalbandh villagers to water their cattle at the plaintiff's tank, and for an injunction against the said villagers to prevent their doing so. The Secretary of State did not defend the suit. The First Court dismissed the suit on the ground that it was not maintainable under s. 80 of the Land Revenue Act, and was also barred by limitation. On appeal the Additional District Judge, Bhandara, set aside the decree of the First Court and remanded the suit for a decision on the merits, holding that the suit was maintainable under s. 80, and that the suit was not barred by limitation.

The defendants make this second appeal, and the only point taken is one of limitation, namely, that the suit is barred under s. 80 of the Land Revenue Act. Section 80 of the Land Revenue Act provides that any person aggrieved by any order or entry under certain sections, mentioned, may institute a suit in the Civil Court, within one year from the date on which the assessment is offered to the proprietor, to have such order or entry cancelled or amended, and subject to the result of such suit, if any, the order or entry shall be conclusive.

It is contended that the present suit is barred by limitation, admittedly not having been brought within one year from the date of the assessment being offered to the proprietor on 29th November 1919, while the suit was brought on 13th May 1921. The learned Judge of the first Appellate Court has held that the suit is governed by sub-s. (2) of s. 80, which provides that "nothing in sub-s. (1) shall apply to a person whose right was not expressly considered and decided by the Settlement Officer." Unfortunately, neither party has produced the order of the Settlement Officer on which the village *wajib-ul-arz* is presumably based.

It is contended on behalf of the appellants that under s. 78 of the Land Revenue Act the duty cast upon the Settlement Officer is of ascertaining and recording the custom in each village, and it is to be presumed that he performed his duty and that he held an enquiry. It is admitted that both parties, plaintiff and defendants, were present when the Settlement Officer made his enquiry in the village. Both the Courts below have held on the evidence that no enquiry was made with reference to this particular custom, with which we are now concerned, namely, the right of the villagers of Chirchalbandh to water their cattle in the village tank of Basipar belonging to the plaintiff. This is a finding of fact. Of course, there were many other matters, into which the Settlement Officer had to enquire in making a settlement, and in the absence of any order of the Settlement Officer stating that he had made an enquiry on the spot into this particular custom, I do not think I can go behind the findings of the Courts below that this question was not expressly considered and decided by the Settlement Officer. I admit that the presumption being that any orders passed by the Settlement Officer were passed after due enquiry, the burden lies on the plaintiffs to prove that they were not so passed. But although the plaintiff has not produced the order, I cannot make any presumption that it contains or does not contain any reference to this particular matter as being passed after enquiry, because the defendants have not produced it either, although it would have materially strengthened their case. The lower Appellate Court has considered the evidence on the subject. It is correct in saying that the First Court has misread the plaintiff's evidence, for he says distinctly that no enquiry was made on this point.

Apart from this, an additional point has been raised by the learned Counsel for the respondent. Under the ruling in

Musammat Maina v. *Ram Krishna* (1) which was under s. 83 of the old Revenue Act, which corresponds to s. 80 of the present Act, a person suing to set aside an order or decision of the Settlement Officer must produce a certified copy of the decision or entry, sought to be set aside, with the plaint.

It has been pointed out by the learned Counsel for the respondent that the plaintiff applied for a copy of the *wajib-ul-arz* to the Deputy Commissioner on 14th June 1920 and was informed that it was not yet passed. This appears from Ex. P. 5, and no copy of the *wajib-ul-arz* was supplied until 4th January 1921.

It is contended that the law does not compel a man to do what is impossible and that if he is required to produce a copy of a document, which is not in existence, he cannot be made to suffer for that. Reference is made to the case of *Balkrishna* v. *Tima* (2) where it is said "that the law does not compel a man to do that which he cannot possibly perform."

I may point out that under s. 85 of the Land Revenue Act "no settlement shall be final until it has been confirmed by the Chief Commissioner." (Now I suppose by Government). Although s. 80 lays down as the starting point of limitation the date on which the assessment is offered to the proprietor, under s. 84 the proposals of the Settlement Officer shall be submitted to the Financial Commissioner for sanction.

I need not go into the question of whether limitation should run from the date of final sanction, but it will appear in this case that the delay in furnishing the *wajib-ul-arz* was probably due to its not having been passed for want of the Financial Commissionar's sanction or the final sanction of the Chief Commissioner, and it may, therefore, be fairly argued that there was no final order or entry in existence at the date when the plaintiff brought the present suit.

In these circumstances I do not see any reason to differ from the order of the lower Appellate Court, and the appeal is dismissed with costs.

K. S. D. *Appeal dismissed.*

(1) 13 C. P. L. R. 140.
(2) 12 Ind. Cas. 810; 7 N. L. R. 176 at p. 178.

SIND JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATIONS NOS. 48 AND 49 OF 1921.

July 5, 1922.

Present:—Mr. Kennedy, J. C., and Mr. Aston, A. J. C.

MESSRS. MITSUI BUSSAN KAISHA LTD., KARACHI—APPLICANTS

versus

MESSRS. TOTARAM-BHAGWANDAS AND ANOTHER—OPPONENTS.

Arbitration—Arbitration proceedings—Suit filed—Proceedings, whether invalidated—Award, filing of—Procedure—Stay of suit—Arbitration Act (IX of 1899), s. 19.

The fact that an act is done contrary to a contract does not necessarily render the act invalid. [p. 84, col. 1.]

Thus a party may have contracted to submit his dispute to arbitration, but nevertheless may, if so disposed, break his contract, and submit his dispute for decision to the public tribunal, if no statutory bar exists. [p. 84, col. 2.]

But the mere filing of the suit does not invalidate the arbitration proceedings, and the arbitrators are at liberty to proceed. [*ibid.*]

Khillooram Lokuram v. *Louis Dreyfus & Co.*, 52 Ind. Cas. 130; 13 S. L. R. 8, followed.

Doleman & Sons v. *Osset Corporation*, (1912) 3 K. B. 257, 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915, not followed.

Arbitration proceedings pending suit, however, though not invalid, remain in abeyance, and the award cannot be filed, until a stay of the suit is obtained by an application under s. 19 of the Arbitration Act. [*ibid.*]

If the application for stay of the suit is refused, or the party applying waives his right by pleading in the suit, the arbitration proceedings and any award made therein are invalidated, and the Court alone is seized of the dispute. [*ibid.*]

Therefore, where an application for filing an award is made during the pendency of a suit relating to the same subject-matter, the correct procedure for the Court is not to order that the award be taken of the file absolutely as invalid, but to postpone the consideration of the application to file the award, or to direct its return to the applicant with liberty to be presented after the Court has disposed of the application under s. 19 of the Arbitration Act or has ceased to be seized of the suit without adjudication on the merits. [p. 86, col. 2; p. 87, col. 1.]

Application for revision against an order of Raymond, A. J. C.

Mr. *Dipchand Chandumal*, for the Applicants.

Mr. *T. G. Elphinston*, for the Opponents.

JUDGMENT.

Kennedy, J. C.—In this case the facts are that there was a dispute between respondents No. 1 and respondents No. 2 under a contract which contained an arbitration clause. On the 17th of February 1920 respondents No. 1 called upon respondents No. 2 to appoint an arbitrator. And

on the 3rd of March 1920 respondents No. 1 informed respondents No. 2 of appointment of the arbitrators. The reference was executed in favour of the arbitrators on the 19th of March 1920. On the 24th of March 1920 the arbitrators gave notice.

In the meantime on the 26th of November 1919 respondents No. 2 filed a suit in Beawar Court for accounts. The suit was registered on the 11th of May 1920. The summons for final disposal was issued for the 27th of May 1920. On the 21st of July 1920 respondents No. 1 applied under s. 19 of the Indian Arbitration Act to the Beawar Court for the stay of the suit which application has not yet been disposed of.

The arbitrators proceeded with their arbitration and came to an award on 15th June which they proposed to file. Respondents No. 2, however, made an application to this Court asking the award to be taken off the file on the ground that the arbitrators had, in the circumstances above stated, no authority to proceed and the award is, therefore, a nullity.

For the purposes of this application we must take it as established that the Beawar suit covered the same matter as the arbitration.

Some difficulties have arisen in consequence of the proceedings in the Beawar Court at the time of the filing of the plaint. The plaint, as I said, was filed in November 1919 but was considered by the officers of the Beawar Court as being not in proper form. And it was only after considerable delay that these imperfections were removed or explained. Beawar Court appears, with all due deference, to have made use of an obsolete procedure in respect of the plaint. There is no provision in the present Code for the return of the rejection of the plaint in such circumstances and the correct procedure for the Beawar Court was to have had the plaint registered leaving it for the plaintiff (if so advised) to apply for its amendment under the appropriate order what would have been the case, had the plaint after rejection or return never been again presented, need not be dealt with as it has been again presented. I am of the opinion that the suit in the Beawar Court must be held to have begun on the date when the plaint was originally presented, *viz.*, in November 1919.

The question now is what was the effect on the arbitration proceedings of the fact that before the arbitration proceedings had begun, the plaint had been filed, the award having been come to during the pendency of the suit before any stay order was obtained.

These matters have been frequently discussed. It seems to me so far this Court is concerned, the law is as follows:—

The fact that an act is done contrary to a contract does not necessarily render the act invalid. Thus a party may have contracted to submit his dispute to arbitration, if so disposed he may break his contract and submit his dispute for decision to the public tribunal if no statutory bar exists. The public tribunal will thereon try and proceed. It would have been inconvenient that the two tribunals the public tribunal and the private tribunal should deal with the same matter simultaneously. Such proceedings might lead to an unseemly race between the public tribunal and the private tribunal to see who gives the decision first. One of the two must, therefore, stay its proceedings. The public tribunal is compelled to dispose of the suit presented to it, it is not possible for the public tribunal to suspend its functions except in accordance with law. The only way in which it could be induced to stay its proceedings is by application under s. 19. Until then an application has been made under s. 19 and has been granted by the Court, the private tribunal must remain in abeyance.

So far the matters seem to apply not only in Sind but in other countries in which the Arbitration Act has been in force.

The question, however, now before us is at what point the private tribunal's activity is suspended and to what notice the parties and the private tribunal is entitled before ceasing its operation. This is a point which has, I think, been decided in Sind in the case of *Khillooram Lokuram* v. *Louis Dreyfus & Co.* (1), where it was held that the mere fact of the suit being filed does not invalidate the arbitration proceedings, and it is for the Court to decide whether it should try the suit or not. If, however, an order under s. 19 of the Act to stay the suit is refused or if the party applying under that Act has by pleading in the suit waived his right of going into arbitration, the arbitration proceedings are invalidated and the Court alone is seized of

(1) 52 Ind. Cas. 130; 13 S. L. R. 8.

the dispute. Therefore, until the Court has so made up its mind, under s. 19 the arbitrators are not *functi-officio*.

This finding is perhaps contrary to the *ratio decidendi* in *Doleman & Sons* v. *Ossett Corporation* (2). But then the dictum of Fletcher Moulton, L. J. that the filing of the suit invalidates arbitration altogether is *obiter*. In the King's Bench case what happened was that no application had been made to stay.

On strict principles, it is possible the principle of *Doleman & Sons case* (2) should be extended so as to cover cases in which the Court had not yet decided whether it should stay or not. In this province, we are bound by the decision in the case of *Khillooram Lokuram* v. *Louis Dreyfus & Co.* (1). I think on that judgment, I ought to find the arbitrators were, until the Court had decided the application under s. 19 at liberty to proceed. But until that application is disposed of by Court staying the proceedings, the award could not be filed. Of course, if the Court on the application under s. 19 had refused to stay the trial, the award of the arbitrators could not be filed as an award. It seems to me, therefore, until the Beawar Court disposed of matter before it, the award of the arbitrators is not a nullity and is not bad but is in suspense. The correct order for this Court would have been to reject the award and order it to be taken off the file with liberty to be represented after the Beawar Court had disposed of the application under s. 19 or had otherwise ceased to be seized of the case without adjudication on the merits.

Aston, A. J. C.—Under 5 indents entered into in Beawar on various dates between 15th November 1917 and 22nd April 1918 both inclusive the appellants Messrs. Mitsui Bussan Kaisha of Karachi entered into agreements with the respondents Messrs. Totaram Bhagwandas of Beawar relating to consignments of wool to be sold in London. The indents contained the usual submission to arbitration clause providing that any disputes which arose were to be referred to the arbitration of two European merchants residing in Karachi.

Disputes eventually arose regarding a sum of Rs. 8,652-9-7 alleged to be due on re-drafts which the respondents had failed to pay.

(2) (1912) 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.

On the 26th November 1919 the respondents filed a suit in the Court of the Sub-Judge, Beawar praying for an account and for the amount due to respondents on the account and for further and other relief.

The order passed by the learned Sub-Judge was that the plaint was to be checked and a report made on 12th December 1919.

On 2nd December 1919 the reader of the Court reported that the plaint stamp and process-fee stamp were in order, but that the suit was for settlement of accounts but the plaintiff had filed no account from which the amount of the plaint stamp might be ascertained. He further reported that a copy of the plaint and translation fees had not been filed and that the body of the plaint contained some English words written in Urdu characters.

On 12th December the Sub-Judge ordered that the plaint was to be returned and presented within a weak after amendment. After various postponements the plaint was presented as amended on the 13th April 1920 and the orders subsequently passed by the Sub-Judge were that the case was to be registered and summons issued for 27th May. The suit was duly registered as Suit No. 99 of 1920.

I concur in the opinion of the Judicial Commissioner that the Sub-Judge appears to have adopted an obsolete procedure in ordering the return of the plaint. I have some doubt, in view of the erroneous procedure, adopted, whether the learned Sub-Judge was seized of the suit for the purposes of this case prior to 13th April 1920 but the point is immaterial for both dates are prior to the 14th April when the arbitrators had made their award.

On the 17th February 1920 the appellants had sent a final request for payment to the respondents and requested them failing payment to appoint their arbitrator within seven days.

On 3rd March the respondents having failed to appoint an arbitrator the appellants appointed Mr. H. C. Cargill as an arbitrator in their behalf and appointed Mr. W. U. Nicholas as their own arbitrator. On 24th March 1920 the arbitrators gave notice that they would hold the arbitration on the 12th April. On the 14th April the arbitrators made their award. On 21st July 1920 an application was made to the Sub-Judge, Beawar under Sch. II, r. 18 of the C. P. C. or in the alternative under s. 19 of the Indian Arbitra-

tion Act, to stay Suit No. 99 of 1920 but no orders had apparently been passed on this application until 18th April 1924, when the learned Additional Judicial Commissioner set aside the award expressing the opinion that the award made during the pendency of the suit was bad.

From this decision Messrs. Mitsui Bussan Kaisha & Co. have come to this Court in revision.

In support of the order it has been urged that the institution of a suit relating to the same subject-matter as proceeding in arbitration renders the arbitrators *functi officio* and that any action taken by them after the suit is instituted is invalid.

There is no statutory provision, however, invalidating arbitration proceedings relating to the same subject-matter as a pending suit. On the contrary, s. 21 of the Specific Relief Acts bars a suit instituted by a person, who has contracted to refer the subject-matter to arbitration. The right to compromise suits as Jessel, M. R., observed in *Besant* v. *Wood* (3) is the natural corollary to the right to institute them.

It has been held by a Full Bench of this Court, that parties can validly refer to arbitration the subject-matter of a suit, without the leave of the Court, both under the C. P. C., and under the Indian Arbitration Act.

That being so, it would seem illogical to hold, that while the subject-matter of a pending suit can be validly referred without the leave of the Court, the institution of a suit renders invalid the continuance of arbitration proceedings commenced before the institution of the suit.

The arbitration proceedings may be invalid, owing to the invalidity of the submission relied on, or the suit may be barred, owing to the existence of a valid agreement to refer its subject-matter to arbitration, but these are facts which have still to be ascertained.

As was pointed out in *Khillooram Lokuram* v. *Louis Dreyfus & Co.* (1) the mere fact of a suit being filed does not invalidate arbitration proceedings and this was also the view taken in prior rulings of this Court *viz.*, *Louis Dreyfus Co. &* v. *Seth Shevakram Harkarandas* (4) and *Sawyer* v. *Louis Dreyfus & Co.* (4), where it was held that an arbitrator may proceed in spite of a suit filed after the reference to arbitration. It has, however, been pointed out, that it is inexpedient that there should be a sort of race between the judicial and extra-judicial tribunals in deciding a controversy.

To remedy this evil, the Courts, in the absence of a statutory provision for the stay of final orders relating to arbitration proceedings have resorted on the authority of *Doleman & Sons* v. *Ossett Corporation* (2), to the fiction that a party who has pleaded in the suit and failed to apply for its stay has abandoned his rights under the arbitration, and that a Court which has refused to stay a suit has decided that it alone shall be seized of the dispute.

It would I think be putting an unduly heavy strain on the fiction to hold that a party who has obtained an award after the institution of the suit, and has applied for the stay of the suit, and for the filing of the award, has abandoned his rights under the arbitration, or that a Court, which has passed no orders on a stay application has decided that it alone shall be seized of the dispute.

The case of *Khillooram Lockuram* v *Louis Dreyfus & Co.* (1), shows I think that the appellants may yet be entitled as of right to have the award filed even though it was made after the institution of the suit. I would myself be inclined to go further and hold that circumstances might exist in which the Court might ignore the pendency of the arbitration where the party has failed to obtain an order for stay of a suit relating to the same subject-matter. And yet recognize an executed award for while it is expedient that a race between judicial and extra-judicial tribunals in deciding a dispute should be avoided it is also expedient that by an abuse of the process of Courts, the very object of arbitration, which is to provide a speedy settlement of disputes should not be defeated.

If the Court considers it expedient to ignore an award made during the pendency of a suit, relating to the same subject-matter, and during the pendency of final orders on an application to stay the suit, the correct procedure in my opinion is to postpone consideration of the application to file the award, or to direct its return to the applicant with liberty to be

(3) (1879) 12 Ch. D. 605 at p. 622; 48 L. J. Ch. 497; 40 L. T. 445.

(4) 1 S. L. R. 255.

(5) 20 Ind. Cas. 504; 13 S. L. R. 1.

presented after the Court has disposed of the application under s. 19 of the Arbitration Act or has ceased to be seized of the suit, without adjudication on the merits. I concur in the orders passed.

By the Court.—We, therefore, set aside the order of the learned Additional Judicial Commissioner directing the award to be takenoff the file absolutely. The other should be that the award be now taken off the file with liberty to represent, should such representation become admissible. It is noted that the other objections to the award have not been disposed of and will of course be considered, should the award be so represented. Applicants to have costs of these applications. Costs below to follow the result. *Order set aside.*

N. H.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 207B OF 1921.

December 22, 1923.

Present:—Mr. Kinkhede, A. J. C.

LAXMANSINGH—PLAINTIFF—APPELLANT

versus

JANARDAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 60, 101—Mortgage, indivisibility of—Mortgagee purchasing rights of one of several mortgagors in satisfaction of entire debt—Suit by puisne mortgagee—Option.

In order that a mortgage may fully attain its end of securing satisfaction of the entire obligation in the rank and with the efficacy which the law or the will of the parties determined, it is essential that it should not suffer any disintegration. This character of indivisibility exists not only with reference to the mortgagee, who may generally be more benefited thereby, but also with reference to the mortgagor. And save as a matter of special arrangement and bargain entered into between all the persons interested, neither the mortgagor nor the mortgagee, nor persons acquiring through either a partial interest in the subject, can, under the mortgage, get relief except in consonance with the principle of indivisibility. [p. 89, col. 2.]

Huthasanan Nambudri v. *Parameswaran Nambudri*, 22 M. 209 at p. 212; 8 Ind. Dec (N. S.) 149, and *Din Dayal* v. *Sheoraj Singh*, 2 N. L. R. 116 at p. 118, relied on.

The mere circumstance that by a contract between the prior mortgagee and one of the mortgagors, the prior mortgagee purchases the share of that mortgagor in the mortgaged property in full satisfaction of the whole of the mortgage-debt due to him, cannot affect the principle of the indivisibility of the mortgage. In such a case the prior mortgagee has under s. 101 of the Transfer of Property Act, in answer to a claim based upon an intermediate mortgage, the option to stand by his purchase or to give up his rights thereunder, and fall back on his own prior mortgage. Where he elects to fall back on his prior mortgage and disclaims his rights *qua* owner of the equity of redemption the only capacity which remains with him is that of a prior mortgagee, and in virtue of that capacity he is entitled to demand the entire debt due to him from whomsoever may claim to recover the property in his possession by redemption. [p. 89, col. 2; p. 90, col. 1.]

Ram Sarup v. *Ram Lal*, 75 Ind. Cas 472; 44 A. 659 at p. 661; 20 A. L. J. 596; (1922) A. I. R. (A.) 394, *Sonba Teli* v. *Lahanoo*, 15 C. P. L. R. 188 at p. 190, and *Yadalli Beg* v. *Tuka Ram*, 57 Ind. Cas. 535; 16 N. L. R. 154; 39 M. L. J. 147; (1920) M. W. N. 369; 28 M. L. T. 95; 2 U. P. L. R. (P. C.) 123; 12 L. W. 503; 22 Bom. L. R. 1315; 47 I. A. 207; 25 C. W. N. 241; 48 C. 22 (P. C.), relied on.

Appeal from a decree of the Second Additional District Judge, East Berar, Amraoti, in Civil Appeal No. 47 of 1921, dated the 4th April 1921.

Mr. *D. T. Mangalmoorti*, for the Appellant.

Messrs. *R. R. Jaywant* and *A. V. Khare*, for the Respondents.

JUDGMENT.—The plaintiff Laxmansingh sues to recover possession of a third share of Survey No. 50 of *Mouza* Warud together with mango and other trees situate therein which is now represented by Survey No. 50 sub-No. 1 area 12-20, *jama* Rs. 10, under the following circumstances.

Vithoba defendant No. 2 and his three brothers Gangaram, Mukunda and Sheoram, formed a joint family. By a mortgage-deed dated 16th August 1891 (Ex. 1 D-1) they mortgaged the entire field Survey No. 50 to defendant No. 1 Tukaram, who is how represented for the purposes of this appeal by his legal representatives Janardan and Udhao, his minor sons, and Vithal and Rajaram his brothers. Gangaram died in a state of jointness and consequently the shares of the surviving brothers Vithoba, Mukunda and Sheoram enlarged to $\frac{1}{3}$rd each. After the death of Gangaram the three brothers divided the property among themselves and each became a separate owner of his $\frac{1}{3}$rd share of the land. The defendant No. 2 Vithoba, who thus became the owner of a separate $\frac{1}{3}$rd share mortgaged it to plaintiff Laxmansingh on 16th April 1908 with a condition of foreclosure. On 27th July 1909 he sold that share to Tukaram defendant No. 1 by a sale-deed of that date (Ex. 1 D-2) in full satisfaction of the entire

mortgage-debt due under the prior mortgage dated 16th August 1891 (Ex. 1 D-1). It appears that his two brothers Sheoram and Mukunda had also mortgaged their shares with plaintiff and in order to redeem those shares from the mortgage each of them sold his share to one Raghunath Ramdhan Marwadi by sale-deeds dated 26th March 1909 (Ex. P-9) and 12th April 1909 (Ex. P-8). Vithoba defendant No. 2, however, did not pay up his mortgage. He was, therefore, sued by plaintiff for foreclosure in Suit No. 185 of 1914 in the Court of Sub-Judge, Yeotmal. The present defendant No. 1 being a purchaser of Vithoba's share under his sale-deed (Ex. 1 D-2) was impleaded as a co-defendant in that suit. In answer to the claim based upon the subsequent mortgage dated 6th April 1908 the defendant No. 1 pleaded his paramount lien based on his prior mortgage dated 16th August 1891 (Ex. 1 D-1) and claimed to fall back upon it, and declared that he was not willing to redeem the subsequent mortgage of the plaintiff, in his capacity of a purchaser of equity of redemption and claimed to be redeemed by a plaintiff (Exs. P-2 and P-11). The defendant No. 1 was accordingly discharged from that suit on 20th April 1915. A preliminary decree for foreclosure was accordingly passed in that case on 20th April 1915 against defendant Vithoba alone (Exs. P-5 and P-6). Vithoba had really no interest left in him to redeem, and consequently he did not pay and the decree was made final on 4th November 1916 (Ex. P-7). The plaintiff got formal possession of the share foreclosed on 9th March 1917 (Exs. P-4 and P-3) but the defendant No. 1 succeeded in recovering back possession of the share in July 1917 by virtue of an order passed in his favour under O. XXI, r. 100 of the C. P. C. The plaintiff, therefore, instituted the present suit on 14th May 1918, for establishing the right which he claims to the present possession of the property as contemplated by O. XXI, r. 103 of the C. P. C. He has prayed for possession of the property being decreed in his favour alternately on redemption by payment of a $\frac{1}{3}$rd share of the prior mortgage debt due to defendant No. 1. He further claims a decree for surplus receipts from the mortgaged property that may be found due to him, on taking proper accounts. His contention is that as defendant No. 1 purchased Vithoba's share, and thereby split up his own mortgage security, the plaintiff became entitled to redeem the defendant No. 1's prior mortgage piecemeal and to confine the relief of redemption to the property foreclosed by himself, and that he was not concerned with the payment of anything which is in excess of his proportionate third share of the principal sum and interest secured by the prior mortgage, on the ground that it is chargeable against the $\frac{2}{3}$rds of the property held by Raghunath Ramdhan under his purchases (Exs. P-8 and P-9). The Court of first instance gave plaintiff an option to amend the plaint by claiming redemption on payment of the entire amount payable under the prior mortgage dated 16th August 1891, but he declined to avail himself of that opportunity and returned the plaint without any amendments on 24th March 1919. The First Court, therefore, holding that the entire mortgage security was kept alive and was in tact and within time, and that the plaintiff could not claim to redeem the prior mortgage piecemeal, dismissed the suit.

In appeal, Mr. R. M. Bhagade held that the plaintiff was liable to first redeem the whole mortgage and then entitled to sue the other persons interested in the rest of the property comprised in the mortgage of 1891, for contribution under s. 95 of the Transfer of Property Act, but that, as he had refused to redeem the entire mortgage and to amend the plaint, the dismissal of the suit was inevitable. Mr. Bhagade's decision was based on the view that defendant No. 1 was entitled to fall back on the prior mortgage of 1891, and that as the mortgage was indivisible the integrity of the mortgage could not be said to have been broken up by his purchasing Vithoba's share in the property mortgaged, especially as he had given up his character as purchaser under the sale-deed dated 27th July 1909 (Ex. 1 D-2) in answer to plaintiff's suit to enforce the 2nd mortgage. Plaintiff has, therefore, come up in second appeal urging the following grounds:—

"1. The respondent prior mortgagee could not release the properties which were mortgaged with him and which fell to the share of Mukunda and Shrawan from his mortgage and take in satisfaction of the whole mortgage-debt, Vithoba's share only to the prejudice of the appellant.

2. The appellant is entitled to redeem the share of Vithoba mortgaged with him from the respondent-mortgagee, on payment of a proportionate part of the debt due on the prior mortgage: the lower Courts are wrong in holding that appellant could not redeem that part only.

3. The purchase by Tukaram from Vithoba has under s. 60 of the Transfer of Property Act the effect of splitting up of the mortgage security and that the appellant's claim for partial redemption ought to have been allowed.

4. The respondent Tukaram ought not to have been allowed to fall back on his mortgage.

5. The plaintiff-appellant ought to have been given possession unconditionally."

The appellant relies upon s. 60 of the Transfer of Property Act. It is argued on his behalf that the 1st paragraph of s. 60 of the Transfer of Property Act affords ample authority for allowing piecemeal redemption in this case. No doubt the defendant No. 1 became by the purchase dated 27th July 1909 interested in a part of the mortgaged security covered by the mortgage dated 16th August 1891. But before that date, *i. e.*, on the date of plaintiff's mortgage dated 6th April 1908 or on the dates of Raghunath's purchases (26th March 1909 and 12th April 1909) the whole of the property covered by the defendant No. 1's prior mortgage, namely, the share of Vithoba as also the shares of Vithoba's other two brothers Sheoram and Mukunda, was subject to a common prior charge created by the mortgage dated 16th August 1891. In spite of the division effected between the mortgagors *inter se* the prior mortgagee Tukaram was entitled on the principle of indivisibility of the mortgage to insist upon foreclosing the whole of the property covered by the mortgage for non-payment of the whole, or any portion, of the mortgage debt due to him. He could not be forced to submit to piecemeal redemption, by all or any of the mortgagors much less by the plaintiff or by Raghunath, so that if the plaintiff or Raghunath, had then offered to redeem that mortgage neither of them could have redeemed it except in consonance with the principle of the indivisibility of the mortgage. The following passage quoted with approval by Sir Henry Drake-Brockman, J. C., in *Din Dayal* v. *Sheoraj Singh* (1), from *Huthasanan Nambudri* v. *Parameswaram Nambudri* (2), where Subramania Ayyar, J., observed as follows is pertinent. It has my entire concurrence:—

"But in order that a mortgage may fully attain its end of securing satisfaction of the entire obligation in the rank and with the efficacy which the law or the will of the parties determined, it is essential that it should not suffer any disintegration. This character of indivisibility exists not only with reference to the mortgagee, who may generally be more benefited thereby, but also with reference to the mortgagor. And *save as a matter of special arrangement and bargain entered into between all the persons interested, neither the mortgagor nor the mortgagee, nor persons acquiring through either a partial interest in the subject*, can, under the mortgage, get relief except in consonance with the principle of indivisibility referred to."

The mere circumstance, therefore, that by a contract between defendant No. 1 and defendant No. 2 the prior mortgagee purchased on 27th July 1909 only Vithoba's share in the mortgaged property in full satisfaction of the whole of the mortgage debt due to him cannot affect the principle of the indivisibility of the mortgage. It cannot be utilised by the plaintiff for the purpose of compelling the prior mortgagee to part with the property acquired by him in lieu of the entire debt, only on payment of a proportionate share of the mortgage debt. The position is on the face of it absurd and unmeaning. The property went into the hands of the prior mortgagee in lieu of the entire prior mortgage-debt and not in lieu of only a 1/3rd share thereof. It will be highly unjust and inequitable to tell the prior mortgagee that he must part with that property on payment of only 1/3rd share of the mortgaged debt in proportion to the share which that property bears to the entire mortgaged property. The prior mortgagee had under s. 101 of the Transfer of Property Act, the option to stand by the sale dated 27th July 1909, or to give up his rights thereunder, and fall back on his own prior mortgage in answer to the claim based upon the plaintiff's intermediate mortgage. He has exercised that option and has declared, as per Exs. P-2 and P-11, on 20th April 1915 that he treats his rights as a purchaser as non-existent. In view of such declaration and disclaimer of the right to redeem, the effect of which was to

(1) 2 N. L. R. 116 at p. 118.

(2) 22 M. 209 at p. 212; 8 Ind. Dec. (N. S.) 149.

effectively release in favour of the plaintiff the equity of redemption purchased by defendant No. 1 so as to make it available for being foreclosed in plaintiff's favour in the former suit as if that equity still remained in the mortgagor Vithoba, and of the further fact that equity of redemption having now become vested in plaintiff, the plaintiff became clothed with the double capacity of an intermediate mortgagee, as also of a representative of the mortgagor, to redeem the defendant No. 1's prior mortgage subject to which the foreclosure was ordered in his own mortgage suit. The foreclosure vested the estate in plaintiff subject to the liability to redeem the defendant No. 1's prior mortgage. The plaintiff's only remedy as against defendant No. 1 was, therefore, to redeem him by payment of the entire prior mortgage debt as if the purchase dated 27th July 1909 had never been made by him. He could not maintain ejectment as against the defendant No. 1. So long as the fusion of the rights of the prior mortgagee and of the mortgagor's equity of redemption lasted, the plaintiff could have said that the last para. of s. 60 was applicable, but the moment the prior mortgagee made his election and separated his two capacities the last para. of s. 60 of the Transfer of Property Act ceased automatically to be applicable to the case. *Qua* owner of the equity of redemption defendant No. 1 was the representative of the mortgagor and as such was liable to be foreclosed, while *qua* prior mortgagee he was liable to be redeemed, by the plaintiff. He having disclaimed his rights *qua* owner of the equity of redemption, the only capacity which remained with him was that of a prior mortgagee, and in virtue of that capacity his right was to demand the entire debt due to him from whomsoever may claim to recover the property in his possession by redemption. See *Ram Sarup* v. *Ram Lal* (3) and *Sonba Teli* v. *Lahanoo* (4). It has been held by their Lordships of the Privy Council in *Yadalli Beg* v. *Tuka Ram* (5), that while the transferee of a part of the mortgaged security would be entitled to redeem the entire mortgage on the properties generally, he could not compel the mortgagee to allow him to redeem his part by itself. This would be so as the result of the principle of indivisibility unless something had happened, which extinguished the mortgage in whole or in part such as an exercise of a power of sale conferred on the mortgagee by security. Their Lordships confirmed the decree passed by the Additional Judicial Commissioner for redemption of the entire mortgage on payment of the whole mortgage-debt in that case. Similarly a decree could have been passed in the present case, if the plaintiff had been willing to take it. He having declined to amend his plaint so as to claim that relief although he was given full opportunity to do so, his claim as laid was rightly dismissed. Under these circumstances the only course left to the Courts below was to hold that the plaintiff was not entitled to redeem piecemeal and the suit as laid was, therefore, liable to be dismissed and the Courts below were perfectly justified in dismissing the same.

The result is that the appeal fails and is dismissed with costs. Costs in the Courts below will be paid as already ordered.

Z. K. *Appeal dismissed.*

(3) 75 Ind. Cas. 472; 44 A. 659 at p. 661; 20 A. L. J. 596; (1922) A. I. R. (A.) 394.

(4) 15 C. P. L. R. 188 at p. 190.

(5) 57 Ind. Cas. 535; 16 N. L. R. 154; 39 M. L. J. 147; (1920) M. W. N. 369; 28 M. L. T. 95; 2 U. P. L. R. (P. C.) 123; 12 L. W. 503; 22 Bom. L. R. 1315; 47 I. A. 207; 25 C. W. N. 241; 48 C. 22 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 499 OF 1924.

December 3, 1924.

Present :—Mr. Justice Srinivasa Iyengar.

KARIYA GOUNDAN AND ANOTHER —PLAINTIFFS—PETITIONERS

versus

TIRUKKAIVELU CHETTY AND OTHERS —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. VI, r. 17—Amendment of pleadings—Power of Court—Interlocutory order—Revision.

The powers of amendment of pleadings conferred on the Courts are very wide and all amendments should be allowed as would enable the Court finally to determine all matters in controversy between the parties.

The High Court has power to interfere with interlocutory orders in a pending suit but it is only in extraordinary circumstances that such interference would be justifiable.

Where an application for amendment of a plaint, so as to include a claim which was omitted by inadvertance or ignorance is rejected by the Trial

Court, the High Court would be justified in interfering in revision and directing that the amendment should be allowed in order to avoid trouble, expense and delay which would be occasioned if the amendment was not carried out immediately.

Sri Poosapathi Ramachandra Raju v. *Sri Rajah Vachavayi Venkata Subbayamma*, 30 Ind. Cas. 41; 29 M. L. J. 53, followed.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the District Munsif, Dindigul, in I. A. No. 910 of 1922 in O. S. No. 799 of 1920, dated the 18th February 1924.

Mr. *T. L. Venkata Rama Iyer*, for the Petitioners.

Mr. *A. Sundaram*, for the Respondents.

JUDGMENT.—I think this petition should be allowed. The petitioners as plaintiffs instituted a suit for redemption of property mortgaged by their father. They subsequently applied to amend their plaint by including a claim against defendants Nos. 5 and 7 as the substituted mortgagees for the reduction of the amount that may be found as damages due and payable to them in respect of the alienation effected by defendants Nos. 5 and 7 of a portion of the mortgaged property. The learned District Munsif dismissed the petition characterising it as belated and vexatious. I think he was wrong. The powers of amendment conferred on the Courts under the present law are much wider than formerly and it has often been stated by very eminent Judges that all amendments should be allowed as would enable the Court finally to determine all matters in controversy between the parties. I have no doubt whatever that this claim which is now sought to be included in the plaint by way of amendment was omitted to be so included only by inadvertance or ignorance. But the learned Counsel for the respondents argued that the mere fact that a wrong order has been made by the Court below will not justify this Court in interfering at this stage in revision. I agree it is only in extraordinary circumstances such interference would be justifiable. In my opinion such interference would be justified in this case in view of the trouble, expense and delay that would be caused if the amendment were not carried out now. It is clear that if this amendment should not be made now, the case will have to proceed in the Court of first instance and in the Court of Appeal if the appeal should be allowed, the case will have to be remanded and fought all over again. The learned Counsel for the respondents has drawn my attention to certain cases in which it was held that though the amendment applied for to be made by the plaintiff was proper and was refused by the lower Court, that was no reason for the High Court interfering by way of revision at that stage. I have not been able to see what was the nature of the amendments that were applied for to be made in those cases. However, that may be, all those cases have been recently considered by learned Judges of this Court, specially in the case of *Sri Poosapathi Ramachandra Raju* v. *Sri Rajah Vachavayi Venkata Subbayamma* (1), and this decision of Mr. Justice Kumaraswami Sastriar has since been followed by several of the learned Judges of this Court. There is no doubt whatever that this Court having the right to revise even in respect of the proceedings in pending suits would undoubtedly do so in proper cases and the only question is whether having regard to the circumstances of this case the Court should interfere or not. Having regard, as I have already said, to the amount of trouble, expense and delay that would be caused if the amendment should not be carried out immediately, I am of the opinion that the order of the District Munsif should be set aside and I accordingly set it aside.

Respondents Nos. 1 to 5 will pay the costs of the petitioners in this Court.

This petition has been withdrawn by the petitioners' Vakil so far as the 6th respondent is concerned who is a minor and for whom a guardian has not been appointed.

V. N. V.

Z. K. *Petition allowed.*

(1) 30 Ind. Cas. 41; 29 M. L. J. 53.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 530 OF 1923.

November 28, 1924.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

KALIKA SINGH—PLAINTIFF—APPELLANT

versus

RAM LAL SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Wajib-ul-arz, *entry in, construction of*—*Sale to co-sharer of inferior class*—*Pre-emption by co-sharer of superior class.*

In the absence of specific words in a *wajib-ul-arz* giving priority in the case of a sale by a co-sharer belonging to one category to a co-sharer belonging to another category, a clause for pre-emption defining the rights of co-sharers *inter se* as against a stranger cannot be construed so as to give a right of pre-emption to a co-sharer of a superior class upon a sale to a co-sharer of an inferior class.

Sheobalak Singh v. *Lachmidhar*, 23 A. 427; A. W. N. (1901) 120 and *Narain Saran Singh* v. *Sidh Narain Singh*, 5 A. L. J. 655; A. W. N. (1908) 251, followed.

The *wajib-ul-arz* of a village provided that if a co-sharer wanted to sell his share the right of purchase would belong, in the first instance, to a co-sharer who was a paternal kinsman, then to a co-sharer of the *patti* and then to a co-sharer of the village, on payment of the proper price, in preference to a stranger:

Held, that the right of purchase under the clause was given in the order mentioned in the event of a sale to a stranger, and though the different categories in which priority was to be exercised were mentioned, they were subject to the main qualification that the question of priority would only arise where a sale to a stranger was made.

Second appeal from a decree of the Subordinate Judge, Jaunpur, dated the 6th of January 1923.

Mr. *A. P. Pandeya*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—The question for consideration in this case is whether under the custom of pre-emption prevalent in the villages in which the property sold is situated the plaintiff is entitled to a right of pre-emption in the case of a sale otherwise than in favour of a stranger to the co-parcenary body.

The property sold stood in several villages the *wajib-ul-araiz* of which have been produced in the case. The sale was made in favour of a co-sharer of the village. The plaintiff was also a co-sharer; but he claimed a preferential right by reason of his being a paternal kinsman of the vendor. The Court of first instance was of opinion that the *wajib-ul-araiz* of the villages in question gave him a right of preference over the vendee; but the lower Appellate Court found that no such right of preference was given where a sale was made to a member of the co-parcenary body.

The *wajib-ul-arz* of the village Madho Patti Khas provides that if any co-sharer wants to transfer his share the right of purchase shall belong first to a paternal kinsman who is a co-sharer (*ek jaddi sharik*) and then to the co-sharers of the village on payment of the proper price in preference to a stranger.

The *wajib-ul-arz* of the village Madho Patti provides that in the case of a transfer of property the right of pre-emption shall belong in the first instance to a co-sharer who is a paternal kinsman (*sharik ek jaddi*) then to the co-sharers in the property itself, and after them to the co-sharers of the village in preference to a stranger on payment of such a price as a stranger pays.

The *wajib-ul-arz* of Alampur village provides that if a co-sharer wants to sell his share the right of purchase shall belong in the first instance to a co-sharer who is a paternal kinsman (*sharik ek jaddi*) then to a co-sharer of the *patti*, and then to a co-sharer of the village on payment of the proper price in preference to a stranger.

In each of these *wajib-ul-araiz* the right of purchase seems to have been given in the order mentioned in the event of a sale to a stranger, and though the different categories in which priority is to be exercised are mentioned they are subject to the main qualification that the question of priority would only arise where a sale to a stranger is made. The *wajib-ul-arz* in the present case is very similar to the *wajib-ul-arz* in *Sheobalak Singh* v. *Lachmidhar* (1). In that case it was held that in the absence of specific words giving priority in the case of a sale by a co-sharer belonging to one category to a co-sharer belonging to another category, a clause for pre-emption, defining the rights of co-sharers *inter se* as against a stranger, could not be construed so as to give a right of pre-emption to a co-sharer of a superior class upon a sale to a co-sharer of an inferior class. The same principle has been applied in *Narain Saran Singh* v. *Sidh Narain Singh* (2). The lower Appellate Court was right in refusing to allow pre-emption in these circumstances.

The appeal, therefore, fails and is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 23 A. 427; A. W. N. (1901) 120.

(2) 5 A. L. J. 655; A. W. N. (1908) 251.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 78 OF 1923.

October 2, 1923.

Present :—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

MACMILLAN & Co., LTD.—PLAINTIFFS —APPELLANTS

versus

K. & J. COOPER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Copies of judgment and decree - Different applications—Exclusion of time—Reasonable and proper steps.

Under s. 12 of the Limitation Act an appellant is entitled to a deduction of the aggregate of the time taken in obtaining a copy of the judgment as well as of the decree, after deducting therefrom any overlapping period. [p. 93, col. 2.]

Rajani Kanth Kapali v. *Kali Mohan Das Kapali*, 38 Ind. Cas. 66; 21 C. W. N. 217 and *Silamban Chetty* v. *Ramavadhan Chetty*, 4 Ind. Cas. 301; 33 M. 256; 7 M. L. T. 29; (1910) M. W. N. 141; 21 M. L. J. 152, followed.

Tukaram Gopal v. *Pandurang Sadaram*, 25 B. 584; 3 Bom. L. R. 143 and *Pandharinath* v. *Shankar*, 25 B. 586; 3 Bom. L. R. 244, referred to.

Pramatha Nath Roy v. *Hon. William Arthur Lee*, 68 Ind. Cas. 900; 49 I. A. 307; 31 M. L. T. 193; (1922) A. I. R. (P. C.) 352; 4 U. P. L. R. (P. C.) 103; 43 M. L. J. 765; 27 C. W. N. 156; 21 A. L. J. 118; 37 C. L. J. 86; 18 L. W. 56; (1923) M. W. N. 526; 49 C. 999 (P. C.) and *New Piecegoods Bazar* v. *Jivabhai Vadilal*, 20 Ind. Cas. 537; 13 Bom. L. R. 681, distinguished.

In order to get the benefit of s. 12 of the Limitation Act reasonable and proper steps to obtain a copy of the decree must be taken. This requirement is satisfied if the application is made within the time allowed by law for appealing. [p. 94, col. 1.]

Application for admission of Memorandum of Appeal.

Mr. *Campbell*, for the Appellants.

Mr. *Engineer*, for the Respondents.

JUDGMENT.—The dates material for the purpose of dealing with the point arising on this Rule are these :—

The decree sought to be appealed from was passed on June 11, 1923. An application for a certified copy of the judgment was made on June 12. On June 30, an application for a certified copy of the decree was made. The copy of the judgment applied for was furnished on July 3, 1923, and the copy of the decree was furnished on August 8. The plaintiffs presented the memorandum of appeal on August 22, but it was rejected by the Prothonotary as being beyond time on August 31.

On the application of the appellants we granted a Rule to show cause why the appeal should not be admitted. It is urged in support of the Rule that the time spent in obtaining copies of the judgment and of the decree should be excluded and that if that is done the presentation of the appeal should be within time. The whole question is whether the time requisite for obtaining the copy of the decree only should be excluded, or the time requisite for obtaining the copy of the judgment also should be excluded. The Prothonotary has allowed deduction of the time taken in obtaining the copy of the decree, but has not allowed any time for the copy of the judgment. Under s. 12, sub-s. (2), a party is entitled to deduct the time taken in obtaining a copy of the decree appealed from; and under s. 12, sub-s. (3), where a decree is appealed from or sought to be reviewed, time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded. The appellants rely on this provision as entitling them not only to the deduction of time taken in getting a copy of the decree but also of the time taken in getting a copy of the judgment exclusive of the overlapping period. On the interpretation of s. 12 of the Indian Limitation Act, I should not find any difficulty in accepting the view contended for by the appellants. This view is supported by the decisions in *Rajani Kanth Kapali* v. *Kali Mohan Das Kapali* (1) and *Silamban Chetty* v. *Ramahadvan Chetty* (2). It may be mentioned that it has been held by this Court in *Tukaram Gopal* v. *Pandurang Sadaram* (3) and *Pandharinath* v. *Shankar* (4) that in order that a party may be entitled to deduct the time taken in obtaining a copy, it is necessary for him to make an application for copies of the decree and the judgment before the expiration of the time allowed to him by law to prefer an appeal. If this is done there is no reason why the time occupied in obtaining copies of the decree and the judgment should not be deducted as provided by s. 12. There is no decision of this Court directly bearing on the question whether the aggregate of the time taken up in obtaining both the copies should be excluded, of course deducting therefrom any overlapping period. On inquiry we are informed

(1) 38 Ind. Cas. 66; 21 C. W. N. 217.
(2) 4 Ind. Cas. 301; 33 M. 256; 7 M. L. T. 29; (1910) M. W. N. 141; 21 M. L. J. 152.
(3) 25 B. 584; 3 Bom. L. R. 143.
(4) 25 B. 586; 3 Bom. L. R. 244.

that the practice on the Appellate Side is to exclude the longer of the two periods where the applications for the two copies are made on different dates. The decisions of the Calcutta and Madras High Courts, to which I have just referred, are opposed to this practice. But they appear to us to be based on a correct interpretation of s. 12 of the Indian Limitation Act. It is desirable that there should be uniformity of interpretation on a point of this nature, and in spite of the contrary practice we think that the view taken in these two cases should be followed. In the present case the whole period from June 12 to August 8 should be excluded according to this view; but the overlapping period from June 30 to July 3 should not be excluded twice over. The other view is based upon the assumption that a party is bound to apply for both the copies at the same time, for which there is no express warrant.

On behalf of the respondents reliance is placed upon the decision in *Pramatha Nath Roy* v. *Hon William Arthur Lee* (5). It appears from the statement of facts in that case that the order sought to be appealed from was made on July 26, 1918. An application was made by the respondent in that case on August 6 to have the order drawn up, the draft of the order was sent to the appellant on August 7, and it was approved and returned by him on August 16. It was signed by the master on August 28 and was actually filed on September 3, 1918. The appellant had made no application for a copy of the order until September 9, and the appeal was in fact presented on August 30, 1918. The appeal was clearly beyond time, and no application for a certified copy of the order in that case was made within twenty days. In my opinion the *ratio decidendi* of that case cannot apply to a case where the applications for copies of the decree and of the judgment have been made within the time allowed by law for appealing. In the words of their Lordships reasonable and proper steps to obtain a copy of the decree must be taken in order to get the benefit of s. 12. According to the decisions and the practice this requirement is satisfied if the application is made within the time allowed by law for appealing. And we do not read the observation in *Pramatha Nath Roy's case* (5) as touching the decision and the practice on this point in any way. In the present case the applications for copies were made within the time allowed for appealing; and the appellants are entitled as of right to exclude the time occupied in obtaining them. The only question is whether they are entitled to the aggregate of two periods deducting the overlapping period, or only to one period which may happen to be longer than the other.

A reference has been made to the decision in *New Piece goods Bazar* v. *Jivabhai Vadilal* (6). I do not think that that case presents any difficulty. All that is decided in that case is that the intention to appeal must be made manifest within the time allowed by law for appealing. In the present case that was done by the appellants applying for the copies in time. It is not suggested in this case that the appellants are in any way responsible directly or indirectly for the time occupied in obtaining the copies.

We make the Rule absolute.

Costs to be costs in appeal.

N. H. & K. S. D. *Rule made absolute.*

(5) 68 Ind. Cas. 900; 49 I. A. 307; 31 M. L. T. 193; (1922) A. I. R. (P. C.) 352; 4 U. P. L. R. (P. C.) 103; 43 M. L. J. 765; 27 C. W. N. 156; 21 A. L. J. 118; 37 C. L. J. 86; 18 L. W. 56; (1923) M. W. N. 526; 49 C. 999 (P. C.).

(6) 20 Ind. Cas. 537; 13 Bom. L. R. 681.

CALCUTTA HIGH COURT.

CIVIL RULE No. 861 OF 1924.

November 21, 1924.

Present:—Mr. Justice B. B. Ghose.

SHUNDI BIBI—PETITIONER

versus

MOBARAK ALI SHIKDAR AND OTHERS —OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale, application to set aside—Person who has sold his interest, whether can apply.

A person whose interests are affected by an execution sale at the time of the sale is entitled to make an application under O. XXI, r. 90 of the C. P. C. to set aside the sale. It is not necessary to show that the interest of the applicant was affected by the sale at the time of the application. A person who has, since the date of the sale, parted with his interest in the property sold is, therefore, entitled to maintain such an application. [p. 95, col. 1.]

Rule against an order of the Court of the District Judge, Backergunj.

Babu *Abinash Chandra Ghosh*, for the Petitioner.

Dr. *Jadunath Kanjilal* and Babu *Nripendra Chandra Das*, for the Opposite Party.

JUDGMENT.—The point for decision in this case depends upon the construction of r. 90 of O. XXI, C. P. C. The learned Judge finds that the property in question was sold in execution on the 8th September 1919. The decree-holder was the purchaser and it is said that he took possession on the 28th of August 1920 after evicting the judgment-debtors. One of the three judgment-debtors was one Aisha Bibi. She sold her interest by a *kobala* in the property to a person called Serajuddi on the 19th of February 1921. Aisha Bibi then died and her heir is one Sundi Bibi, the petitioner, before me. This Sundi Bibi made an application for setting aside the sale on the 3rd June 1921 under O. XXI, r. 90, C. P. C. The Court of first instance made an order in her favour. The decree-holder then appealed and, on appeal, the learned District Judge held that the applicant had no *locus standi* to make the application and, without, therefore, entering into the merits of the case, he dismissed it. The question now is whether Sundi Bibi, the present petitioner, can be said to be a person whose interest is affected by the sale.

It is contended by the learned Vakil for the opposite party that the person who makes an application to set aside a sale must show that at the time of the application his interest was affected by the sale, and that, as in the present case, the applicant or her predecessor-in-interest had parted with her interest prior to the date of the application, the petitioner was not in a position to make the application under O. XXI, r. 90, C. P. C. It seems to me that that contention cannot be accepted. The rule in question includes, in my opinion, all persons whose interests are affected by the sale at the time of the sale. Therefore, the present applicant comes within the provisions of that rule and is entitled to maintain the applicatian. To hold otherwise would, it seems to me, be extremely anomalous because if, after the sale is effected, the judgment-debtor sells the property to a third persons, it would be difficult for that persons to say that his interest is affected by the sale because he would be met by the answer that he had purchased nothing and his interest, if any, accrued only after the sale, and, if it is held that the vendor is not entitled to maintain such an application, the result would be that neither the vendor nor the purchaser would be in a position to make an application for setting aside the sale, although there may be very good grounds for doing so. Several cases have been cited before me dealing with the construction of r. 89 of O. XXI, C. P. C., in which persons in the position of the applicant in the present case were held to be entitled to have the sale set aside under the provisions of that rule. It is unnecessary for me to make any further reference to those cases in construing r. 90. It is alleged by the learned Vakils on both sides that there is no reported case relating to the construction of this particular rule. On the grounds stated above, this Rule is made absolute. The judgment on appeal of the lower Appellate Court is set aside and the case remitted to that Court for re-hearing of the appeal on the merits. Costs will abide the result three gold *mohurs*.

Z. K. *Rule made absolute: Case remanded.*

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

July 29, 1924.

Present:—Lord Dunedin, Lord Carson and Sir John Edge.

Thakur CHANDIKA BAKHSH SINGH AND ANOTHER—APPELLANTS

versus

MADHO SINGH—RESPONDENT.

Will—Execution—Proof.

The fact of the execution of a Will was put in issue 25 years after its alleged date of execution. The Will had been witnessed by several persons, all of whom, except two, had died before suit, but these two gave clear evidence that the Will was executed in their presence, that it represented what the testator wished, and that the testator, although he may not have understood some of the flowery expressions contained in the Will, was yet perfectly competent to compre-

hend the simple provisions of the Will. The Will was in favour of the son-in-law of the testator and was challenged by a distant reversioner, the question of whose relationship was not clear at the time of the execution of the Will. No Probate had been obtained, but the Will was produced before a Mutation Officer shortly after the death of the testator. The Courts in India held the execution of the Will proved:

Held, that under the circumstances their Lordships of the Privy Council did not see any reason to hold that the judgment of the Court of Appeal in India was not correct.

Appeal from the decree of the Oudh Judicial Commissioner's Court.

Mr. *Kenworthy Brown*, for the Appellant.

Messrs. *Dunne, K. C.*, and *Dube*, for the Respondent.

JUDGMENT.

Lord Dunedin.—The only question in this case is whether a certain Will was really executed or not. This point is mooted for the first time twenty-five years after the Will was executed, and that fact necessarily explains to a certain extent the paucity of evidence which is available as to the actual facts of execution. The Will was witnessed by several persons; death has taken away all of them except two, but, as regards those two, they are both quite clear that the Will really was executed; that it represented what the testator wished, and that he, although he might not have understood some of the flowery expressions, was yet perfectly competent to comprehend what, after all, were very simple provisions.

The Will was produced at once; it was not kept quiet; it was produced within a very short time for the practical purpose of having mutation made of names in the register. The same thing happened when there was another change, owing to a death, and, again, the Will was produced for the purpose of mutation of names.

In those circumstances, what really is said against the Will? It is said, first of all, that it is of an unnatural character, because the eventual taker under the Will is only a son-in-law. Their Lordships, however, are inclined to agree with the view taken by the Appeal Court that, considering that the reversioner was a person far off a person as to whose own particular identity there must have been some considerable amount of doubt because the pedigree, at that time, had not been, so to say, cleared up, it was not unnatural that this man should wish that his son-in-law should succeed, and it was certainly most natural that he should make a Will, because, according to the custom of the village, if he allowed himself to die intestate, his daughter, who was naturally the person whom he would have cared for most, would have been cut out altogether. It is also quite clear that not only his daughter, but also his widow, who under an intestacy would have been entitled to a life-interest of the whole, both acquiesced in this Will and in proceedings being taken for mutation under its provisions.

Then it is said that it is curious that this man did not have any of the villagers at the place that he lived in for witnesses. Their Lordships do not consider that that fact by itself is at all of sufficient weight to get over the circumstances which they have already mentioned. It really becomes rather a matter of speculation to settle who are most likely to be taken as witnesses. The fact of the Will does not seem necessarily to depend on the exactitude of the story that is told by the defendant. The truth is that, if there were only the evidence of the defendant, it might be said that it was obviously interested. Their Lordships are, therefore, inclined to discard the evidence of the defendant as liable to be attacked upon the ground of interest, and because weight must be given to the fact that he certainly did, in the matter of the pedigree, seem to have shown himself a most unreliable person. But that does not affect the actual facts, which have been already stated.

The only other ground is that the Will was not produced for Probate, but those who are conversant with these matters say that that often is not done.

On the whole their Lordships do not see any reason why they should interfer with the judgment—which seems a very careful judgment—of the Court of Appeal, and they will humbly advise His Majesty to dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

Solicitor for the Appellant.—Mr. *H. Polak.*

Solicitors for the Respondent.—Messrs. *Barrow, Rogers* and *Nevill.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 15 OF 1924.

April 28, 1924.

Present:—Mr. Kincaid, J. C., and Mr. Kennedy, A. J. C.

KHANU—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 377—Coitus per os.

Coitus per os falls within the provisions of, and is punishable under, s. 377, Penal Code. [p. 98, col. 1.]

Appeal against the conviction and sentence of the Sessions Judge, Hyderabad, (Sind), dated the 3rd January 1924.

Mr. *Partabrai D. Punwani*, for the Appellant.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—The principal point in this case is whether the accused (who is clearly guilty of having committed the sin of Gomorrah (*coitus per os*) with a certain little child, the innocent accomplice of his abomination, has thereby committed an offence under s. 377, Indian Penal Code.

Section 377 punishes certain persons who have carnal intercourse against the order of nature with *inter alia* human beings. Is the act here committed one of carnal intercourse; if so, it is clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of *coitus per os* is impossible. Intercourse may be defined as mutual frequent action by members of independent organisation. Commercial intercourse provides for the merchants of the state *A* who wish to come to and trade in the state *B*, not intending permanently to settle there but with *animus redeandi* to *A*, and similarly for the merchants of the state *N*. Such is the *magnus* intercourse which regulated the trade of Brittain and Flanders in the middle ages. Social intercourse provides the rules under which members of one family may resort to the premises occupied by another family, not intending to reside in such premises occupied by another family, not intending to reside in such premises but merely to visit them for laudable purposes, reciprocity being of the essence of the bargain. By a metaphor the word intercourse, like the word commerce, is applied to the relations of the sexes. Here also there is the temporary visitation of one organism by a member of the other organisation, for certain clearly defined and limited objects. The primary object of the visiting organisation is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity. Looking at the question in this way it would seem that sin of Gomorrah is no less carnal intercourse than the sin of Sodom. The sin of Lesbos or Reboim is clearly not such intercourse, and I doubt if mutual cheirourgia would be such. Not very much can be gathered from a consideration of English authorities which are all affected by the fact that the offence of unnatural vice was originally one of the three offences dealt with by the ecclesiastical tribunals and that the Civil Courts when called on to deal with those offences showed their usual tendency to look with much jealousy on the criminal legislation of the church. The cognate offences of heresay and usury are now not dealt with by the Criminal Courts at all, and the third is held only to have been committed when the offender is proved to have committed the sin of Sodom.

And it was this vice in particular which was rendered punishable by the early Christian state, for it was par excellence the vice of the Hellene and the Saracen. By making this vice particularly punishable, therefore, the State not only protected good moral but struck at its enemies. It is this vice, therefore, which attracted severest censures of State and Church, but in mediaeval times all emission other than in *vas legitimum* was considered unchristian because such emission was supposed ultimately to cause conception of demons.

It will be seen how little help can be extracted from Christian sources in deciding this question. But why is it that most modern states, now freed from the influence of superstition, still make the sin of Sodom punishable. Partly I suppose of the desire of princes to encourage legitimate marriage. Partly because there is an idea, (perhaps erroneous) that the public or tolerated practice of that vice creates a tendency in the citizens of the State, where it is practiced, to adopt an unmanly

and morbid method of life and thinking so that a person saturated with those ideas is less useful a member of society, partly because of the danger that men put in authority over other men may use their power for the gratification of their lusts, but principally I suppose because of the danger to young persons, least they be indoctrinted into sexual matters prematurely. But surely all these ill consequences would equally follow in a city where the sin of Gomorrah was tolerated.

It is to be remembered that the Penal Code does not, except in s. 377, render abnormal sexual vice punishable at all. In England indecent assaults are punishable very severely. It is possible that under the Penal Code, some cases might be met by prosecuting the offender for simple assault, but that is a compoundable offence and in any case the patient could in no way be punished, is it to be supposed that the Legislature intended that a Tigellinus should carry on his nefarious profession perhaps vitiating and depraving hundreds of children with perfect immunity?

I doubt not, therefore, that *coitus per os* is punishable under s. 377, Indian Penal Code.

But we must not allow our disgust at the perpetrators of such acts to blind us to the fact that this vice is less pernicious than the sin of Sodom. It has not been surrounded by the halo of art eloquence and poetry. It cannot be practised on persons who are unwilling. It is not common and can never be so. It cannot produce the physical changes which the other vice produces. It is, therefore, rightly punishable but the punishment need not be so extremely severe as in the other case.

Neither the actual penetration *per annus* or in a legal sense attempt at such penetration is proved in the present case.

As for the question of kidnapping, the learned Judge has not addressed himself to that question with his usual thoroughness. It is arguable that a child playing in the street and induces to accompany a man for a few minutes is not kidnapped, it would be otherwise no doubt if there were a diversation, *e.g.*, if the child had been intercepted while going to school or sent on some errand. But on the other hand the child next was locked up, and thus wholly put under the dominion of the accused. Thus it would seem there was a kidnapping.

I would, therefore, dismiss the appeal against the convictions under ss. 367 and 377 and against the sentence under s. 367. But I would reduce the sentence under s. 377 to one of 5 years' rigorous imprisonment. The sentences to be concurrent.

P. B. A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 417 OF 1924.

November 12, 1924.

Present:—Justice Sir Balington Newbould, KT., and Mr. Justice Mukerji.

AHED FAKIR AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 297—Penal Code (Act XLV of 1860), s. 147—Rioting—Trial by Jury—Question of title to land, direction to ignore—Misdirection.

Where in a case of rioting the question of title to a certain property is of importance and the Sessions Judge in his charge to the Jury asks them to arrive at their verdict irrespective of that question, his action amounts to a misdirection which vitiates the trial. [p. 100, col. 1.]

Babu *Debendra Narain Bhattacharjee*, for the Appellants.

Mr. *Khundkar*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The appellants before us were put on their trial on several charges. They were all charged with rioting punishable under s. 147, Indian Penal Code. The appellant Ahed Fakir was charged with having committed culpable homicide not amounting to murder by causing the death of Mohorulla. The other appellants were charged with being constructively guilty of culpable homicide under the provisions of s. 149, Indian Penal Code, and one of the appellants, Baksu Fakir, was charged with committing simple hurt with a dangerous weapon to one Omed Ali. The Jury unanimously found all the appellants guilty of rioting. They found Ahed Fakir guilty of the minor offence of voluntarily causing grievous hurt to Mohorulla. On the other charges they returned a verdict of not guilty.

The main facts of the case appear to be as follows. Khos Mahmud and Lal Mahmud *alias* Tunya are two brothers. Their father

Dost Mahmud died about four years ago leaving some land which was inherited by these two. The land in dispute in the present case is a plot of six *cottas* of land which according to the evidence of the prosecution was let out in *barga* to the witness Mohitulla during the year 1922. On the expiration of the *barga* lease it is said that Mohitulla held over as *burgadar* and grew *kalai* on the land in 1923. At the beginning of 1924 on the 2nd January Khos Mahmud executed a *kobala* Ex. 1 purporting to sell him this six *cottas* of land. On the 5th January last in the early morning Mohitulla and his step son Monu went to plough the land. When they were ploughing they were resisted by the appellants who succeeded in turning Mohitulla and Monu out of the land. At about 10 A. M., some hours later Mohorulla, the brother of Mohitulla, and others came to the land where the appellants still were and a fight took place in the course of which Mohorulla received injuries which fractured two of his ribs and ruptured his spleen and caused his death. Injuries were also received both by the appellants and several of the witnesses for the prosecution.

The learned Sessions Judge in summing up the case to the Jury has stated the facts and the evidence in our opinion fairly. But he had fallen into a serious error in directing the Jury on an important point of law. He has told the Jury that "if the actual possession of the land by Mohitulla is established then quite irrespective of the question whether Mohitulla acquired a valid title to the land by the *kobala* Ex. 1 from Khos Mahmud or of the question whether the title to the land rested with Khos Mahmud's brother Lal Mahmud's *alias* Tunya, the accused persons must held to have formed members of an unlawful assembly if they had assembled with the common object of enforcing the right or supposed right of Tunya to the land in question by means of criminal force or show of criminal force" But in this case having regard to the fact that there were two separate occurrences the question whether Tunya on whose behalf the appellants were acting had title to the land is most material. From the charge as framed it is clear that the occurrence for which the appellants were put on their trial was the second occurrence. The charge of rioting as originally framed by the Committing Magistrate referred to the assault on Mohitulla and others as parts of the unlawful common object. This charge was amended in the Sessions Court by striking of the words "and assaulting Mohitulla and others" and by the substitution of the name of Mohorulla in place of the words "the said Mohitulla". This shows that the appellants were charged with having committed rioting in connection with the second part of the occurrence when Mohorulla was wounded and not with reference to the first part of the occurrence when Mohitulla was driven from the land. With reference to this second part of the occurrence the title of Tunya is most material as it cannot be held that the offence of rioting was then committed with the common object stated in the charge if in fact Tunya had good title to the land. From the evidence of the prosecution witnesses there is some evidence of Tunya's title which should have been put before the Jury and their decision obtained, for instance even in the First Information the place of occurrence is described in two separate sentences as Tunya's land and Ahed Fakir who laid the First Information has also in his deposition before the Sessions Court stated that Mohorulla was beaten and he fell on the land of Lal Mahmud that is, of Tunya. We also find another witness, Jomir Sheikh, stating that the disputed land originally belonged to Tunya. That Tunya originally had some interest in the land is not disputed and there is no clear evidence that he parted with this interest. The deed of sale to Mohitulla was executed by Khos Mahmud alone and purports to sell the whole of six *cottas* as Khos Mahmud's property. It must, therefore, be said that the case put up on behalf of the appellants that Lal Mahmud *alias* Tunya was the real owner of the land was supported by some evidence before the Sessions Court and there should have been a decision on that point. If it had been held that Tunya's title to the land has been made out it cannot be said that during the second part of the occurrence the appellants were acting with the common object set out in the charge, namely, of taking forcible possession of the land in possession of Mohitulla. By 10 o' clock on the 5th January the appellants were already in possession of the land in dispute since they had turned out Mohitulla and his step son in

the early hours of that morning. If subsequently to the forcible possession which they then obtained they were holding the possession on behalf of Tunya in whom the legal right to possession was vested it can not be said that the complainant's party had any right to forcibly eject them when they returned with force for that purpose. We must hold that this misdirection as to the necessity of deciding the title is a material one which has in fact occasioned a failure of justice.

There remains the conviction of Ahed Fakir under s. 325, Indian Penal Code. As regards this we can see no reason for reversing the verdict of the Jury. As we have already said the evidence has been fairly put to the Jury on the important facts. The only important point of non-direction to which our attention has been drawn is as to the statement made by Mohorulla. It would appear that Mohitulla when he gave evidence before the investigating Sub-Inspector stated that Mohorulla had told him that Ketu Fakir with Manik Fakir had struck him on the hand with *lathis* and did not say that Mohorulla had told him that Ahed and Zahed struck him on the head with *lathis*. We do not think that this non-direction is of material importance. The important point was not who struck Mohorulla on the head but who struck the blow on the abdomen which fractured his ribs and ruptured his spleen. As regards this particular point the evidence appears to be one sided, and we cannot hold that the omission to draw specific attention by the Judge to the above mentioned discrepancy has led to any mis-carriage of justice. We do not think that it will serve any useful purpose to order a re-trial on the charge of rioting. We set aside the conviction and sentence of all the six appellants on the charge of rioting punishable under s. 147, Indian Penal Code. We uphold the conviction of Ahed Fakir under s. 325, Indian Penal Code, and the sentence of five years, rigorous imprisonment passed under that section.

The appellants other than Ahed Fakir will now be discharged from their bail bonds if they are on bail or they should be released if they are in Jail.

Z. K. *Appeal allowed: Convictions set aside.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 280 OF 1924.

September 17, 1924.

Present:—Mr. Justice Marten and Mr. Justice Fawcett.

In re SHRIRAM SHAMBHUDAYAL—ACCUSED—APPLICANT.

Extradition Act (XV of 1903), ss. 10 (4), 23—Criminal Procedure Code (Act V of 1898), ss. 54 (7), 497—Bombay City Police Act (IV of 1902), s. 33 (g)—Arrest without warrant—Detention for purposes of extradition—Magistrate, jurisdiction of, to entertain application for bail.

Where a person is arrested in pursuance of the provisions of s. 54 (7) of the Cr. P. C. or under s. 33 (*g*) of the Bombay City Police Act, without an order from a Magistrate and without a warrant, and is detained under the provisions of s. 23 of the Extradition Act, the Magistrate under whose orders he is detained has jurisdiction to entertain an application for his bail. [p. 101, col. 1.]

Per *Fawcett, J.*—Section 23 of the Extradition Act covers the case of an arrest under s. 33 (*g*) of the Bombay City Police Act. [p. 101, col. 2.]

Criminal application against an order of the Acting Chief Presidency Magistrate, Bombay.

Mr. *P. N. Godinho*, for the Applicant.

JUDGMENT.

Marten, J.—The sole point before us is whether the learned Magistrate was right in thinking that the application of the accused for bail could not be entertained by him as he was "directed to retain the accused in custody pending the extradition proceedings as per Ex. A." The proceedings in question against the accused are under the Indian Extradition Act, XV of 1903, in respect of an alleged criminal breach of trust committed in the State of Indore. With the facts of that case we are not now concerned, and many of the allegations in the petition before us are for present purposes wholly irrelevant.

It is said that the accused has been arrested without an order from the Magistrate and without a warrant in pursuance of the provisions of s. 54 (7) of the Cr. P. C. Consequently s. 23 of the Indian Extradition Act, 1903 applies under which such a person "may, under the orders of a Magistrate within the local limits of whose jurisdiction such arrest was made, be detained in the same manner and subject to the same restrictions as a person arrested on a warrant issued by such Magistrate under s. 10." Then if one turns to s. 10, it gives power to a Magis-

trate to issue a warrant of arrest in certain cases, and then enacts in sub-s. (4) that "in the case of a person arrested or detained under this section, the provisions of the Cr. P. C. for the time being in force relating to bail shall apply in the same manner as if such person were accused of committing in British India the offence with which he is charged." In other words ss. 23 and 10 (4) enable the Magistrate to grant bail.

It is accordingly important to bear in mind that this is not a case under s. 3 where a requisition has been made to the Government of India or to any Local Government by the Government of any Foreign State for the surrender of a fugitive criminal of that State. In such a case s. 3, sub-s. (5), provides for bail, "if the Magistrate is of opinion that a *prima facie* case is not made out in support of the requisition, or if the case is one which is bailable under the provisions of the Cr. P. C."

The learned Magistrate appears to have been of opinion that because the telegrams or letters from the District Magistrate of Indore asked him to detain the accused in custody, therefore, he could not entertain any application for bail. But we think having regard to the sections which I have just alluded to, and in particular to s. 10 (4), that the learned Magistrate had jurisdiction to entertain an application for bail.

Accordingly we think that the proper course is to remit the application for bail to the learned Magistrate with the above intimation of our opinion as to his legal powers. It will to then for him to consider the application for bail on its merits.

The matter being urgent we will direct the Registrar to forward the papers to the Magistrate with all convenient speed and if possible to-day.

Fawcett, J.—I concur. I would only add that, as the petitioner was arrested in the City of Bombay, it may be said that he was not arrested in pursuance of the provisions of s. 54, cl. (7) of the Cr. P. C. of 1898 within the meaning of s. 23 of the Indian Extradition Act, XV of 1903. Under s. 1 of the Cr. P. C, that particular s. 54 does not extend to the Police in the town of Bombay. The accused was, therefore, really arrested without a warrant in pursuance of the powers given by s. 33, cl. (*g*) of the Bombay City Police Act, 1902. That section reproduces practically word for word the provisions of s. 54, and cl. (*g*) that I have referred to is exactly in the same words as cl. (7) of s. 54 of the Code.

It is probable that the fact of s. 54 of the Code not applying to the town of Bombay was overlooked by the Legistature when the Indian Extradition Act, XV of 1903 was passed. And under the general rule of interpreting a Statute when possible, so as to give effect to its intent and spirit, I think we are clearly justified in holding that s. 23 of the Indian Extradition Act covers the case of an arrest under s. 33, cl. (*g*), of the Bombay City Police Act.

Z. K. *Order accordingly.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 672 OF 1924.

November 25, 1924.

Present:—Mr. Justice Broadway and Mr. Justice Zafar Ali.

NATHA SINGH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal case— Weakness of defence.

A conviction must stand or fall on the strength of the prosecution and not on the weakness of the defence. [p. 102, col. 2.]

Appeal from an order of the Sessions Judge, Lahore, dated the 24th June 1924.

Dr. *Nand Lal*, for the Appellant.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—At about sunset on the 20th November 1923, an occurrence took place which resulted in Ishar Singh son of Jwala Singh and Ladha Singh son of Kharak Singh receiving injuries to which Ladha Singh succumbed on the 7th December 1923. The injury he received was a blow on the head with a sharp cutting instrument, such as a *takwa*, which cut right through his skull into his brain. As a result of the Police investigation that followed Natha Singh, Kartar Singh and Hazara Singh were placed before a Magistrate charged under s. 302, Indian Penal Code,

in connection with the death of Ladha Singh, and under s. 307, Indian Penal Code, in regard to the injuries inflicted on Ishar Singh. All three were committed to the Sessions for trial under those sections. This trial resulted in the acquittal of Kartar Singh and Hazara Singh on both charges, and in the conviction of Natha Singh on the charge of having murdered Ladha Singh while he has been acquitted of the attempt to murder Ishar Singh. He has preferred an appeal to this Court, and Dr. Nand Lal, on his behalf, has, at great length, criticised the evidence on the record as well as the judgment of the learned Sessions Judge.

The judgment of the learned Sessions Judge is a very detailed one and gives the stories told by the prosecution and the defence at much length, but he has been guilty of falling into one or two minor inconsistencies which have given the learned Counsel an opportunity of claiming that the learned Sessions Judge was inclined to vacillate in his opinion. It is not necessary to discuss the entire evidence on the record as the details are contained in the judgment under appeal.

The story for the prosecution is, briefly, that Ishar Singh, who is a distant collateral of one Sant Singh, had assisted Sant Singh by coming with him to Lahore where he lodged a charge against the appellant and two or three others of having stolen his (Santa Singh's) cattle. It is said that Ishar Singh's interference in this matter was strongly resented by Natha Singh and his friends and relatives and, on the day in question, while Ishar Singh and Ladha Singh were sitting in front of the former's house, or on its threshold, the appellant with Kartar Singh, Hazara Singh and one Atma Singh, who has absconded, suddenly appeared in the lane and seeing Ishar Singh abused him for having sided with Sant Singh as he had done. Ishar Singh returned the abuse whereupon Atma Singh struck him with a *takwa* that he was armed with. Ladha Singh is said to have remonstrated and to have attempted to intervene whereupon the appellant struck him a violent blow on the head with a *takwa* knocking him down, and then all the others proceeded to beat Ishar Singh but on the arrival of the people left him and went away. This story is supported in all main particulars by Ishar Singh, Harnam Singh, son of Sant Singh, Ram Singh and Labh Singh, who claim to have witnessed the occurrence, while Kishan Singh (P. W. No. 7) arrived immediately after the attack had ended. Kesar Singh, brother of Ishar Singh, is said to have made a report of the occurrence at the Punitive Police Post in the village, Her. This report was entered at about 9 P. M., or a little after.

The defence is of two-fold nature, firstly, Natha Singh claims that he was not in the village at all, and, secondly, a story has been set up, supported by four witnesses, to the effect that a fight took place between Ladha Singh and his friends on one side and Ishar Singh and his friends on the other, that Ladha Singh had been struck by Ishar Singh who had in his turn been struck by Labh Singh, prosecution witness, that this fight had taken place in front of the *dharamsala* and not in front of Ishar Singh's house; and that the cause of it was that Ladha Singh resented Ishar Singh leaving his cart in the lane. It is then asserted that the parties conspired together and decided to falsely name Natha Singh and his friends owing to the ill-feeling between Sant Singh and the appellant.

Now, so far as the *alibi* is concerned there is only one witness whose story, even if true, is insufficient to prove that the appellant was not in the village at sunset on that day.

The conviction must stand or fall on the strength of the prosecution and not on the weakness of the defence. As Dr. Nand Lal, has, however, deemed it necessary to lay very considerable stress on the defence story of how the occurrence took place it is necessary to deal with it, but it will only be dealt with briefly as the learned Sessions Judge, before whom the same line of argument was taken, has given excellent reasons for discrediting the defence story. The witnesses in support of this story are four in number, D. W. No. 2, Kartar Singh, D. W. No. 3, Gurdit Singh, and D. W. No. 4, Surain Singh, are all admittedly more or less interested in Natha Singh. Kartar Singh is his first cousin, Gurdit Singh cultivates land belonging to Natha Singh's uncle while Surain Singh has also held land from the family. Now all these three witnesses agree in saying that the fight took place in front of the *dharamsala* and that Ishar Singh struck Ladha Singh while Labh Singh struck Ishar Singh. None of these three, however, thought it necessary to make any statement before the Police and

it is at the Trial in the Court of Sessions that this story is for the first time advanced by them. The fourth witness, D. W. No. 1 Nihal Singh, is in no way related to the appellant, but, although he says that the fight took place in front of the *dharamsala* at about sunset, he admits that he did not go to the Police Post, but has sworn that he told the Head Constable that evening and on the following day made his statement to the Superintendent of Police. The Head Constable had sworn that the story told by these four witnesses was never hinted at during the Police proceedings in his presence, and we agree with the learned Sessions Judge in thinking that had Nihal Singh made the statement before the Superintendent of Police, which he claims to have made, that statement would have been recorded and enquired into. We, therefore, find ourselves in complete agreement with the view taken of this evidence by the learned Sessions Judge which followed the unanimous opinion of the Assessors, and would note that no real explanation or account has been given of how and when the conspiracy took place.

It remains to be seen whether the evidence for the prosecution is sufficient. This has been attacked on various grounds, mainly on the ground of relationship, but great stress has also been laid on the fact that although this occurrence is said to have taken place about sunset, (which appears to have been at about 5-30 P. M. on the day in question) the Police were not informed till at least 9 P. M. This matter has not been lost sight of by the learned Sessions Judge who has come to the conclusion that although there was some delay, the delay was explicable and attributable to the "dilatory ways of village people in this country." Now, it has to be borne in mind that two persons were injured, Ladha Singh being rendered unconscious. The first thing that the friends and relatives of these two persons would do would be to ascertain the extent of the injuries received by them and to endeavour to relieve their suffering as much as possible. In these circumstances it is not a matter of great surprise to find that the Police were not informed of this occurrence for about three hours after it had taken place and we, therefore, agree with the learned Sessions Judge in thinking that the delay in making the report at the Police Post does not necessarily, in the present case, render the testimony of the eye-witnesses untrue.

Again the relationship between the witnesses and Ishar Singh is not a very near one and there appears to be no reason whatever to think that there was any occasion for any collaboration on the part of the witnesses nor we think that any attempt was made to concoct a false case. The story put up by the defence is that Labh Singh caused injuries to Ishar Singh and in these circumstances it is difficult to believe that Labh Singh would have been made a witness instead of an accused. In our judgment the story told by the prosecution is substantially correct. The appellant with others taunted Ishar Singh with having assisted Sant Singh. Ishar Singh returned the taunt with abuse and was in turn struck by one of the appellant's party. Upon this Ladha Singh, a wholly innocent individual, attempted to intervene to prevent further harm being done and was put out of action by the appellant by being struck with what must be regarded as a lethal weapon.

Dr. Nand Lal cited several authorities and urged that in the circumstances of the case the offence was not one under s. 302, Indian Penal Code, and in fact that no offence had been committed at all. We, however, are unable to see the bearing of the authorities cited and find ourselves in complete agreement with the learned Sessions Judge, in fact we may say that we are prepared to accept the unanimous view of the Assessors and agree with them in thinking that the intention of Ishar Singh's assailants was to kill him. We, therefore, hold that Natha Singh has been rightly convicted of murder, and dismiss his appeal.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 455 OF 1924.

November 13, 1924.

Present:—Mr. Justice Newbould and Mr. Justice Mukerji.

In re SAHORALI MOLLA—APPELLANT.

Criminal Procedure Code (Act V of 1898), s. 360—Deposition read over by witness himself and admitted correct—Section, whether complied with.

The fact that the deposition of a witness is read over by the witness himself and is admitted by him to be correct, does not amount to sufficient compliance with the provisions of s. 360 of the Cr. P. C.

Mr. *B. M. Sen* and Babu *Anil Chandra Roy Chowdhury*, for the Appellant.

Mr. *Khondkar*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The appellant Sahorali Molla was tried by the Additional Sessions Judge of Faridpur with the aid of a Jury on a charge under s. 376, Indian Penal Code. The Jury brought in a verdict of guilty in proportion to 4: 1 and the learned Judge not finding sufficient reason to disregard the verdict of the majority of the Jury agreed with and accepted it, and convicted the appellant under s. 376, Indian Penal Code, and sentenced him to undergo rigorous imprisonment for four years and to pay a fine of Rs 25 in default to undergo additional rigorous imprisonment for three months. Against this conviction and sentence the appellant has preferred this appeal.

Of the grounds urged in support of the appeal it is necessary to mention only one, namely, the one relating to the non-compliance of the provisions of s. 360, Cr. P. C. in respect of one of the prosecution witnesses, namely, No. 10 Satis Chandra Sarkar. It is alleged and it also appears to be a fact that the deposition of this witness was read over by the witness himself and he admitted it to be correct. It has been held by this Court that this is not a sufficient compliance with the provisions of s. 360, Cr. P. C. The conviction of and the sentence passed on the appellant must, therefore, be set aside.

The question now arises as to whether we should direct a re-trial of the case. Having regard to the fact that the evidence of the woman is the only evidence in respect of the offence and the corroborative evidence that has been adduced is not of such a character as can be relied upon with any degree of certainty. We think that no useful purpose will be served by a re-trial of this case.

The appellant will, therefore, be acquitted and released.

Appeal allowed;
Conviction set aside.

Z. K.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 209 OF 1924.

December 15, 1924.

Present :—Mr. Kennedy, J. C., and Mr. Aston, A. J. C.

HAJI UMER—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Bombay District Municipal Act (III of 1901), ss. 131, 150—Notice to occupier to put land in sanitary condition—Occupier, liability of—Disobedience—Landlord, responsibility of, whether can be pleaded in defence.

Where a notice is served on the occupier of a plot of land under s. 131 of the Bombay District Municipal Act calling upon him to put the plot in a sanitary condition, as provided by the rules of the Municipality, and the notice is disobeyed, it is not open to the occupier to plead that as between himself and the landlord, it was the latter's duty to comply with the notice. [p. 105, col. 1.]

Application to revise the conviction and sentence by the Bench Magistrates, Karachi, dated the 30th September 1924.

Mr. *Gopaldas N. Lalla*, for the Applicant.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—In this case Haji Umer is a tenant of a certain plot of land situate within the Municipal limits of Karachi, the owner of that land is one Fazul Ellahie. The tenant used to keep cows on it and the Municipality of Karachi has apparently passed some bye-laws requiring that the ground on which the cows are kept should be provided with a certain drainage system and pavement. This particular plot of land was not so provided. Accordingly notices were issued under s. 131 of the Bombay District Municipal Act (III of 1901) directing the applicant to clear off the cows or otherwise put the land in a proper state. This notice was issued both to the landlord and the tenant. Neither of them complied therewith and the Municipality thereupon took proceedings. This matter came up for trial under s. 131 which imposes upon the recusant a fine of Rs. 25 forthwith and a continuing fine of Rs. 5 a diem in case of failure to comply. The Magistrate recorded a plea of guilty in the case of the tenant and proceeded to fine him Rs. 15.

It is urged that the plea of guilty was a mistake but it is not possible to go beyond the record. But however that may be, the case of Haji Umer seems to be that he never intended to plead that he was liable

to be punished. What he meant by his plea was that it is true that the land is in a dirty condition and that it is true that notice had been given to him to keep the stables clean but it was not his business to clean it but that of the owner. This certainly would have amounted to a plea of not guilty in law but it would appear that this contention if proved would have been wholly irrelevant. Even if he had established that there had been an agreement between himself and the owner that will in no way exempt him from the penalty imposed under s. 131 or under s. 150. The Municipal Act is particularly careful to render all such enquiries unnecessary and it is obviously impossible to carry on any sort of Municipal Administration if it were open to the actual occupier of the premises to say that not he but his landlord was the person who is reponsible for the nuisance. If the occupier is not inclined to do anything his remedy is clear that is to leave the premises. He cannot be allowed to say that although the Municipality has declared the land in a noxious condition still he is entitled to go on keeping it in a noxious conditin until the Municipality has traced the owner of the land and until all disputes pending between the owner and the occupier have been decided. Therefore, it is useless for the occupier to plead in Court that not he but some one else is responsible under s. 131. Therefore, it seems to us that the defence of Haji Umer is not a valid defence in law. Whether or not Fazul Ellahie ought to have been punished also or whether it is possible to compel Fazul Ellahie by appropriate means to drain this plot of land, we are not prepared to say, because, that is an investigation which the Magistrates were by no means, bound to enter into. All that we should find under s. 131 is whether due notice has been given to the present accused as the occupier and whether he had complied with it. As it is proved that that latter condition does not exist, he was right ly convicted.

We, therefore, dismiss this application.

Z. K.

Application dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 330 OF 1924.
(CRIMINAL REVISION PETITION No. 275 OF 1924).

December 10, 1924.

Present:—Mr. Justice Srinivasa Iyengar.

THEETHARAPPA PILLAI—COUNTER-PETITIONER—PETITIONER

versus

MEENAKSHI AMMAL—PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488 (3) — Maintenance order—Application for execution—Objection, whether can be considered—"Sufficient cause," meaning of.

The language of cl. (3) of s. 488 of the Cr. P. C. contemplates a person, against whom an order for maintenance has been made, coming into Court when execution of the order is applied for and showing cause why the order should not be executed. The Court is then bound to consider the sufficiency of the cause alleged by him and to refuse execution of the order if it is satisfied that the cause is sufficient and to grant execution if it is not so satisfied. [p. 106, col. 1.]

The Legislature has deliberately used the expression "sufficient cause" in cl. (3) of s. 488 of the Cr. P. C., intending that the Magistrate before whom the matter comes up should be in a position to use his judicial discretion having regard to all the circumstances and that such judicial discretion should not be fettered or limited by any definite rules. The expression is wide enough to include all possible considerations that may be submitted to the Magistrate in such circumstances. [*ibid.*]

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Tuticorin, in M. C. No. 3 of 1924.

Mr. *K. P. Ramakrishna Iyer*, for the Petitioner.

Mr. *S. Ramaswami Iyer*, for the Respondent.

ORDER.—The order of the Sub-Divisional Magistrate of Tuticorin dated 23rd March 1924 directing the execution of the order for maintenance was clearly wrong and should be set aside. The counter-petitioner before the Magistrate who is the petitioner before me filed a counter-petition presumably under sub-cl. 3 to s. 488 of the Cr. P. C. setting out certain grounds on which he contended that the order should not be executed. The words in sub-cl. 3 of the section as now amended are "If any person so ordered fails *without sufficient cause* to comply with the order, etc." These words clearly contemplate a counter-petitioner in such circumstances coming into Court when execution of the order is applied for and showing cause why it

should not be executed. The Court is then bound to consider the sufficiency of the cause alleged by the counter-petitioner and to refuse the execution if the Court should be satisfied that the cause is sufficient and to grant execution if the Court is not satisfied with the cause alleged. It is contended by the learned Vakil for the respondent that having regard to the terms of sub-cl. (5) to s. 488 of the Cr. P. C. it is not open to any counter-petitioner who has not had the order against him set aside under that sub-clause to come under sub-cl. (3) and seek to show any sufficient cause against the execution of the order. But it seems to me that such a construction would involve the Court not giving effect to the clear words contained in sub-cl. (3), namely, "failing without sufficient cause." I am, therefore, clearly of opinion that the Sub-Divisional Magistrate erred in summarily ordering execution without considering the grounds set out in the counter-petition. I do not want to prejudice either party by any expression of opinion with regard to what would or would not constitute sufficient grounds within the meaning of sub-cl. (3) of the section. The Legislature has deliberately used the expression "sufficient cause" obviously intending that the Magistrate before whom the matter comes up should be in a position to use his judicial discretion having regard to all the circumstances and that such judicial discretion should not be fettered or limited by any definite rules. The learned Vakil for the respondent submitted that if after an order under the section had been made and when execution of the order is sought by the petitioner, the counter-petitioner would not be entitled to come to the Magistrate and say that he was then willing to take back the petitioner and maintain her and contend that that would be sufficient cause within the meaning of sub-cl. (3). But as I have already observed whether in the circumstances of the particular case such a contention would or would not be sufficient cause must be determined judicially by the Magistrate himself. If, for instance, the original order had been made on the ground of the refusal of the counter-petitioner to maintain the petitioner, then the offer of the counter-petitioner to maintain the petitioner may be sfficient cause; but if the original order for maintenance had been made in spite of the offer of the counter-petitioner to maintain her then obviously the mere offer of the counter-petitioner to maintain her would not in the circumstances be a sufficient cause. I have referred to these matters only by way of illusrtation. The expression "sufficient cause" is wide enough to include all possible considerations that may be submitted to the Magistrate in such circumstances.

I, therefore, set aside the order of the Sub-Divisional Magistrate directing the execution of the order and I direct that the application for execution and the counter-petition be taken on the file and be heard and disposed of by the Magistrate in the light of the observations I have made.

V. N. V.

Z. K. *Order set aside.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 699 OF 1924.

January 20, 1925.

Present:—Justice Sir Jwala Prasad, KT.

MOHAMMAD NASIRUDDIN—

ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342—Examination of accused, mode of—Penal Code (Act XLV of 1860), s. 456—House breaking—Trespass with intention to force illicit intrigue on woman—Offence.

It is impossible to lay down any hard and fast rule as to the nature of the examination of an accused person under s. 342 of the Cr. P. C. It is not necessary, nor is it desirable, to examine the accused in great deal or to force him to disclose his defence so as to enable the prosecution to take advantage of it when the witnesses for the accused are examined. [p. 108, col. 2; p. 109, col. 1.]

Where the act with which the accused is charged is of a simple nature and the accused is examined before the charge is framed, and, after the charge has been framed and prosecution witnesses have been further cross-examined, he is asked whether he has any further statement to make and he replies in the negative, it cannot be said that the requirements of s. 342 of the Cr. P. C. have not been complied with. [p. 108, cols. 1 & 2.]

Accused broke the lock of a room in which certain women of the family of the complainant were sleeping and introduced his head into the room. The object of the accused was found to be to force an intrigue upon one of the women sleeping in the room:

Held, that the accused was guilty of an offence under s. 456 of the Penal Code. [p. 109, col. 1.]

(Case-law referred to.)

Criminal revision from an order of the Sessions Judge, Manbhum, dated the 21st

November 1924, upholding that of the Sub-Divisional Magistrate, Sambalpur, dated the 29th September 1924.

Messrs. *C. M. Agarwala* and *M. N. Pal*, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The petitioner has been convicted under s. 456, Indian Penal Code, and sentenced to two months' rigorous imprisonment. The conviction has been upheld by the Sessions Judge of Manbhum.

The petitioner is a Ticket Collector at Jharsuguda Railway Station and takes his food in the kitchen of the Refreshment Room. Rammurti, a Madrasi gentleman, has recently gone to Jharsuguda as a Refreshment Room Clerk. He occupies a quarter in the Railway godown consisting of a room the door of which opens on to the closed lattice work verandah which itself has a door. Rammurti's household consists of his mother, a woman of about 50 years, and his nieces aged about 19 and 14, of whom the former is a widow and the latter a married woman. On the night of the occurrence the ladies slept in the house and Rammurti on the verandah of the Railway Mail Service Office just in front of his quarter and opposite to it. He locked the door of the verandah on the outside and kept the key with himself. About 1-30 A. M. on the night of the 13th July the mother of the complainant, Rammurti, called the elder Sundaramma, being aroused by the cackling of the fowls in the kitchen of the Refreshment Room, heard stones thrown against the door of the room in which the ladies slept. Shortly, afterwards she saw a man thrust his head within the door of the room and throw small stones at her grand-daughters. The junior Sundaramma woke up, nudged her grandmother and both of them recognized the petitioner and cried out to Rammurti. Rammurti ran up to the verandah and recognized the petitioner running away. The door of the verandah was found open and stones and cinders were found here and there in the room and some on the bed of the younger woman. Rammurti forthwith went to the Assistant Station Master on duty who went with the Yard-Foreman and a Constable to the complainant's quarters, found the brass lock with which Rammurti had closed the door of the verandah lying broken on the ground outside and the state of the apartments as described above. An information was lodged by Rammurti to the Police next morning, and after investigation the accused was sent up.

The Courts below have found the prosecution story as stated above to be true and established by evidence in the case.

Mr. Agarwala on behalf of the petitioner takes an exception to the validity of the trial upon the ground that the Magistrate failed to comply with the provisions of s. 342, Cr. P. C. It is not denied that the accused was, as a matter of fact, examined by the Magistrate on the 25th August 1924 after the close of the prosecution case and before he was called upon to enter into his defence. The objection is as to the manner of the examination of the accused by the Magistrate. The accused was first examined on the 7th August 1924. On the 25th August he was examined under the latter portion of s. 342 of the Code. The question put to him by the Magistrate was as follows:—"You have heard the further evidence given by the prosecution witnesses in your presence to-day. Have you got to say anything else?" The answer of the accused was "No". In his earlier examination he was asked whether he entered the house of Rammurti by breaking the lock of the door and threw stones at his nieces who were sleeping in the room. His answer was "No". Then he was asked why this case was brought against him. He said that the case was brought against him out of grudge and then he detailed this plea by giving facts and circumstances in his statement. It is said that on the 25th August 1924 after the close of the prosecution case and before the accused was called upon to enter into defence the Magistrate ought to have asked the accused questions upon the evidence in the case that showed the participation of the accused in the offence of which he was charged so as to give him an opportunity to explain those circumstances. The contention is that the Magistrate who heard the evidence of the prosecution must have told the accused on what points he considered the evidence against the accused for the purpose of enabling the accused to explain those circumstances. It is true that at that stage it is imperative upon a Magistrate "to question the accused generally on the case" and the object of this examination is to "enable the accused to explain any circumstance appearing in the evidence against him." This provision in the Code has been the subject of

great divergence of opinion. Lately there has been difference of opinion in this Court, *vide*, *Durga Ram* v. *Emperor* (1) and *Banamali Kumar* v. *Emperor* (2). Mr. Justice Kulwant Sahay held that the examination of an accused person under the latter part of s. 342 should be a detailed one and the Magistrate ought to let the accused know as to what are the circumstances indicated in the evidence against him for obtaining if possible an explanation of the accused and that the putting of a simple question as to whether the accused had anything to say is not a sufficient compliance with the provisions of the law. Mr. Justice Foster took a contrary view. The matter has recently been dealt with by the Calcutta High Court in the case of *Emperor* v. *Alimaddin Naskar* (3). Newbould, J. held that "a formal question in general terms which gives the accused an opportunity of making a statement of his defence with his own lips is a sufficient compliance with the mandatory provisions of s. 342 of the Cr. P. C., since it enables the accused to explain any circumstance appearing in the evidence against him. To what extent the Court when complying with the mandatory provisions of the section should also exercise its discretionary powers under the other provisions of the section is a different question. The exercise of this discretion must vary with and depend on the circumstances of each particular case but in the majority of cases it is neither necessary nor desirable that there should be any detailed questioning of the accused." Mukerji, J., held that "in questioning the accused under s. 342, Cr. P. C., the Court must point out to the accused the salient points appearing in the evidence against him in a succinct form and he must be asked to explain them if he wishes to do so. If on a general question as to whether he wishes to say anything being put the accused answers in the negative it will be no use asking him any further questions."

I would invite attention to the difference in the wording of the first and the second portion of s. 342, the former being discretionary and the latter mandatory. As the prosecution case goes on the first portion gives power to the Court to put any question to the accused that he thinks necessary in order to obtain an explanation of any circumstance appearing in the evidence against the accused. The provision says that the Court may "put such questions to him (accused) as the Court considers necessary." After the close of the prosecution case the mandatory portion of the section requires the Magistrate to "question him (the accused) generally on the case," the object being the same as in the case of an examination under the first portion of the section, namely, to enable the accused to explain any circumstance appearing in the evidence against him. It depends upon the circumstance of each case what must be the nature of the question put by the Court; but it would be a sufficient compliance with the provision of the Code if the Court gives to the accused an opportunity by questioning him generally on the case to explain the circumstances appearing in the case against him. In this connection the examination of the accused, if any, under the first portion of the section, may usefully be looked into. In the present case the accused was in his earlier examination told the case against him as disclosed in the evidence of the prosecution and that case was that on the night of the 13th July 1924 he entered into the house of Rammurti by breaking the lock attached to the door and threw stones at his nieces who were sleeping in the room. On the 7th of August he was asked whether he committed the act or not, and he denied it. He was then asked as to why the case was brought against him and he gave his reasons for it. After this four prosecution witnesses were cross-examined and discharged, and then the accused was asked whether upon hearing the evidence given that day he had anything to say. The witnesses for the prosecution, as observed above, were cross-examined on behalf of the accused, and thus he was fully aware that he had to explain the circumstances brought out by the prosecution evidence against him. The Magistrate then gave him an opportunity, by putting questions generally upon the case under the latter portion of s. 342, to explain these circumstances against him and to disclose his own defence. His answer was in the negative. In the circumstances of the present case I do not think the provision in the latter portion of s. 342 was not complied with. It is not necessary nor is it desirable to examine the

(1) 86 Ind. Cas. 156; 6 P. L. T 33; (1925) A. I. R. (Pat.) 342; 26 Cr. L. J. 716.
(2) 86 Ind. Cas. 58; 6 P. L. T. 39; 3 Pat. L. R. 25 Cr.; (1925) A. I. R. (Pat.) 389; 26 Cr. L. J. 682.
(3) 85 Ind. Cas. 919; 29 C. W N. 231; 41 C. L. J. 101; (1925) A. I. R. (C.) 361; 26 Cr. L. J 631.

accused in great detail or to force him to disclose his defence so as to enable the prosecution to take advantage of it when the witnesses for the accused are examined. It is impossible to lay down any hard and fast rule as to the nature of the examination of an accused under s. 342 of the Code. I, therefore, overrule the contention of the learned Counsel that the trial was vitiated by not properly complying with the requirements of s. 342 of the Code.

The next contention is that the conviction under s. 456, Indian Penal Code, is bad, inasmuch as the intention of the accused has not been found to be to commit any offence or to intimidate, insult or annoy any person in possession of the house in question. Reference has been made to the case of *Ambika Charan Sarkar* v. *Emperor* (4). In that case the finding was that the intention of the accused in entering the house of the complainant was to carry on an intrigue with the complainant's widowed sister-in-law. It was held that the entry is not an offence, nor was the intention to cause any annoyance to the occupants of the house rather it was to secretly carry on an intrigue without the knowledge of the persons in the house. The conviction was set aside. The case of *Balmukand Ram* v. *Ghansamram* (5) was distinguished in that case upon the ground that the intention of the accused in that case was to commit adultery with the wife of the complainant which in itself was an offence punishable under the Code. In the case of *Queen-Empress* v. *Rayapadayachi* (6), the finding was that the accused entered the house to have sexual intercourse with the complainant's unmarried sister and it was held that the accused could not be convicted under s. 456, Indian Penal Code. This case was followed in the Full Bench case of *Vullapa* v. *Bheema Row* (7), where it was held that an offence under s. 441, Indian Penal Code, is committed only when the trespass is with one of the intents specified in that section and the proof that the trespass committed with some other object was known to the accused to be likely or was certain to cause insult, or annoyance, is insufficient to sustain a conviction under s. 448, Indian Penal Code. Undoubtedly in order to constitute criminal trespass under s. 441, Indian Penal Code, the entry into the house or property in the possession of another must be with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, and in order to sustain a conviction under s. 456 it must be proved that there was in the first instance criminal trespass as defined in s. 441, Indian Penal Code. Thus, a mere entry into a house occupied by another with intent to carry on an intrigue or to have sexual intercourse with a woman living in that house will not in itself be a criminal trespass. In such a case it is supposed that the entry has been with the consent or connivance of the woman living in the house. However, if she along with other inmates is in possession of the house as in the case of a joint Hindu family, the trespass in the house must cause an insult and annoyance to the other members in the house. If the object is to force an intrigue upon a woman in the house and to have a forcible intercourse with her, the intention of the entry will necessarily be to insult and annoy that woman. In the present case the finding of the Court below is that there was no pre-arrangement between the accused and the junior Sunderamma, or for the matter of that with any other lady in the house. The case stated in the judgments of the Courts below, on the other hand, goes to show that all the ladies in the house, the grand-mother, the widowed Sunderamma and the unmarried girl Rajjo were startled at the bold attempt on the part of the accused to force himself into the house and to throw pebbles at them. The junior Sunderamma is stated to have, when she suddenly woke up at hearing the noise, nudged her grand-mother. Therefore, in the present case the intention was not to carry on a peaceful intrigue and intercourse with any of the ladies in the house and with the consent or convenience of any of them but the intention of the accused was to commit a criminal trespass into the house and an indecent and unjustifiable trespass upon the person of the occupants of the house. The concurrent finding of the Courts below in the present case makes the authorities cited by the learned Counsel on behalf of the petitioner inapplicable to the present case. This contention must, therefore, also be held to be untenable.

(4) 4 C. L. J. 169; 4 Cr. L. J. 144.
(5) 22 C. 391; 11 Ind. Dec. (N. S.) 262.
(6) 19 M. 240; 1 Weir 537; 9 Ind. Dec. (N. S.) 872.
(7) 43 Ind. Cas. 578; 41 M. 156; 6 L. W. 794; 33 M. L. J. 729; (1918) M. W. N. 81; 19 Cr. L. J. 162.

The last submission of Mr. Agarwala is that the punishment in this case is excessive and that it should be reduced. The view taken by the Court below is that the punishment in this case is leniwent and that the Magistrate has erred on the side of leniency. I do not think the accused has any grievance on account of the severity of the sentence. The act committed by him is most reprehensive. Rammurti happened to come to Jharsuguda only recently with several ladies of his family. The outrage attempted upon his household is a heinous offence, and the punishment in the present case is far from being severe.

The application is refused.

Z. K. *Application refused.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 113 OF 1924.

August 26, 1924.

Present:—Mr. Kennedy, J. C., and Mr. Aston, A. J. C.

ALI SHER—APPLICANT

versus

MIR MAHOMED AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 256 (2), 344—"Remaining witnesses," meaning of—"Remaining witnesses" not in attendance—Complainant's right to claim postponement—"Reasonable cause" for demand—Postponement discretionary.

The witnesses whom prosecutor may wish to examine, after the cross-examination and re-examination of prosecution witnesses already examined, are "remaining witnesses" within the meaning of s. 256 (1), Cr. P. C.

If the "remaining witnesses" are not in attendance the complainant has no right to insist on a postponement for their examination.

Even when there is a "reasonable cause," it is discretionary with the Court to postpone or adjourn a case. Therefore, a Magistrate is within his discretion if (being of the opinion that the complainant is unnecessarily wasting time and protracting proceedings) he refuses to postpone a case for the examination of "remaining witnesses."

Application under ss. 435 and 439, Cr. P. C., for revision of an order, dated the 8th March 1924, of the Special First Class Magistrate, Ratodero.

Mr. *P. S. Shahani*, for the Applicant.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—This is an application under ss. 435 and 439 of the Cr. P. C. against the order of the learned Special First Class Magistrate, Ratodero refusing to examine seven more witnesses for the prosecution in a case of bigamy filed by the applicant against opponents before the accused were called upon to enter on their defence.

It appears that the learned Magistrate held an enquiry and committed the accused to the Sessions on a charge of bigamy. Owing to the amendment of the Cr. P. C., the offence of bigmay ceased to be exclusively triable by the Court of Sessions and this Court sent the case back to the Trying Magistrate for disposal. The prosecution witnesses, who had been examined and cross-examined, were then re-called and cross-examined again. The complainant then asked that the evidence of seven prosecution witnesses might be taken.

Mr. Shahani, who appears for the applicant, admits that at the time he made his application, the witnesses were not present but he states that cases are decided in the Magistrate's Courts piece-meal—one or two witnesses being examined and cross-examined at a hearing and then a postponement being granted in order that other cases may be tried. He contends that under s. 256 of the Cr. P. C. the witnesses whom they wished to examine were "remaining witnesses" and that the learned Magistrate was bound to give him an opportunity of examining them. It may here be mentioned that some of the witnesses had, as a matter of fact, been summoned but had not attended. With regard to others an application for witness summonses had been granted.

The learned Special First Class Magistrate in rejecting the application expressed the opinion that the witnesses sought to be examined were not "remaining witnesses" within the meaning of s. 256, Cr. P. C., and stated that if the complainant wanted these witnesses he could have acquainted the Court that they might be called before commitment. He also draws attention to the fact that the Court ordered that three of these witnesses should be summoned after process-fee was paid. This order was passed on 15th of April 1923 and no process-fee was paid for three months. The learned Magistrate was of the opinion that the prosecution wished to prolong the case unnecessarily.

We are of opinion that the learned Magistrate in so far as he expressed the view that the witnesses who were required at that stage could not be regarded as "remaining witnesses" was in error. But it seems to us as these witnesses were not in attendance the complainant had no right to insist on the examination of persons for whose evidence a postponement would have been necessary. In our opinion the circumstances were entirely governed by s. 344 of the Cr. P. C. In the Explanation to that section, it is clear that the fact that the witnesses could give further evidence implicating the accused was a reasonable cause for a remand, but a reasonable cause for remand is not in itself sufficient to satisfy the requirements of s. 344. Even where there is a reasonable cause for remand the section provides that the Court may if it thinks fit by order in writing stating the reasons therefor from time to time postpone or adjourn a case. The view of the learned Magistrate was that the complainant desired to waste time unnecessarily and protract the proceedings. That being so, we are of the opinion that he was fully within his discretion in refusing to pass orders for the attendance an examination of witnesses who were not present.

We, therefore, dismiss this application.

S. D. *Application dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 39 OF 1924.

May 13, 1924.

Present:—Mr. Kendall, A. J. C.

KARHLEY—APPLICANT

versus

Pandit JAGANNATH PARSHAD—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 436—Discharge of accused—Further enquiry, when to be directed—Revision.

A District Magistrate or a Sessions Judge has power to order a further enquiry under s. 436 of the Cr. P. C., even when the Magistrate has recorded all the evidence for the prosecution. [p. 112, col. 1.]

Where a Sessions Judge after going carefully through the evidence comes to the conclusion that the finding of the Magistrate is either perverse or manifestly at variance with the evidence which he had recorded, and makes an order for further enquiry under s. 436 of the Cr. P. C., the order directing a further enquiry is not illegal, improper, and incorrect and cannot be interfered with in revision. [*ibid.*]

Case-law referred to.

Application for the revision of an order of the Sessions Judge, Hardoi, dated the 2nd February 1924, reversing that of the District Magistrate, First Class, Hardoi, dated the 22nd December 1923.

Messrs. *Hakim-ud-din* and *Nazir-ud-din*, for the Applicant.

Mr. *Hyder Husein*, for the Opposite Party.

ORDER.—This is an application under ss. 435 and 439 of the Cr. P. C. against an order passed by the learned Sessions Judge of Hardoi under s. 436, Cr. P. C. directing a further enquiry in a case in which Lala Babu Prasad a Magistrate of the First Class, had discharged a person accused of an offence under s. 408, Indian Penal Code.

The case was instituted in the Magistrate's Court by the proprietor of a village against his *zilledar*. The Magistrate recorded the statements of a number of witnesses, but decided that the prosecution had not been able to make out a case against the accused, which if unrebutted would warrant his conviction. The Sessions Judge went into the evidence in some detail, and concluded that the Magistrate had not given good and sufficient reasons for the discharge of the accused and, therefore, ordered a further enquiry. I am now asked to upset that order on the ground that the Magistrate had recorded all the evidence for the prosecution, that he had come to a finding that was neither perverse, foolish, nor based on incomplete evidence and that the mere fact that the Sessions Judge places a different value on that evidence was not a good ground for directing a further enquiry.

Several decisions have been referred to, both in support of the application and against it. Among the former, reliance has been placed on *Emperor* v. *Udai Raj Singh* (1) where a single Judge of the High Court held that s. 437, Cr. P. C. should not be used for the purpose of having a review of proceedings merely because the District Magistrate happened to take a different view of the evidence which was before the Trying Magistrate, remarking. "In my opinion the Trying Magistrate was quite entitled to come to the opinion which he did, and merely because another Court does not agree with that opinion, is no reason to direct the so-called further enquiry." On the other hand, several Bench rulings of different High Courts have been referred to to show that a Revising Court has very wide powers under s. 436, Cr. P. C., (which used to be s. 437 before the amendment of

(1) 71 Ind. Cas. 528; 44 A. 691; (1922) A. J. R. (A.) 429; 24 Cr. L. J. 176.

1923) *Queen Empress* v. *Chotu* (2), *In the matter of Hari Dass Sanyal* (3), *Queen Empress* v. *Balasinnatambi* (4), *Venkatta Subba Reddi* v. *Ayyalu Reddi* (5) and *Mangat Rai* v. *Emperor* (6). For the most part it may be said that these rulings do not go further than to show that the Revising Court has power to order a further enquiry, even when the Subordinate Magistrate has recorded all the evidence for the prosecution. In the present case I am not able to say that the Magistrate's enquiry was cursory or that he passed his order on insufficient materials. I am not even convinced that, if an application against his order had been filed in my Court, when I was sitting as a Sessions Judge, I should have felt compelled to pass an order for further enquiry under s. 436, Cr. P. C. The proceedings, however, have now advanced to a further stage, and I have to consider whether the Sessions Judge's order is any way illegal, incorrect or improper. It is evident that the Sessions Judge after going carefully through the evidence came to the conclusion that the finding of the Magistrate was either perverse, or in all probability wrong or manifestly at variance with the evidence which he had recorded. As this was his considered opinion, I am certainly not prepared to hold that his order directing a further enquiry was illegal, improper or incorrect. I, therefore, dismiss the application.

Z. K. *Application dismissed.*

(2) 9 A. 52; A. W. N. (1886) 281; 5 Ind. Cas. (N. S.) 465.

(3) 15 C. 608; 13 Ind. Dec. Jur. 55; 7 Ind. Dec. (N. S.) 989.

(4) 14 M. 334, 1 M. L. J. 343; 2 Weir. 557, 5 Ind. Dec. (N. S.) 234.

(5) 3 Ind. Cas. 488; 32 M. 214; 5 M. L. J. 356; 10 Cr. L. J. 299.

(6) 27 Ind. Cas. 203; 13 A. L. J. 111; 16 Cr. L. J. 139.

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS APPLICATION No. 243 OF 1924.

December 5, 1924.

Present:—Mr. Justice Daniels.

RAVI CHANDER SAHAI AND OTHERS—APPLICANTS

versus

SUNDAR SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 526, 528—Transfer application—Procedure.

The High Court will not ordinarily entertain an application for a relief which could equally well be granted by a subordinate Court until recourse has first been had to that Court. It will not, therefore, entertain an application for transfer unless the District Magistrate or the Sessions Judge has been moved in the first instance.

Muneshar v. *Raghubir*, 21 Ind. Cas. 155; 11 A. L. J. 741; 14 Cr. L. J. 555, followed.

Where, however, notices have been issued and the matter has been argued the matter may be dealt with on the merits in order to avoid unnecessary repetition.

Criminal miscellaneous application for transfer.

Mr. *Baleshwari Prasad*, for the Applicants.

JUDGMENT.—There is one grave objection to this application, which is for the transfer of a case pending in the Court of the Magistrate First Class of Hamirpur District to the Court of any other Magistrate in that District. It offends against the rule that this Court will not ordinarily entertain an application for a relief which could equally well be granted by a subordinate Court until recourse has first been had to that Court. This rule has been repeatedly laid down with reference to applications for revision and it was laid down with special reference to applications for transfer by the late Sir George Knox at the conclusion of his judgment in *Muneshar* v. *Raghubir* (1). In this case the transfer applied for could be granted by the District Magistrate under s. 528 (2) of the Cr. P. C. Admittedly no application has so far been made to the Magistrate. If this fact had been brought to the notice of the Court at the time when the application was filed I have no doubt that it would have been rejected at the outset.

As notices have now gone and the matter has been argued it is perhaps unnecessary to do now what I should ordinarily do in such a case, namely, to reject the application until such time as the applicant had first applied to the District Magistrate. The reasons given in support of the application are not particularly strong especially in view of the explanation which the Magistrate has submitted, but as only two witnesses have been examined in the case, as the application is not opposed, and as the Magistrate concerned says that he has no objection whatever to the case being transferred, I direct that it be transferred to any other Magistrate to whom the District Magistrate may make it over.

Z. K. *Application granted.*

(1) 21 Ind. Cas. 155; 11 A. L. J. 741; 14 Cr. L. J. 555.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 246 AND 523 OF 1924 AND CIVIL MISCELLANEOUS PETITIONS NOS. 1293 AND 2472 OF 1924.

November 25, 1924.

Present:—Mr. Justice Krishnan.

IN C. R. P. No. 246 OF 1924

AND

IN C. M. P. 1293 OF 1924

C. JANARDHANAN AND ANOTHER—RESPONDENTS NOS. 1 AND 2—PETITIONERS

versus

N. M. VERGHESE AND OTHERS—PETITIONERS—RESPONDENTS NOS. 3 AND 4—RESPONDENTS.

IN C. R. P. No. 523 OF 1924

AND

IN C. M. P. No. 2472 OF 1924

A. J. GABRIEL—RESPONDENT No. 1—PETITIONER

versus

K. B. JOSEPH AND OTHERS—PETITIONERS NOS. 2 AND 3—RESPONDENTS.

Madras District Municipalities Act (V of 1920)—Rules for Conduct of Elections, r. 8 (e)—Electoral roll, correctness of, whether can be questioned by Court holding election enquiry—"Election proceedings," meaning of—"Failure to observe other directions", meaning of—Election petition—Objection that petition does not disclose ground for enquiry, dismissal of—Revision—Civil Procedure Code (Act V of 1908), s. 115.

Under r. 8 (e) of the Rules for the preparation of electoral rolls prepared under the Madras District Municipalities Act, the electoral roll when finally settled must be taken as final for the purposes of election proceedings. The expression "election proceedings" in the rule includes all proceedings relating to an election until it is finally determined who the candidate is who has been properly elected. The expression thus includes an election enquiry and it is not competent to the Court holding such enquiry to question the correctness of the electoral roll. [p. 114, cols. 1 & 2.]

Palanisami Pillai v. *Srinivasarangachariar*, 85 Ind. Cas. 322; 47 M. L. J. 795; 20 L. W. 851; (1925) A. I. R. (M.) 160; (1925) M. W. N. 283, followed.

The expression "failure to observe other directions" in r. 8 (e) is not confined to directions contained in the Rules but includes directions contained in the Madras District Municipalities Act as well. [p. 114, col. 2.]

Where an objection is taken to an election petition on the ground that it does not disclose any ground for enquiry, and the objection is disallowed, the order disallowing the objection is open to revision under s. 115 of the C. P. C., inasmuch as if the order is erroneous the lower Court in holding an enquiry would be exercising a jurisdiction not vested in it. [p. 113, col. 2; p. 114, col. 1.]

IN C. R. P. No. 246 OF 1924.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Subordinate Judge, Cochin, in O. P. No. 2 of 1923.

IN C. M. P. No. 1293 OF 1924.

Petition, praying that the High Court may direct stay of further proceedings, in O. P. No. 2 of 1923 on the file of the Court of the Subordinate Judge, Cochin, pending disposal of the said C. R. P. No. 246 of 1924.

IN C. R. P. No. 523 OF 1924.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Subordinate Judge, Cochin, in O. P. No. 4 of 1923.

IN C. M. P. No. 2472 OF 1924.

Petition praying that the High Court may direct stay of further proceedings, in O. P. No. 4 of 1923, on the file of the Court of the Subordinate Judge, Cochin, pending disposal of the said C. R. P. No. 523 of 1924.

Messrs. *T. M. Krishnaswamy Iyar* and *B. Pocker*, for the Petitioners.

Mr. *T. S. Viswanatha Iyar*, for the Respondents.

JUDGMENT.—These are two applications under s. 115 of the C. P. C. to revise the common order passed by the Subordinate Judge of Cochin on two applications put in by the respondents against the petitioners who were declared to have been elected in two wards in the town of Cochin to have their elections set aside. The petitioners objected before the Subordinate Judge that the petitions filed against them did not disclose any grounds on which an enquiry could be held under r. 11 of the Election Enquiry Rules framed by the Governor-in-Council, Madras and published in the *Fort St. George Gazette* dated the 30th November 1920; and they asked, therefore, that the petitions should be dismissed without any enquiry. The Subordinate Judge, however, pronounced a common order in both cases deciding that the petitions did disclose reasons for going into evidence and for holding an election enquiry. It is against that order that these revision petitions have been filed in this Court.

A preliminary objection has been taken by the learned Vakil for the respondent before me that I should not interfere under s. 115 of the C. P. C., as the order of the Subordinate Judge was an order passed in the course of the election enquiry and that this Court should not interfere with such interlocutory orders. I am not able to support this objection, because it seems to me that if as the learned Vakil for the petitioners argues the election petitions did not disclose any ground for an enquiry,

the Subordinate Judge will be exercising a jurisdiction not vested in him by holding such an enquiry and to hold it will simply lead to waste of time of the Court and of the parties. In such a case it seems to me that it is but right and proper that this Court should decide whether the petitions disclose any grounds for holding an enquiry and, if they do not, this Court should say so at once and stop the enquiry at the very outset. The question then which has to be considered is whether these election petitions filed disclose any ground for an election enquiry. Rule 11 of the Rules already referred to says what the circumstances are under which the election of a candidate can be declared to be void. There are three sub-clauses to the rule (*a*), (*b*) and (*c*); and (*b*) has four sub-divisions. Unless the objections raised in the election petitions can be brought under one or other of these clauses, it is clear that the election petitions should be rejected *in limine*. The only point taken in the petitions in this case is that the candidates who have been declared elected, were wrongly put upon the electoral roll, because they had not paid their taxes and that one of them was not a resident within the Municipality. It is contended that on account of these objections these candidates should not have been put on the electoral roll. With regard to one of the men these objections were taken before the revising authority after the preliminary electoral roll had been published, but that authority overruled the objections and continued his name on the roll. As regards the two others no objections were taken before the revising authority and their names appeared on the roll as those of fit and proper persons to vote and to stand as candidates for election. Rule 8 (*e*) of the Rules for the preparation of the electoral rolls makes it quite clear, as the Subordinate Judge himself has noted, that the electoral roll when finally settled must be taken as final for the purposes of election proceedings. It says, "No failure to observe the dates prescribed in these rules or to observe other directions regarding the preparation of the electoral roll shall entitle any one to question the validity and conclusiveness of the registers in election proceedings". To get rid of the effect of this rule which gives finality to the electoral roll it was argued that the word "proceedings" applied only to proceedings taken for election and that as soon as the election was over and an election enquiry was started, it was no longer an election proceeding; in other words it was contended that "election proceedings" do not include an election enquiry at all. This argument was accepted by the Subordinate Judge. But it seems to me it is clearly erroneous. "Election proceedings" include all proceedings relating to an election until it is finally determined who the candidate is who has been properly elected. They thus include an election enquiry. This is the view that has been taken by this Court in a recent case *Palanisami Pillai* v. *Srinivasarangachariar* (1) and I respectfully agree with it. It seems to me that to hold otherwise will lead to an absurdity, for there is no object whatsoever in making the electoral roll final for the purpose of election if the whole thing can be re-opened by making it possible for a candidate who has been disappointed to put in a petition and get it decided by a Court whether the electoral roll was a proper roll or not. The very object of making the electoral roll final is to avoid the difficulty of a candidate standing for election who can afterwards be objected to as disqualified on convassing for votes from people who might afterwards be declared to be improper voters. For the purposes of an election, a roll has to be settled and after that is settled, it must be taken as settled for all purposes of the election up to the very end, till it is finally declared who the properly elected candidate is.

It was attempted to be argued that r. 8 (*e*) would not apply to a case where a candidate has failed to pay his taxes, because it was said that the rule, which lays down that the name of a person who has not paid taxes shall not be included in the electoral roll, is a provision in the Act itself in s. 46, and that r. 8 (*e*) does not deal with objections based on the provisions of the Act. There is, however, nothing in the wording of r. 8 (*e*) to exclude any such objection. "Failure to observe other directions" mentioned in it, is not confined to directions in the rules but include directions in the Act as well.

It is also urged before me that the allegations in the petitions would come within cl. (2) of r. 11 of the Rules of 30th

(1) 85 Ind. Cas. 322; 47 M. L. J. 795; 20 L. W. 851; (1925) A. I. R. (M.) 160; (1925) M. W. N. 283.

November 1920. That clause says "If in the opinion of the Judge the returned candidate, his agent, or any other person with the connivance of such candidate or agent, has committed or abetted the commission of any one of the offences described in ss. 52 to 58 of the Madras District Municipalities Act, the election of the returned candidate shall be void". I have looked carefully into the allegations in the petition filed by the objectors in these two cases but I can find none thereof any offence having been committed under s. 52 by the candidates or their agents. As regards the allegation that the names of candidates were improperly retained on the rolls even though taxes were not paid, the objection is to the conduct of the revising authority and of the Municipal Chairman. It is not an allegation against the candidate of having committed any offence. It is not even an allegation against the Chairman or the revising authority which would come under s. 52; but even if it did, an allegation against the Chairman or the revising authority would not affect the candidate under r. 11 (*a*). So far as I can see, there is no allegation in the petitions filed by the objectors in the lower Court which requires an enquiry to be held; the petitions should, therefore, have been dismissed.

I allow the revision petitions and dismiss the election petitions with costs in this and the lower Courts.

Vakil's fee Rs. 50 in each petition.

V. N. V. *Petitions allowed.*

Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 95 OF 1924.

February 5, 1925.

Present:—Mr. Baker, J. C.

DHEKAL—PLAINTIFF—APPELLANT

versus

RAGHU AND ANOTHER—DEFENDANTS—RESPONDENTS.

C. P. Tenancy Act (I of 1920), ss. 12, 13, 35—Occupancy holding—Relinquishment by tenant in favour of co-sharer, effect of—Lambardar, *right of, to let out holding—Abandonment, what amounts to—Notice—Publication—Transfer of Property Act (IV of 1882), s. 43, applicability of, in case of doubtful title.*

A relinquishment of his holding by a tenant in favour of a co-sharer for a private debt due to him is a transfer and not a surrender, and is governed by the provisions of s. 12 of the C. P. Tenancy Act. Such a transfer is liable to be set aside by the *lambardar* under s. 13 of the Act, and until steps are taken to have the transfer set aside under that section the *lambardar* has no right to let out the holding to a third person. [p. 116, col. 1.]

Ramdayal v. *Gulabia Bai*, 4 N. L. R. 120, relied on.

When a tenant transfers his occupancy holding and abandons possession of the same he must be taken to have abandoned his holding. But the landlord is not entitled to enter on the holding unless he files a notice in the office of the Tahsildar, under s. 35 of the C. P. Tenancy Act, stating his intention to treat the holding as abandoned and such a notice is duly published under the section. [p. 116, col 2.]

Lal Mamud Mandal v. *Arbullah Sheikh*, 1 C. W. N. 198, *Robert Wilson* v. *Radha Dulari Koer*, 2 C. W. N. 63 and *Samujan Roy* v. *Munshi Mahaton*, 4 C. W. N. 493, referred to.

A lease by a *lambardar* of a holding which is in the actual possession of a tenant, and on which the *lambardar* has no present right to enter, is absolutely illegal and void. [*ibid.*]

Semble.—Section 43 of the Transfer of Property Act cannot operate on a doubtful title.

Appeal against a decree of the District Judge, Bhandara, dated the 12th November 1923, in Civil Appeal No. 51 of 1923.

Mr. *D. T. Mangalmurti*, for the Appellant.

Mr. *S. B. Gokhale*, for the Respondents.

JUDGMENT.—The facts of this case are that the plaintiff got a lease of the land in dispute from defendant No. 2, the *lambardar*, in February 1920. The land at that time was in possession of *Musammat* Harku as tenant, but in June 1920 she transferred it to defendant No. 1 who is a co-sharer in the village. Plaintiff sued for possession of the land, but his suit has been dismissed by both the Courts below. Plaintiff makes this second appeal.

It is admitted that the transfer to a co-sharer may not amount to a surrender, but it is contended that the tenant having abandoned the land the defendant No. 2 got the right to dispose of it as *lambardar*, and this right is affected under s. 43 of the Transfer of Property Act by the lease already granted to plaintiff by the *lambardar*.

The question, therefore, in this appeal is whether on a tenant transferring his right to a co-sharer the *lambardar* gets the right to deal with the land as he likes.

It has been observed by the lower Appellate Court that the plaintiff's case originally was that the original tenant died without heirs and the land lapsed to the proprietary body and was let to

plaintiff by the *lambardar*. He entirely ignored the existence of *Musammat* Harku, the heir of the original tenant Sego. When her existence was pleaded by defendant No. 1, the plaintiff alleged she had surrendered the land to the *lambardar*, a point which has been found against him by the Courts below.

Under the ruling in *Ramdayal* v. *Gulabia Bai* (1) the relinquishment by Harku in favour of defendant No. 1, a co-sharer, for a private debt due to him, is a transfer and not a surrender. The point whether on this transfer being made the *lambardar* had authority to deal with the land as if it had been surrendered to him, is one which has not as yet been the subject of any decision.

The transaction between defendant No. 1 and Harku not being a surrender is governed by s. 12 of the Tenancy Act, and is against those provisions, and is liable to be set aside by the *lambardar* under s. 13 of the Act. But it seems to me that there would be no object in requiring the intervention of a Revenue Officer under s. 13 if the landlord were at liberty to ignore the transfer without taking the steps required by that section. That section also contemplates the avoidance of the illegal transfer by the tenant's heirs.

I am, therefore, of opinion that the *lambardar* in face of the provisions of s. 13 of the Tenancy Act cannot simply ignore the transfer. Therefore as there was no surrender and no steps have been taken under s. 13 of the Tenancy Act to set aside the transfer, the landlord has no right under either of those provisions to let the land.

Next it is contended that the transfer should be regarded as equivalent to abandonment and that the case should be remanded for the purpose of a finding whether *Musammat* Harku had abandoned the land or not. This is not a plea taken in the Courts below and there is no issue on it.

It is contended on behalf of respondents that under s. 35 of the Tenancy Act it must be shown that not only has the tenant ceased to cultivate the holding but that she has allowed one year's rent to fall into arrears, and has left the village. It is admitted that defendant No. 1 is in possession of the land and it has been held by the Calcutta High Court in several cases [*Lal Mamud Mandal* v. *Arbullah Sheikh* (2), *Robert Wilson* v. *Radha Dulari Koer* (3) and *Samujan Roy* v. *Munshi Mahaton* (4)], that when the tenant transfers his occupancy holding and abandons the possession of the same he must be taken to have abandoned his holding.

Assuming the tenant *Musammat* Harku to have abandoned her holding, under s. 35 of the Tenancy Act the landlord is required at any time after the end of the agricultural year to file a notice in the office of the Tahsildar stating his intention to treat such holding as abandoned and after the publication the landlord shall be entitled to enter on the holding.

Nothing has been done here and, therefore, the landlord has no right to enter on or let the holding.

We are not now dealing with the respective rights of defendant No. 1 and defendant No. 2, the co-sharer who has taken the transfer, and the *lambardar*. That question is elaborately discussed in *Ramdayal* v. *Gulabia Bai* (1).

I do not think that the landlord can completely ignore the provisions of the Tenancy Law as has been done in the present case. At the time of the lease in February 1920 the tenant *Musammat* Harku was actually on the land and the lease was absolutely illegal and void.

After *Musammat* Harku's transfer to defendant No. 1 the defendant No. 2 did not adopt any of the courses laid down in the Tenancy Act. The question of his title to lease the land is extremely doubtful and I am of opinion that plaintiff cannot claim to eject defendant No. 1 on the strength of s. 43 of the Transfer of Property Act, operating on an extremely doubtful title.

The appeal will consequently be dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 4 N. L. R. 120.
(2) 1 C. W. N. 198.
(3) 2 C. W. N. 63.
(4) 1 C. W. N. 493.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 241 OF 1921
AND
CIVIL REVISION PETITION No. 482
OF 1921.
September 12, 1924.

Present:—Justice Sir Kumaraswami Sastri, KT., and Mr. Justice Waller.

RAMAPPA NAYUDU—APPELLANT IN A. A. O. No. 241 OF 1921 AND PETITIONER IN C. R. P. No. 482 OF 1921

versus

SAMBOORANATHACHI AND OTHERS —RESPONDENTS IN BOTH.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 9—Minor—Appeal filed by minor through next friend dismissed for default—Negligence of next friend—Minor, whether entitled to re-hearing.

An appeal filed on behalf of a minor was dismissed for default of appearance and thereupon another relative of the minor made an application to the Court for removing the next friend of the minor, for appointment of himself as next friend and for an order directing that the appeal should be re-heard. The Appellate Court dismissed the application without taking any evidence. In the meantime the minor had attained majority and adopted the proceedings taken on his behalf by the relative who had made the application:

Held, (1) that the minor having become a major it was no longer necessary to remove the next friend as the latter had ceased to be such by the mere efflux of time; [p. 117, col. 2.]

(2) that the lower Court should have taken evidence as to whether the next friend of the minor had been guilty of gross negligence in allowing the appeal to be dismissed in default and if such negligence was established the minor was entitled to re-hearing of the appeal. [*ibid.*]

Appeal against, and Petition to revise; the orders of the Court of the Third Additional Subordinate Judge, Tanjore, at Mayavaram, dated the 6th January 1921, in I. A. Nos. 324 and 323 of 1920, respectively, in A. S. No. 153 of 1919 (A. S. No. 574 of 1919, on the file of the District Court, Tanjore).

[Appeal against Order and the Civil Revision Petition, came on for hearing on the 13th of November 1923 before Krishnan and Waller, JJ.]

Mr. *T. V. Muthukrishna Aiyar*, for the Appellant.

Mr. *K. Krishnaswamy Iyangar*, for the Respendents.

JUDGMENT.—The Civil Miscellaneous Appeal and Civil Revision Petition arise from the dismissal by the lower Appellate Court of Appeal No. 153 of 1919 for default of appearance of the guardian of the first appellant, who was then a minor but has now become a major. An application was made soon after the dismissal for default by the paternal uncle of the minor for the removal of the guardian on the ground of fraud and negligence for appointing him as a new next friend and for setting aside the order of dismissal and re-hearing the appeal on the ground that the guardian on record had acted with gross negligence in getting the appeal dismissed for default. It was alleged that the guardian had so allowed the appeal to go by default because there were criminal proceedings between him and the minor and civil litigation between him and the minor's grandmother with reference to the minor's estate.

The learned Judge, in disposing of the matter on affidavits, held that there was no sufficient ground for removing the guardian, but he did not in doing so refer to the main allegation of enmity between the guardian and the minor; and after having refused to remove the guardian he dismissed the application for restoring and re-hearing the appeal on the ground that the person who applied for it, the paternal uncle, not having been accepted as the next friend of the minor, had no *locus standi* to apply on behalf of the minor. The minor has now become a major pending the proceedings in this Court and he has adopted the petition filed by his paternal uncle as his own and has proceeded before us on that footing.

The main complaint that is urged is that the Court should have taken evidence and decided whether the guardian was not negligent in his duty in allowing the appeal to go by default. The minor having become a major, it is no longer necessary to remove any guardian as the guardian has ceased to be such by the mere efflux of time. We have only, therefore, to consider the question whether he should allow the appellant to adduce evidence to show that his guardian was negligent in his duty and did not conduct the appeal properly before the lower Court and that, therefore, this appeal should be restored to the file and re-heard with himself as the appellant. We think there is substance in this appellant's contention that evidence should have been taken as the respondent does not admit that there has been enmity between the guardian and the minor That is a matter which can be decided only after taking evidence. We, therefore, decide to call for a finding from the Subordinate Judge of Tiruvalur on the following issue: "Whether the guardian

acted with gross negligence in allowing Appeal No. 158 of 1919 on the file of the Third Additional Subordinate Judge's Court of Tanjore at Mayavaram to be dismissed for default by that Court." Evidence will be allowed on both sides and the finding will be returned in two months from this date and ten days will be allowed for objections.

[In compliance with the order contained in the above judgment, the Subordinate Judge of Tiruvalur submitted a finding to the effect that he was satisfied that the father wantonly allowed the appeal to be dismissed for default of prosecution so as to amount to a fraudulent conduct and not mere gross negligence.]

This Appeal against Order and the Civil Revision Petition coming on for final hearing after the return of the finding of the lower Court upon the issue referred by this Court for trial the Court delivered the following

JUDGMENT.—We accept the findings to which no objections have been filed.

We reverse the order of the lower Court and direct that the appeal be restored and disposed of according to law.

Costs to abide and follow the result.

V. N. V. *Order set aside.*

Z. K.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 178 OF 1923.

December 10, 1924.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

Thakur ANRUDH SINGH—PETITIONER—APPELLANT

versus

Musammat RUPA KUNWAR AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 9—Dismissal for default—Restoration, application for—Sufficient cause—Duty of Court.

It is the business of the Courts to decide the rights of the parties and not to deprive them of their rights by the mere exercise of discipline, but to use their discipline for the purpose of visiting neglect upon them and removing the results of such neglect.

Where a suit was dismissed for default and on an application for restoration it appeared that the plaintiff had started with his witnesses in time to catch the last train which would bring him to the Court before the suit was called on, but had missed that train and was thus prevented from arriving in Court till after the suit had been dismissed :

Held, that the plaintiff was entitled to have the suit restored as there was sufficient cause for his failure to appear at the time when the suit was called on for hearing.

First appeal from an order of the Second Subordinate Judge, Cawnpore, dated the 15th September 1923.

Dr. *K. N. Katju*, for the Appellant.

Mr. *S. P. Sinha*, for the Respondents.

JUDGMENT.—In this case we are satisfied that the appellant is entitled to another chance. It is the business of the Courts to decide the rights of the parties and not to deprive them of their rights by the mere exercise of discipline, but to use their discipline for the purpose of visiting neglect upon them and removing the results of such neglect. The learned Judge rightly says that at times parties will stay away when they are not ready and then come back with a cock and bull story to apply for restoration, in other words that they are acting *mala fides*. He has not been able to find that that was so. In this case he only finds that the plaintiff was negligent in starting for the last train and missing it. Negligence of that kind is human and not irreparable. It can be repaired by paying the costs of the other side and restoring the parties to their original position. We are satisfied in this case by really overwhelming evidence, namely, that the claim was Rs. 20,000, that the plaintiff did start with his witnesses, and that he did in fact take the train and apply that day to have his case restored, on the ground, that he had been prevented by having missed the earlier train. We, therefore, reverse the order and direct the lower Court to restore the case to its pending file for re-hearing on the condition that the plaintiff pays into Court within a month a sum of Rs. 100 as security for all costs borne by the defendant in the lower Court with fees in this Court on the higher scale. The money must be paid before the case is heard.

Z. K. *Order reversed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 493 OF 1923.

September 23, 1924.

Present:—Mr. Justice Jackson.

SOLAIMALAI THEVAN—PETITIONER—APPELLANT

versus

SINNATHAMBI PADAYACHI—DEFENDANT—RESPONDENT.

Tariff Act (VIII of 1894), s. 10—"Increase," meaning of—Contract after increase of tax—Contract Act (IX of 1872), s. 74—Contract of sale—Misunderstanding of market rate—Breach of contract.

The word "increase" in s. 10 of the Tariff Act refers to the act of Government and not to the actual levy of the excise at the factory. Parties who have entered into a contract of sale before the date on which the increase is to come into force and whose contract is still subsisting on that date, would come within the mischief of the section but the section has no reference to parties who enter into a contract of sale after the date on which the increase of the tax is to come into force although they may never have heard of such increase.

In a suit to recover the value of salt sold by the defendant to the plaintiff but not delivered, the fact that the market rate on the date of breach was due to a misunderstanding of the intentions of Government in respect of the levy of the enhanced rate of salt tax is no reason for refusing compensation to the plaintiff at that rate.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the decree and judgment of the Court of the Subordinate Judge, Mayavaram, in S. C. S. No. 473 of 1922.

Mr. *V. Sundarasa Iyer*, for the Appellant.

Mr. *C. A. Seshagiri Sastri*, for the Respondent.

JUDGMENT.—On 1st March 1922 at 9 A. M. the plaintiff bought 120 maunds of salt from the defendant, which were separated and packed in 60 of the plaintiff's own gunny bags. He took away 35 bags and left 25 in the custody of the defendant. That evening the exciseman made the defendant pay Rs. 150 enhanced salt duty on the 60 bags which he had sold, having heard that the duty of excise was increased from the commencement of March 1st. To recompense himself, the defendant sold the 25 bags to other persons. Subsequently the exciseman who was acting under a misapprehension refunded the excess duty to the defendant. The plaintiff sued for the value of his 25 bags of salt on the date when they were taken from him by defendant. The short point for determination is whether defendant was justified in selling these 25 bags. The Subordinate Judge finds, without giving any reason for his finding that the defendant had a lien for the excess duty payable on the 25 bags left in his custody; and, therefore, he had a right to sell the bags. The counter-petitioner supports this finding by reference to s. 10, Act VIII of 1894.

"In the event of any duty of excise on any article being imposed, increased, decreased or remitted after the making of any contract for the sale of such article, if such increase so takes effect that the increased duty is paid, the seller may add so much to the contract price as will be equivalent to the increase of duty and shall be entitled to recover such addition."

'Increase' in this section refers to the act of Government and not the levy of the excise at the factory. Any party who had contracted before March 1st and whose contract was still subsisting (that is to say in the words of the English Statute, "before there had been clearance and delivery," 39, 40, Vict. 20) would come within the mischief of s. 10; but it has no reference to parties who enter into a contract of sale after the increase of the tax, although they themselves may never have heard of such increase.

If the Subordinate Judge acted with reference to s. 10, his mistake in all probability was that he took 'imposition' to mean 'levy.' The levy was at 9 P. M. but the imposition was from midnight 28th February to 1st March. I have not been shown any other provision of law giving defendant a vendor's lien in the circumstances of this case. The petition is, therefore, allowed with costs throughout, and plaintiff is given a decree as prayed for, the decree of the lower Court being reversed. The fact that the market rate was due to a misunderstanding of the intentions of Government is no reason for not allowing plaintiff to claim recompense at that rate. I accept the finding that the rate is Rs. 6-12-0 per bag.

V. N. V.
Z. K.

Petition allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No 1432 OF 1923 AND APPEAL FROM ORDER No. 125 OF 1924.

November 21, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

MONMOHAN SAHA CHOWDHURY —DEFENDANT—APPELLANT

versus

SARIFANNESSA CHOWDHURANI —PLAINTIFF—RESPONDENT.

Landlord and tenant—Putni, Taluq—*Rent decree —Sale of properties, order of -Contract between parties, effect of.*

In passing a decree for arrears of rent of a *putni* tenure the Court is not entitled, in the absence of any contract to the contrary, to direct that the defaulting tenure should first be sold and that the balance of the decretal amount, if any, be realised from other properties of the judgment-debtor. Where, however, the parties have expressly contracted that the properties belonging to the judgment-debtor should be sold in a certain order to satisfy a rent decree passed against him, and such contract is not contrary to the provisions of the law, the Court is bound to give effect to it.

Sourendra Mohan Tagore v. *Surnomoyi*, 26 C. 103; 3 C. W. N. 38; 13 Ind. Dec. (N. S.) 670, distinguished.

Appeal against a decree of the Additionl District Judge, Pabna, dated the 26th of January 1923, modifying that of the Officiating Subordinate Judge, First Court at Pabna, dated the 3rd of December 1921.

Babus *Gopal Chandra Das* and *Bhagirath Ch. Das*, for the Appellant.

Babus *Mohendra Nath Ray* and *Manmatha Nath Ray*, for the Respondent.

JUDGMENT.—This appeal arises under the following circumstances. The appellant is the *putnidar* under the respondents. The respondent brought a suit for rent in respect of the *putni*. It was decreed partially by the Court of first instance but the learned Additional District Judge on appeal decreed the suit in full. The objections taken against the decree of the lower Appellate Court are, first, with regard to the payment of road-cess. The point taken is that under the lease the *putnidar* is not liable to pay the amount of road-cess in excess of what is stated therein. And secondly, the decree against the appellant for the payment of the entire amount of road-cess is wrong. On these points in the course of argument before us the learned Vakils on both sides came to an agreement. The entire amount of road-cess claim is Rs. 16-14 per year. It is agreed that the defendant will pay to the plaintiff Rs. 8-7 as per year and the plaintiff will bear the other half.

The next objection taken to the decree is with regard to that portion of it which directs the defendant to pay damages at the rate of 25 per cent. per annum. It is found by the lower Appellate Court that the plaintiff agreed to reduce the rent in view of the alleged reduction in the profits but that the amount was not settled and no effect was given to it. On this finding the defendant submits that he is not entitled to pay damages or at any rate the amount of damages is too high. We think that in these circumstances we should be justified in allowing damages as stipulated in the *potta* itself, *viz.*, that on the arrears of rent the *putnidar* will be liable to pay interest at the rate of 12 per cent. per annum. We, therefore, fix the amount of damages to be paid by the defendant to the plaintiff at the rate of 12 per cent. per annum.

The third point raised before us is more substantial and it is this, that the Court below ought to have ordered in the decree that the *putni* tenure should be first sold and if the amount was not realized from the sale thereof the balance should be realized from the person or other properties of the defendant. This point was not raised, as the learned Judge observes, either in the pleadings or in the issues or in the grounds of appeal before him. But we are pressed with the terms in the *putni potta*. The stipulation with regard to this matter is in these words: "If you fail to pay rent according to the *kists* then according to the provisions of Act VIII of 1819 and other Acts in force on the subject of realization of rents and other Acts which may be passed in future, the arrears with costs and interest at the rate of one per cent. per annum will be realized by auction-sale of the *putni taluq*. If the whole amount of arrears be not realized thereby the balance will be realized from your other properties." In the absence of any contract to the contrary it is no doubt correct to say that in passing a decree for rent the Court is not entitled to direct that the defaulting tenure or holding should first be sold and the balance realized from other properties of the defendant; but where the parties have contracted that properties should be sold in a certain order and such contract is not contrary to the provisions of law. We do not see why it should not

be given effect to. Our attention has been drawn to the case of *Sourendra Mohan Tagore* v. *Surnomoyi* (1), where one of the terms of the *kabuliyats* was to the following effect: "If I fail to pay money due or any instalment you shall be entitled to realize the same with interest from the first day of the month following the one for which default has been made by auction-sale of the said *mouza* under the "provisions of Regulation VIII." In interpreting this clause the learned Judges held that it did not restrict the right of the landlord to proceed against other properties of the tenant besides the defaulting tenure and does not limit the personal liability of the defendant to pay rent. The clause which we have quoted from the present lease is materially different from that which was under consideration in that case. It is stipulated here clearly that the defaulting tenure should be first sold under Regulation VIII of 1819 or any other law in force for realization of rent and if the whole amount of arrears is not realized thereby, the balance will be realized from other properties. The meaning of this clause is that the defaulting tenure should be first sold and if the entire dures of the plaintiff are not realized therefrom the landlord will be entitled to proceed against other properties of the tenant. We think we should give effect to this term of the lease and modify the decree passed by the Court below to that extent.

The result is that we partially allow this Appeal from Appellate Decree (No. 1432 of 1923) and direct that the decree passed by the Court below be amended by inserting the words "if the entire decretal amount and costs are not realized from the sale of the defaulting tenure the balance will be realized from the other properties of the judgment-debtor." There will be a further modification in the decree of the lower Appellate Court with regard to the amount of cesses and damages to be paid by the defendant to the plaintiff. Though the appeal has materially succeeded the points on which we have allowed it were not taken in the Court of Appeal below. We, therefore, think it proper that the appellant should pay the respondent the costs of this appeal.

Z. K. *Appeal allowed.*

(1) 23 C. 103; 3 C. W. N. 38; 13 Ind. Dec. (N. S.) 670.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 147 OF 1922.

January 7, 1925.

Present :—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir Theodore Caro Piggott.

Musammat MANKI KUNWAR—PLAINTIFF—APPELLANT

versus

Musammat KUNDAN KUNWAR—DEFENDANT—RESPONDENT.

Hindu Law—Mitakshara—Inheritance—Sisters, contest between—Poor sister, priority of—Test.

In order to apply the rule of the Mitakshara that in succession to the estate of their father a sister who is "unprovided for" shall take precedence over a sister who is "enriched", each case must be looked at from the point of view of comparative poverty or wealth of the parties, and it is not essential that the poor sister should point to some definite acquisition of property by the rich sister. It is sufficient that her surroundings are such that she can be regarded as a rich woman, for instance, that she is married into a family of position and wealth.

Audh Kumari v. *Chandra Dai*, 2 A. 561; 1 Ind. Dec. (N. S.) 932, *Danno* v. *Darbo*, 4 A. 243; A. W. N. (1882) 30; 2 Ind. Dec. (N. S.) 870 and *Totawa* v. *Basawa*, 23 B. 229; 12 Ind. Dec. (N. S.) 152, referred to.

First appeal from a decree of the Subordinate Judge, Benares, dated the 30th of January 1922.

Dr. *S. N. Sen*, for the Appellant.

Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.—This was a suit of a rather unusual but quite interesting character. It was a suit between two sisters, and the plaintiff claimed that she was entitled to a share to the extent of one-half of the entire property left by her father. In ordinary circumstances that claim was undoubtedly a good one in law, there being only herself, the plaintiff, and her sister Kundan Kunwar as the survivors of the father at the time of the claim. The defendant set up the plea that the plaintiff was a wealthy woman whilst she, the defendant was very poor. She thereby invoked the statement of law recorded in the Mitakshara to the effect that the sister who is "unprovided for" shall take precedence over the sister who is "enriched." The learned Subordinate Judge took the view that the action should fail on the ground that the plaintiff was a rich woman, that the defendant was a very poor woman and that the authority of the Mitakshara gave to the defendant the right to succeed to the whole of the father's estate. This appeal raises two questions, one is a question of fact, the other is a question as to whether on the text of the Mitakshara the defend-

ant has brought herself within its provisions. The question of fact is whether the defendant has correctly described herself as a very poor woman and correctly described her sister as a wealthy one. We have been taken through the evidence of the means of the defendant, and we are of opinion that she has correctly described herself. Compared with the position of the defendant the position of the plaintiff is rightly described as that of a wealthy woman. It was suggested in argument to us that you must construe the text of the Mitakshara and the words "enriched daughter" as meaning a daughter definitely provided for either by a document such as a Will or by having been definitely invested with property in her own right by some other method, gift or some thing in the nature of a settlement. We have been referred to several cases, the first one of which was that of *Audh Kumari* v. *Chandra Dai* (1). In that case it was held that the only criterion was the comparative poverty. But it has been pointed out to us that in that case the rich daughter had at the time of marriage a valuable estate made over to her and, therefore, she was an enriched daughter in the sense that she had acquired property in her own right as apart from her general expectations of property and generally rich surroundings. A few years later that was followed by *Danno* v. *Darbo* (2). There the rich daughter had acquired nothing by Will, had acquired nothing by gift or conveyance, but she was in comparison to her sister a woman who had married into a wealthy family. In that case the Court said, "the expression 'unprovided for' in contradistinction to the term "enriched" must be construed in the sense of 'indigent' as opposed to "possessed of means," irrespective of the sources of provision or non-provision." Other cases were cited to us, but we need only refer finally to the case reported as *Totawa* v. *Basawa* (3). That case is a definite authority, which shows that all that has to be regarded is this. If you find a marked difference in the financial position of the sisters, and one of those sisters in straitened circumstances, that is sufficient to bring into operation the authority of the Mitakshara. This case, as all the other ones, has to be looked at from the point of view of comparative poverty of the plaintiff and defendant and it is not essential that the poor sister should be bound to point to some definite acquisition of property by the rich sister. It is sufficient to say that her surroundings are such that she would be regarded as a rich woman. The ordinary case, of course, is, that she has married into a family of position and wealth. Taking that as a criterion, we are of opinion that the claim of the plaintiff was rightly dismissed and we dismiss this appeal with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 2 A. 561; 1 Ind. Dec. (N. S.) 932.
(2) 4 A. 243; A. W. N. (1882) 30; 2 Ind. Dec. (N. S.) 870.
(3) 23 B. 229; 12 Ind. Dec. (N. S.) 152.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 5420 OF 1922.

January 25, 1923.

Present:—Mr. Justice Fawcett.

ALICE M. CAMPBELL—PLAINTIFF

versus

WILLIAMS CHARD & Co.—DEFENDANTS.

Interest—Deposit, return of—Date from which interest can be claimed.

Interest cannot be awarded by way of damages apart from the provisions of the Interest Act. [p. 123, col 1.]

Plaintiff agreed to purchase a motar-car from the defendant and deposited a certain sum of money with him on account of the price of the car. The bargain fell through owing to the default of the defendant and plaintiff served a notice on the latter demanding a return of the deposit and intimating that if this was not done interest would be charged on the sum depoaited from the date on which the deposit was made. The defendant failed to pay and plaintiff sued to recover the deposit with interest:

Held, that the plaintiff was entitled to interest from the date on which notice was given to the defendant and not from the date on which the deposit was made. [*ibid.*]

In re Metropolitan Coal Consumers' Association, Wainwright's Case, (1889) 59 L. J. Ch. 281 at p. 284; 62 L. T. 30; 1 Meg. 463, *London Chatham and Dovar Ry. Company* v. *South Eastern Ry. Company*, (1893) A. C. 429; 63 L. J. Ch. 93; 1 R. 275; 69 L. T. 637; 58 J. P. 36 and *Soundanappa* v. *Shivbasawa*, 31 B. 354; 9 Bom. L. R. 439, referred to.

Mr. *Binning*, for the Plaintiff.

Mr. *O'Gorman*, for the Defendants.

JUDGMENT.—[His Lordship after dealing with matters not material for this report proceeded:—] I have heard Counsel on the question of interest. In the plaint this

is claimed from the dates of actual payment of the two sums of Rs. 1,000 and Rs. 500 respectively. Mr. Binning for the plaintiff says that his client ought to get this interest, as it is obvious that she has inequitably been kept out of her money by the wrongful acts of the defendants, and cites the case of *Metropolitan Coal Consumers' Association, In re, Wainwright's case* (1), where in regard to a deposit for shares under a contract which the applicant was entitled to have rescinded, it was held he was entitled to interest upon his deposit by way of special damage. I should be very glad if I could see my way to allow the plaintiff interest at any rate from the expiry of the three months referred to in her letter of June 7, 1921. No doubt she had suffered some damage by the wrongful withholding of these deposits by the defendants, and I admit that there are conflicting decisions in the Calcutta, Madras and Allahabad High Courts some of which hold the Court is authorized to allow interest by way of damages in a proper case. But so far as I am aware, there is no case of this Court which has definitely differed from the view taken in the well-known leading case in England of *London Chatham and Dover Ry. Company* v. *South Eastern Ry. Company* (2), where the House of Lords held that interest could not be awarded by way of damages, apart from the special provisions of the Interest Act. The only case which allows an exception is that of *Soundanappa* v. *Shivbasawa* (3), where it was allowed on the special ground that the parties in the suit were Hindus governed by the Law of Mitakshara and that under the special circumstances interest could be awarded under Hindu Law in that case. Otherwise the judgment, as I read it, follows the English decision I have quoted. There is also a decision of the Privy Council to the same effect in *Juggmohun Ghose* v. *Kaisreechund* (4). It has always been my view that the law is correctly stated in Pollock & Mulla's Indian Contract Act, 4th Edition at pages 419 and 421; and I do not think that the authority of *Metropolitan Coal Consumers' Association, In re, Wainwright's case* (1) which seems opposed to the subsequent decision of the House of Lords, is sufficient to justify my taking a different view of this case. Therefore, I can only allow interest to the plaintiff from the date of the letter of October 31, 1922, in which notice was given to the defendants that interest would be claimed at the rate of nine per cent. per annum. Decree, therefore, for Rs. 1,500 with interest at nine per cent. per annum from October 31, 1922, till judgment. Costs and interest on judgment, at six per cent.

Z. K. *Suit decreed.*

(1) (1889) 59 L. J. Ch. 281 at p. 284; 62 L. T. 30; 1 Meg. 463.
(2) (1893) A. C. 429; 63 L. J. Ch. 93; 1 R. 275; 69 L. T. 637; 58 J. P. 36.
(3) 31 B. 354; 9 Bom. L. R. 439.
(4) 9 M. I. A. 256 at p. 260; 1 Sar. P. C. J. 835; 19 E. R. 738.

LAHORE HIGH COURT.

CIVIL APPEAL No. 494 OF 1921.
March 2, 1925.
Present:—Mr. Justice LeRossignol and Mr. Justice Fforde.

JHANDU MAL AND OTHERS—DEFENDANTS—APPELLANTS
versus
SINGH RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Non-proprietor, sale of house by—Suit by some proprietors to recover possession—Decree, form of.

Where a non-proprietor sells his residential house in the village, and a suit is brought by some of the members of the proprietary body to recover possession of the site from the purchaser, the plaintiffs are entitled to a decree for possession of the site jointly with the other co-sharers in the village as against the purchaser, together with an injunction directing the latter to remove the materials of the house within a reasonable period.

Appeal against a decree of the District Judge, Rohtak, dated the 17th November 1920.

Mr. *Manohar Lal*, for the Appellants.

Mr. *Shamair Chand* and Lala *Sardha Ram*, R. S., for the Respondents.

JUDGMENT.—The facts of this case are not disputed and the sole question for decision in this appeal concerns the nature of the relief to be granted to the plaintiffs.

Two non-proprietors of *Mauza* Chalkana sold their residential house and site to two other non-proprietors and the present action was raised by the plaintiffs, who are two members of the proprietary body, for joint possession of the site along with the remaining members of the proprietary body. The First Court finding that the share of the plaintiffs was 2/31 gave them a decree for

joint possession of the house in dispute to the extent of their 2/31 share.

The plaintiffs dissatisfied with this decree appealed to the District Judge who accepted their appeal and gave them a decree for joint possession of the property by ejectment of the defendants-vendees. The vendees have come up to this Court in second appeal and contend that the First Court's decree should be restored. An examination of the authorities shows that the decree granted by this Court in such cases has generally been a decree for possession of the site to the plaintiffs jointly with the other co-sharers in the village as against the vendees together with an injunction to these latter to remove their materials within a reasonable period and we think that the decree in this case should be of that description.

We accordingly accept the appeal and modify the decree of the Court below by granting possession of the site of the house in dispute to the plaintiffs jointly with the other proprietors of the village and direct that the defendants-vendees shall remove the materials of the house within three months on pain of losing all rights therein. The parties shall bear their own costs throughout.

Z. K. *Appeal accepted.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 201 OF 1923.

October 28, 1924.

Present:—Mr. Justice Srinivasa Iyengar.

SRI TOLETI SATYANARAYANA-MURTHI—DEFENDANT—PETITIONER

versus

JAYANTI BUTCHEYYA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3, O. XLIII, r. 1 (j)—Order recording compromise followed by decree—Appeal, whether lies.

An order recording a compromise under O. XXIII, r. 3, C. P. C., is appealable at the instance of the party denying the factum of compromise, even though the order has been followed by a decree passed in terms of the compromise.

Govindaswami v. *Kaliaperumal*, 66 Ind. Cas. 837; 16 L. W. 155; (1922) M. W. N. 83, *Megh Raj* v. *Tulsi Ram*, 80 Ind. Cas. 696; 6 L. L. J. 187; (1924) A. I. R. (L.) 466 and *Paban Sardar* v. *Bhupendra Nath Nay*, 33 Ind. Cas. 769; 23 C. 85, followed.

Alamelu Ammal v. *Rama Iyer*, 70 Ind. Cas. 425; 43 M. L. J. 290; 31 M. L. T. 132; (1922) M. W. N. 495; 16 L. W. 440; (1922) A. I. R. (M.) 446, doubted.

Petition, under s. 115 of Act V of 1908, and s. 107 of the Government of India Act, praying the High Court to revise the order of the Subordinate Judge, Cocanada, in Civil Miscellaneous Appeal No. 6 of 1922, preferred against that of the Principal District Munsif, Cocanada, in I. A. No. 109 of 1921, in O. S. No. 509 of 1920.

Mr. *P. Somasundaram*, for the Petitioner.

Messrs. *K. S. Krishnaswamy Iyangar* and *A. Satyanarayana*, for the Respondent.

JUDGMENT.—In the case from which this revision petition arises, the petitioner was the defendant. He filed an application under O. XXIII, r. 3, for a compromise alleged to have taken place between him and the plaintiff to be recorded. The Court of first instance found for the compromise and passed an order for its being duly recorded. On appeal, the Subordinate Judge disbelieved the case for the defendant and found that the fact that there had been a compromise was not satisfactorily established and dismissed the petition of the defendant. Before me it has been sought to be urged by the learned Vakil who appeared for the petitioner that the plaintiff had no right of appeal to the lower Appellate Court because the order passed by the Court of first instance became merged in the preliminary decree passed at the same time by the Court. Reliance was placed for that position on the decision in *Alamelu Ammal* v. *Rama Iyer* (1). There the learned Judges, Oldfield and Venkatasubba Rao, JJ., observed as follows:—"The order in question is one regarding a compromise between the parties. Decree in terms of that compromise was passed later. It is impossible to see how there can be an appeal against the order when it has become merged in the subsequent decree." It seems to me that, with all respect, the correctness of that decision is open to doubt. However, that may be, for the purposes of the present case it is enough to say that the learned Judges thought that the fact that the decree in terms of the compromise was passed later was a point of distinction. In this case the decree was passed immediately and as part of the order recording the compromise. I may refer here to the case of

(1) 70 Ind. Cas. 425; 43 M. L. J. 290; 31 M. L. T. 132; (1922) M. W. N. 495; 16 L. W. 440; (1922) A. I. R. (M.) 446.

Govindaswami v. *Kaliaperumal* (2), where Sadasiva Iyer and Coutts-Trotter, JJ., held that even when there was a decree passed according to the terms of the compromise, an appeal would properly lie against the order recording or refusing the compromise. A similar view has been taken in *Megh Raj* v. *Tulsi Ram* (3). In *Paban Sardar* v. *Bhupendra Nath Nag* (4), Jenkins, C. J. and, Chatterjea, J., have laid down that the omission by the Court of first instance to make a formal order recording the compromise was irregular, because it had the effect of depriving the parties of the statutory right of appeal against the order given by cl. (*u*) of O. XLIII, r. 1. Therefore, I am satisfied there is no foundation for the objection taken, namely, that the appeal to the lower Appellate Court was not competent. In this view there is no other question of jurisdiction before me.

The learned Vakil has drawn my attention to certain facts and circumstances which go to show that the lower Appellate Court might have conceivably gone wrong in its appreciation of the evidence. But sitting here in revision I have no right to interfere with the conclusion of fact arrived at by the lower Appellate Court.

The revision petition is accordingly dismissed with costs.

V. N. V. *Petition dismissed.*

Z. K.

(2) 66 Ind. Cas. 837; 16 L. W. 155; (1922) M. W. N. 83.

(3) 80 Ind. Cas. 696; 6 L. L. J. 187; (1924) A. I. R. (L.) 466.

(4) 33 Ind. Cas. 769; 43 C. 85.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 8 OF 1924.

December 15, 1924.

Present:—Mr. Baker, J. C., and Mr. Prideaux, A. J. C.

RAMCHANDRA MAHADEORAO—DEFENDANT No. 1—APPELLANT

versus

GOVINDRAO AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1 (1)—Review—Mistake of law or merits, whether ground for review—"Any other sufficient reason," scope of—Judgment based on precedent subsequently modified—Discovery of new evidence.

A review cannot be granted on the ground of a mistake of law or on the merits. [p. 126, cols. 1 & 2.]

Chhajju Ram v. *Neki*, 72 Ind. Cas. 566; 3 L. 127; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459; 49 I. A. 144 (P. C.), *Hazra Sardar* v. *Kunja Behari Nag Choudhury*, 44 Ind. Cas. 161 and *Bibi Ruqaiya Khanam* v. *Fazl Haq*, 63 Ind. Cas. 344; 24 O. C. 154, followed.

Muddlapur Murari Rao v. *Balunath Dikshit*, 76 Ind. Cas. 342; 46 M. 955; 45 M. L. J. 309; 18 L. W. 363; (1923) M. W. N. 761; (1924) A. I. R. (M.) 98, referred to.

Order XLVII, r. 1 of the C. P. C. must be read as in itself definitive of the limits within which review of a decree or order is permitted and the words "any other sufficient reason" in the rule mean a reason sufficient on grounds at least analogous to those specified immediately previously. [p. 126, col. 2.]

Chhajju Ram v. *Neki*, 72 Ind. Cas. 566; 3 L. 127; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. (P. C.) 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459; 49 I. A. 144 (P. C.), followed.

A judgment cannot be reviewed under O. XLVII, r. 1 (1), C. P. C., on account of some mistake apparent on the face of the record, where the alleged mistake or error is a wrong exposition of law, as for instance where the judgment is based on a precedent which has been modified by a subsequent decision. [*ibid.*]

Even assuming that the discovery of an authoritative precedent, by which a precedent relied on in the judgment has been modified, amounts to the discovery of new and important matter or evidence within the meaning of O. XLVII, r. 1 (1), C. P. C., such a discovery is not a ground for review without a strict proof that the subsequent authority was not within the knowledge of the applicant when the decree or order was passed or made. [*ibid.*]

Srimati Garabini Kamarin v. *Surja Narain Singh*, 75 Ind. Cas. 177; 3 Pat. 134; (1924) Pat. 361; 5 P. L. T. 52; (1924) A. I. R. (Pat.) 250, followed.

Case-law discussed.

Appeal against the decree of the Additional District Judge, Nagpur, dated the 15th January 1924, in Civil Judicial Case No. 86 of 1923.

Dr. *H. S. Gour* and Messrs. *D. P. Tiwari*, *Atmaram Bhagwant* and *S. A. Ghadgay*, for the Appellant.

Sir *B. K. Bose*, and Messrs. *V. R. Pandit*, R. B., *W. R. Puranik* and *P. N. Rudra*, for the Respondents.

JUDGMENT.—This is an appeal against an order of the Additional District Judge, Nagpur, allowing the respondents' application for review of judgment and re-opening the case and directing that the sums due under the prior mortgage should be ascertained and considered a valid and good consideration for the mortgage bond in suit.

The facts are that the plaintiff Govindrao

brought Suit No. 23 of 1922 on the basis of a mortgage bond, dated the 30th September 1921, for the recovery of Rs. 84,683 odd, and the Additional District Judge, Nagpur (Mr. Pande) disallowed the claim for Rs. 56,002 odd mainly on the ground that at the time when the prior mortgages of 1920 were executed, the mortgagor (defendant No. 1) was not competent to execute them under para. 11 of the Third Schedule of the C. P. C., as his property was under the management of the Collector, whose permission was necessary for their execution. The mortgages were, therefore, void and the amount due under them, which was included in the consideration of the mortgage bond in suit, was disallowed. The plaintiff presented an application for review on the ground that there was a mistake of law in the judgment in view of the decision in *Narayan* v. *Motisa* (1). He also made certain allegations as to his Pleader having made mistaken admission.

Mr. Trivedi, who succeeded Mr. Pande, did not take into consideration the unauthorized admissions but held that there was a mistake of law in the judgment in view of the ruling quoted above, and held that the money received by the mortgagor under the first two mortgage-deeds could form a valid consideration for the mortgage bond in suit. He accordingly granted the application for review and set aside the decree and directed that the case be re-opened and the amounts be taken as part consideration of the mortgage in suit. Against this order the mortgagor (defendant No. 1) presented this appeal.

The mortgagee had appealed against the decree as it originally stood and his appeal is pending before us, but as he has obtained by the review what he sought by the appeal, it will not be necessary to proceed with the appeal if the order for review stands. As the application for review was admittedly made before the appeal, it cannot be objected to on that score. Although there has been considerable divergence of opinion among the various High Courts as to the grounds on which a review can be granted, the matter has recently been set at rest by a decision of the Privy Council and there is now a preponderance of opinion in favour of the view that a review cannot be granted on the ground of a mistake of law or on the merits. The leading case on the subject is the Privy Council judgment in *Chhajju Ram* v. *Neki* (2) which lays down that O. XLVII, r. 1 of the C. P. C., 1908, must be read as in itself definitive of the limits within which review of a decree or order is now permitted, and the words "any other sufficient reason" mean a reason sufficient on grounds at least analogous to those specified immediately previously. A Court hearing an application for a review of a decree made on appeal has, therefore, no power to order a review upon the ground that the decision was wrong on the merits.

In the present case the review has been granted on the ground that the decision, as it originally stood, was inconsistent with the view of the law laid down in *Narayan* v. *Motisa* (1) which was not published at the time the decision was given. We have direct authority on the point in *Srimati Garabini Kamarin* v. *Surja Narain Singh* (3), where it is stated that a judgment cannot be reviewed under O. XLVII, r. 1 (1), on account of some mistake or an error apparent on the face of the record when the alleged mistake or error is a wrong exposition of the law, as, for instance, when the judgment is based on a precedent which has been modified by a subsequent decision. This case further goes on to state that even assuming that the discovery of an authoritative precedent, by which a precedent relied on in the judgment has been modified, amounts to the discovery of new and important matter or evidence within the meaning of O. XLVII, r. 1 (1), such a discovery is not a ground for review without strict proof that the subsequent authority was not within the knowledge of the applicant, or could not be produced by him when the decree or order was passed or made.

We mention this latter portion of the judgment because it has been argued by the learned Counsel for the respondents that the law laid down in *Narayan* v. *Motisa* (1) is not new law but has already been expressed in *Harnath Kuar* v. *Indar Baha-*

(1) 78 Ind. Cas. 343; 20 N. L. R. 87; (1924) A. I. R. (N.) 132.

(2) 72 Ind. Cas. 566; 3 L. 127; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459; 49 I. A. 144 (P. C.).

(3) 75 Ind. Cas. 177; 3 Pat. 134; (1924) Pat. 361; 5 P. L. T. 52; (1924) A. I. R. (Pat.) 250.

dur Singh (4). A number of other cases have been quoted as laying down the same principle under s. 65 of the Contract Act. We need not quote these cases because we do not propose to go into the merits as regards the validity of the mortgages, which is a matter which will come before us in appeal. Suffice it to say that if the view expressed in *Narayan* v. *Motisa* (1) is a view which has already been expressed by the High Courts of Bombay, Madras and Calcutta, and by the Privy Council in *Harnath Kuar* v. *Indar Bahadur Singh* (4), the remarks in *Shrimati Garabini Kamrin* v. *Suraja Narain Singh* (3) will apply with all the more force and we must hold that there was no discovery of new and important matter or evidence which would justify the plaintiff in claiming a review, because he ought to have been aware of the existence of these decisions.

There are other decisions beside the Patna one, quoted above, to the effect that a review cannot be granted on the ground of a mistake of law, we may refer to *Hazra Sardar* v. *Kunja Behari Nag Choudhury* (5), where it is laid down that a mere mistake of law is not in itself a sufficient mistake or error apparent on the face of the record so as to form a ground for review of judgment; and the same view has been taken by the Oudh Judicial Commissioner's Court in *Bibi Ruqaiya Khanam* v. *Fazl Haq* (6).

The only case to the contrary, which has been quoted to us, in *Muddlapur Murari Rao* v. *Balunath Dikshit* (7) which lays down that "error" under r. 1, O. XLVII, C. P. C., is not limited to one of fact and an error of law committed by a Judge and apparent on a perusal of the record is a ground for granting a review. That case, however, at page 957* states that "it has undoubtedly been held in many cases..... that a mistake in law is not sufficient ground for granting a review", and it goes on to say: "We are of opinion that each case must be judged by itself and that where the error of law is such that it is clearly apparent on a perusal of the record, there is ground for granting a review." In the present case we may point out that the error of law is by no means apparent on the face of the record, since the question of the validity of the mortgages is a very debatable one and many authorities can be shown on either side.

We are of opinion that in view of these decisions and of the ruling of the Privy Council in *Chhajju Ram* v. *Neki* (2), there is no ground for review in the present case.

We may further point out that there would be no finality to the original decree if a review can be sought on account of real or supposed errors of law, a process which might be continued indefinitely. In this case both parties have a remedy by way of appeal against the decree.

In these circumstances we are of opinion that the case is not one in which a review should be allowed. We, therefore, set aside the order reviewing the judgment.

We have confined ourselves solely to the question of law involved, as it has been stated by the appellant that the question of the so-called wrong admissions made by the plaintiff's Pleader was not gone into, although he denied it, and it is apparent from the order itself that the review is based entirely on the alleged mistake of law and not on any mistaken admissions. It is not necessary to go into the merits which will now form the subject of the appeal which is pending before us.

The order of the lower Court reviewing the judgment is set aside. The non-applicants will pay the costs in this Court and the costs of the application for review in the lower Court.

G. R. D.
Z. K. *Order set aside.*

(4) 71 Ind. Cas. 629; 45 A. 179; (1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 346; 27 C. W. N. 949; 50 I. A. 69; 18 L. W. 383; 26 O. C. 223; 33 M. L. T. 216; 5 P. L. T. 281; 2 P. L. R. 237 (P. C.).
(5) 44 Ind. Cas. 161.
(6) 63 Ind. Cas. 344; 24 O. C. 154.
(7) 76 Ind. Cas. 342; 46 M. 955; 45 M. L. J. 309; 18 L. W. 363; (1923) M. W. N. 761; (1924) A. I. R. (M.) 98.

*Page of 46 M.—[Ed.]

MADRAS HIGH COURT.

CIVIL APPEAL No. 138 OF 1922.
December 4, 1924.
Present:—Mr. Justice Phillips and Mr. Justice Odgers.

P. K. P. S. SIVANADIAN CHETTIAR —PLAINTIFF—APPELLANT
versus
BATCHU SURAYYA AND OTHERS— DEFENDANTS—RESPONDENTS.

Carriage of goods—Charter party—"Advance freight," what is—Advance, payment of, for voyage

Voyage impossible—Suit for refund, maintainability of—Substitution of ship, when enforceable.

Under a contract of charter party plaintiff paid a sum of money to defendant, a ship-owner, as advance for carrying certain cargo for two voyages, but no voyage was made as the vessel was stranded on its way to load the cargo for the first voyage. In a suit for the refund of the advance:

Held, that the payment was purely an advance and not in the nature of "advance freight" at all and was, therefore, recoverable.

Per *Phillips, J.*—Advance freight must connote freight, and the idea of freight does not arise until the voyage has actually begun, or at any rate until the goods for which the freight is payable have been loaded on the ship or accepted by bills of lading. [p. 128, col. 1.]

Per *Odgers, J.*—A ship-owner is only entitled to compel the acceptance of a substituted ship after the voyage in the ship contracted for has begun. [p. 129, col. 2.]

Appeal against a decree of the Court of the Subordinate Judge, Cocanada, in O. S. No. 21 of 1920.

Mr. *K. V. Krishnaswami Iyer*, for the Appellant.

Mr. *M. P. Somasundaram*, for the Respondents.

JUDGMENT.

Phillips, J.—I agree. I am quite clear that neither under the contract, Ex. A, nor under the doctrine of English Law can the Rs. 6,600 advance be treated as "advance freight." "Advance freight" must connote freight and it is clear from the authorities referred to by my learned brother that the idea of freight does not arise until the voyage has actually begun, or at any rate until the goods for which the freight is payable have been loaded on the ship or accepted by bills of lading. In this case the ship has never been loaded, nor was it attempted to be loaded and, consequently, there can be no question of freight. Even if the provisions of the Indian Contract Act are applied to this case, (it is unnecessary to decide this point which has not been argued before us) the plaintiff must succeed under the provisions of s. 65, because the contract has become impossible of performance.

Odgers, J.—This was a suit for the recovery of a sum of Rs. 6,600 payable on a contract of charter party (Ex. A) entered into between the plaintiff and the defendants. The Subordinate Judge has held that by the terms of Ex. A, this sum was in fact paid by the plaintiff "as advance freight" which is by a doctrine peculiar to the English Law, irrecoverable. How this occurs is explained by Brett, J., in *Allison* v. *Bristol Marine Insurance Co.* (1). The plaintiff has appealed. Exhibit A after clauses contracting for two voyages of the defendants' barque "Bhagyalakshmi" from Akyab to Jaffna proceeds:—"Payments of freight at the above rates to be made as:—

1. Rs 6,600 (Rupees six thousand six hundred only) advance on acceptance of the charter party, paid by charterers' representative Sabhapathy Chettiar at Cocanada, subject to deduction of Rs. 3,300 per trip on loading.

2. Rs. 3,300 to be paid in Akyab per each trip at the time of lading.

3. The balance freight as the vessel reaches her destination and lands the cargo."

Thus the whole sum of Rs. 6,600 was payable on signing Ex. A, but half of it was to be notionally distributed at Akyab on each trip *at the time of loading there*. Exhibit A was made on 9th October 1919, the first voyage was to be in January 1920 and the second February-March 1920.

The money was paid but no voyage was made according to the charter party by the "Bhagyalakshmi" as she stranded on the Nellore coast while proceeding to Akyab to load for her first voyage.

The question is whether this sum of Rs. 6,600 is advance freight. In Leake on Contracts (7th Edition) page 73, the doctrine as to advance freight is said to be an example of money paid for an executed consideration if it was in fact the consideration bargained for and cannot be recovered back merely on the ground that it proved to be of no value. The learned author says "Upon this principle, freight paid in advance cannot be recovered back after the voyage has commenced, though the goods are lost during the voyage; for it is" "the uniform, though perhaps anomalous, rule that the money to be paid in advance for freight must be paid, though the goods are before payment lost by perils of the sea." The words to be noted here are "after the voyage has commenced."

In *Weir & Co.* v. *Girvin & Co.* (2), Vaugham Williams, L. J., at page 52 refers to the old view that advance freight was

(1) (1876) 1 A. C. 209 at p. 226; 34 L. T. 809; 24 W. R. 1039; 3 Asp. M. C. 178.

(2) (1900) 1 Q. B. 45; 69 L. J. Q. B. 168; 48 W. R. 179; 81 L. T. 687; 16 T. L. R. 31; 5 Com. Cas. 40; 9 Asp. M. C. 7.

different from freight and meant a loan or a sum payable when goods were put on board in consideration of their being received on board. The opinions of the Law Lords in *Allison* v. *Bristol Marine Insurance Co.* (1) make it clear that "freight whether used in respect of advanced freight, or otherwise, always has the same meaning; the practical difference between advanced freight and freight is a difference arising from the stipulations which are made as to payment." Lord Esher, M. R. in *Smith* v. *Pyman* (3) says: "Now, there are two peculiarities of the English Law as regards freight; first, that if part of the freight is advanced and the ship is lost, or the goods are lost, the part so advanced, although really not due under the terms of the contract unless there has been delivery of the goods, nevertheless cannot be recovered back by the charterer from the ship-owner, and secondly, that if there is no stipulation to the contrary, but only a stipulation that there shall be advance freight, it is payable at the moment of starting and even if not paid can be recovered by the ship-owner from the charterer upon the loss of the ship." Advance freight is then payable "at the moment of starting" or in other words the ship must sail, unless there is some special contract to the contrary. As against this, Mr. Somasundaram for respondents relies on *Coker & Co., Ltd.* v. *Limerick Steamship Co., Ltd.* (4), where freight was on the contract payable in Liverpool before sailing on signing the bills of lading. Some of the bills were signed and the House of Lords held that under the agreement a proportional part of the advance freight became payable on the signing of each bill of lading. The question turned on the construction of the charter party. In the present case no cargo was loaded and no bills of lading signed. The case in the House of Lords can have no bearing on it. It appears to me, therefore, that the present payment of Rs. 6,600 can in no sense be viewed as advance freight. It was a pure advance made to the defendants on account of what would be payable to them as freight by the plaintiff, but the conditions precedent, *viz.*, the starting of the voyage or at least of loading, were absent to make it amount in law to advance freight. The wording of cls. (1) and (2) above proves this and there are no special clauses, *e.g.*, as to freight being payable on signing bills of lading.

A faint attempt was made to argue that the defendants were competent to substitute another vessel, the "Mahalakshmi", for the "Bhagyalakshmi" and were entitled to compel the plaintiff to accept her. The documents show that some such proposal was made. The Subordinate Judge has held that it never got beyond the stage of proposal and that plaintiff never consented to the substitution. The authority of Carver's "Carriage by Sea" (Art. 304) clearly shows that a ship-owner is only entitled to compel the acceptance of a substituted ship after the voyage in the ship contracted for has begun, which is not the case here. The appeal must be allowed with costs throughout, interest will be calculated at six per cent. from date of plaint.

V. N. V.
Z. K. *Appeal allowed.*

(3) (1891) 1 Q. B. 742 at p. 744; 60 L. J. Q. B. 621; 64 L. T. 436; 39 W. R. 466; 7 Asp. M. C. 7.
(4) (1918) 118 L. T. 726; 87 L. J. K. B. 767; 14 Asp. M. C. 287; 34 T. L. R. 296.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 179 OF 1921.
February 23, 1923.
Present:—Mr. Justice Fawcett.
NADERSHAW SHERIARJI RABADI—
PLAINTIFF
versus
SHIRINBAI BAPUJI MUSA—
DEFENDANT.

Transfer of Property Act (IV of 1882), ss. 60, 72, 83, 84—Mortgage—Money spent by mortgagee in litigation, whether can be charged—"Mortgage-money," "amount due on mortgage," meaning of—Tender, insufficient, effect of—Contract Act (IX of 1872), s. 74—Compound interest, whether penal—Waiver—Interpretation of Statutes—Bombay Regulation V of 1827, s. 14, applicability of.

Section 72 (c) of the Transfer of Property Act cannot be taken to imply that a mortgagee not in possession has no right to charge the mortgaged property for payments properly made by him in relation to the security. [p. 131, col. 2.]

Under the ordinary law of mortgage the mortgagor is bound, so long as the equity of redemption remains with him, to indemnify the estate against expenses incurred by the mortgagee in protecting the title. [*ibid.*]

An incumbrancer is always entitled to add to his security the costs of proceedings to which he is pro-

perly made party in respect of his incumbrance. [p. 132, col. 2.]

The expression "the amount remaining due on the mortgage" used in ss. 83 and 84 of the Transfer of Property Act is a very wide one, and covers any just allowances or costs, which can be tacked on under the ordinary law of mortgage. [p. 131, col. 1.]

The words "mortgage-money" in s. 60 of the Transfer of Property Act must be taken as including all money which, on taking an account between the parties, may be properly allowed to the mortgagee. [*ibid.*]

Case-law discussed.

The Courts do not lean towards compound interest, they do not award it in the absence of stipulation, but where there is a clear agreement for its payment, it is, in the absence of disentitling circumstances, allowed. [p. 132, col. 2; p. 133, col. 1.]

Hari Lahu v. *Ramji*, 6 Bom. L. R. 307; 28 B. 371, followed.

A stipulation in a mortgage deed that if any of the monthly instalments of interest is not paid on its due date, such unpaid instalment of interest should be capitalised and added to the amount of the principal loan and that all such additions by way of capitalised interest should be chargeable upon the mortgaged property, is not penal, so as to bring it under s. 74 of the Contract Act. [p. 132, col. 2.]

The general rule in regard to waiver is that there can be no waiver, unless the person against whom waiver is claimed had full knowledge both of his rights and of the facts which would enable him to take effectual action for their enforcement. [p. 133, col. 1.]

The mere receipt of interest by the mortgagee after such default by the mortgagor as would entitle the mortgagee to compound interest does not amount to waiver of his right to charge compound interest. [*ibid.*]

Keene v. *Biscoe*, (1878) 8 Ch. D. 201; 47 L. J. Ch. 644; 38 L. T. 286; 26 W. R. 552, relied on.

It is a general rule of construction that Statutes which limit or extend common law rights must be expressed in clear or unambiguous language, and that general words are not to be so construed as to alter the common law, or the previous policy of the law, if a sense or meaning can be applied to them consistent with the intention of preserving the existing policy untouched. [p. 136, col. 2; p. 137, col. 1.]

Every man may renounce a benefit or waive a privilege which the law has conferred upon him, so long as it does not prejudice the rights of third persons. [p. 136, col. 2.]

Section 14 of the Bomby Regulation V of 1827 must be read as if the words "in the absence of a contract to the contrary" preceded the operative words of the section. [*ibid.*]

If a debtor-mortgagor tenders an insufficient sum in payment of the entire mortgage-debt due from him and asks that the mortgagee shall accept that tender as being the full amount due to him under his mortgage, s. 14 of the Bombay Regulation V of 1827 will not operate to allow cessation of interest on the insufficient amount tendered. [p. 137, col. 2.]

Messrs. *Inverarity* and *B. J. Desai*, for the Plaintiff.

Mr. *M. V. Desai* (with him Mr. *Taraporevalla*), for the Defendant.

JUDGMENT.—[After dealing with certain facts not material for the purpose of this report His Lordship proceeded:—] I first take up the question about Awabai's costs in Suit No. 13 of 1917. As already mentioned, the decree in this suit was passed on July 17, 1919, and Awabai's costs were taxed at Rs. 1,494-12-0 in November 1919, Ex. I. There is no specific provision in the mortgage-deed for the payment of any costs of litigation, but Mr. Inverarity for the plaintiffs relies upon the ordinary law of mortgage by which a mortgagee can tack on to the mortgage debt costs of litigation properly incurred by him in supporting the mortgagor's title, etc. Mr. Desai, on behalf of the defendant, has raised various objections, which I will consider in due order.

His first contention is a general one, that these costs were not in any case payable by the mortgagor on October 14, 1919, because they had not been actually ascertained, the allocatur of the Taxing Master not having been given until some time in November 1919; but I think this is completely answered by the fact that the mortgagor's liability for these costs was totally denied, so that there was no occasion for an immediate ascertainment of the exact amount which should be tendered on that account. The position could easily have been met; for instance, the mortgagor might have made an offer to pay these costs under protest, just as the interest for three months in lieu of notice was paid, or an undertaking might have been given by the mortgagor's Solicitors to pay the costs as finally taxed just as they gave an undertaking to pay the reasonable costs of the re-conveyance. Accordingly I do not think there is any force in that particular point.

Next it is said that these costs cannot be tacked on under s. 60 of the Transfer of Property Act, read with the definition of "mortgage-money" in s. 58, *viz.*, "the principal money and interest of which payment is secured for the time being." I notice that in the case of *Pestonji Dadabhai* v. *Harmosji Manekjee* (1), the plaintiff's Counsel in that case (who happened to be Mr. Inverarity) apparently did put forward a contention of that kind which was accepted by the Court, but Batty, J.'s expression of opinion is purely an *obiter dictum*, for the suit was decided on other grounds.

In connection with this contention, it is pointed out that, while s. 72, para. (c), provides for the case of a mortgagee in possession being entitled to add all costs

(1) 5 Bom. L. R. 387 at p. 389.

incurred "for supporting the mortgagor's title to the property," s. 65 of the Transfer of Property Act, on the other hand, clearly contemplates the mortgagor, and not the mortgagee, defending the former's title; and it is, therefore, argued that under the Transfer of Property Act the mortgagee can only add such costs to the mortgage debt, if he is actually in possession. I think it is clearly very improbable that the Legislature intended to alter the English Common Law rule under which the mortgagee is entitled to tack on the costs of litigation relating to the security as part of the terms on which redemption is allowed. The law on this point will be found stated in Halsbury's Laws of England, Vol. XXI, Art. 279 at page 145 and Art. 421 at page 231, and Mr. Inverarity has rightly drawn the Court's attention to the rule that such costs of litigation can only be allowed to the mortgagee as a condition of the redemption. In Art. 421 it is stated that "a mortgagee is allowed proper costs, charges and expenses incurred by him in relation to the mortgage debt or mortgage security including the costs of litigation properly undertaken by him; but all these items are allowed only as a condition of redeeming. There is no implicit contract by the mortgagor to pay them, and they are not, in the absence of express agreement, recoverable against him personally.". This last provision applies in this case, for the mortgage-deed contains nothing regarding the mortgagor's liability to pay costs of litigation, although it does contain provisions for re-payment of costs of repairs, etc., as a charge on the mortgaged property. The law in India has not, so far as I am aware, been authoritatively held to be different from the law in England on this point, and reference may also be made to ss 83 and 84 of the Transfer of Property Act which speak of "the amount remaining due on the mortgage" and not merely of "the mortgage-money" as is done in s. 60. The expression "the amount remaining due on the mortgage" is obviously a very wide one, and, in my opinion, covers any just allowances or costs, which can be tacked on under the ordinary law of mortgage. I think this indicates the real intention of the Legislature, and that the words "mortgage-money" in s. 60 must be taken as including all money which, on taking an account between the parties, may be properly allowed to the mortgagee, as has in fact been held in *Varadarajulu Chetty* v. *Dhonalakshmi Ammal* (2). I also agree with the opinion expressed in *Upendra Chandra Mitter* v. *Tara Prosanna Mukarji* (3) which has been followed in *Rakhohari Chattaraj* v. *Bipradass Dey* (4) that s. 72 cannot be taken to imply that a mortgagee not in possession has no similar right to charge the mortgaged property for payments properly made by him in relation to the security and that the mortgagee is entitled to have amounts so paid added to the amount of the original lien. This is, I think, supported by the ruling in *Damodar Gangadhar* v. *Vamanrao Lakshman* (5), where a Bench of three Judges of this Court have laid down that under the ordinary law of mortgage the mortgagor is bound, so long as the equity of redemption remains with him, to indemnify the estate against expenses incurred in protecting the title, and that it is, therefore, superfluous to insert in the mortgage-deed provisions regarding such indemnification. The Judges there followed the corresponding rule of English Law, which is now set out in para. 1901 of the 6th Edition of Fisher's Law of Mortgage at page 952. I hold, therefore, that the expression "mortgage-money," as used in s. 60, includes costs properly incurred by the mortgagee, such as costs of litigation which are allowed under the law of mortgage in England.

[His Lordship after dealing with the history of Suit No. 13 of 1917, continued:—]

Mr. Desai contends that the case falls under the rule of English Law that the mortgagee will not be allowed the costs of litigation arising out of the wrongful act of a stranger, though it be directed against the mortgaged estate: see Fisher's Law of Mortgage, 6th Edition, page 950; or, as it has been put in Halsbury's Laws of England, Vol. XXI, Art. 433, at page 238, the costs incurred in defending the mortgagee's title to the mortgage against a third person cannot be allowed. But Shakrabhai cannot, in my opinion, be treated as a mere stranger or a third person of that kind. The defendant and her husband had undoubtedly done acts which gave Shakrabhai grounds for contending that he was an equitable mortgagee and the case put in para. 1 of the plaint, if true, would justify his claim, even though the first writing was unregistered, having

(2) 26 Ind. Cas. 184; 16 M. L. T. 365.
(3) 30 C. 794 at p. 800; 7 C. W. N. 600
(4) 31 C. 975.
(5) 9 B. 435; 5 Ind. Dec. (N. s.) 288.

regard to the ruling in *Kedarnath Dutt* v. *Sham Lall Khetry* (6) which has been approved by the Privy Council in the recent case of *Subramonian* v. *M. L. R. M. Lutchman* (7). The same principle is also approved by the Privy Council in *Pranjivandas Jagjivandas Mehta* v. *Chan Ma Phee* (8). No doubt the terms of the document of May 10, 1911, may support the contrary plea set up by the defendants in that suit, but the issue between the parties, if it had been tried, would not have depended on that alone. Thus in *Subramonian's case* (7), although the document contained words leading to the conclusion that the deposit was contemporaneous with the writing, yet their Lordships discussed the oral evidence in regard to the facts. And even supposing that the documents relied upon by Shakrabhai were inadmissible in evidence, the fact remains that it was through defendant's acts, which I have already held were not disclosed to Awabai, that the litigation arose. The suit cannot be said to have been a wholly unjustifiable one and a suit by a merely litigious person, coming within the class of cases referred to in the English Law relied upon by Mr. Desai. And this supposition is supported by the correspondence Exts. N to S, where mention is made of a probable settlement of the suit by the plaintiff and the original defendants, and concurrent adjournments are asked for. The fact that the plaintiff finally did not put in an appearance, when the suit was called on, points very strongly to the fact of some such settlement having been arrived at; and, therefore, there is no ground for saying that the suit was entirely unsuccessful. In this view of the circumstances, it seems to me that all the equities are really in favour of the mortgagee. I also agree with Mr. Inverarity's contention that, even adopting the law laid down in the case of *Parker* v. *Watkins* (9), there is shown to have been such concurrence and assistance by the defendant-mortgagor in the defence put up by Awabai against Shakrabhai's claims, as would bring the present case out of the general rule there laid down. In fact I think that this case really falls under the general principle laid down in Ashburner on Mortgages, Indian Edition, page 383, that —"An incumbrancer is always entitled to add to his security the costs of proceedings to which he is properly made party in respect of his incumbrance." The decree, as I have already mentioned, awarded Awabai's costs against Shakrabhai, but evidence has been given by the Managing Clerk Ardeshir that Shakrabai subsequently became insolvent and that Awabai has not been able to recover her costs from him. No evidence to the contrary has been led and I accept that statement....

I now take up the question of compound interest. There is express provision for this in the mortgage-deed, under which it was agreed that if any of the monthly instalments of interest was not paid on its due date, such unpaid instalment of interest should be capitalised and added to the amount of the principal loan and would henceforth carry interest at the rate of twelve annas per month leviable as simple interest and it is further provided that all such additions by way of capitalised interest should be chargeable upon the mortgaged property. Such a provision is not penal so as to bring the case under s. 74 of the Indian Contract Act according to decisions of the Calcutta High Court which there is no reason to question. On the other hand no action was apparently taken by Awabai or her representatives to demand payment of any compound interest at any rate until 1919; but on this latter point, I do not believe Ardeshir's evidence that he then objected that compound interest should be paid. Musa has denied that any such statement was made and, on a point of conflict of testimony of this kind, I must be guided mainly by the correspondence Ex. H which contains no specific mention of any compound interest being claimed. The question is whether in these circumstances it can be claimed now. The general rule on this point is laid down by Sir Lawrence Jenkins in *Hari Lahu* v. *Ramji* (10) as follows (page 311*):—"The Courts do not lean towards compound interest, they do not award it in the absence of stipulation, but where there is a clear agreement for its payment, it is in

(6) 11 B. L. R. 405; 20 W. R. 150.

(7) 71 Ind. Cas. 650; 25 Bom. L. R. 852; (1923) A. I. R. (P. C.) 50; 44 M. L. J. 602; 32 M. L. T. 184; 1 R. 66; 2 Bur. L. J. 25; 38 C. L. J. 41; 18 L. W. 446; (1923) M. W. N. 762; 28 C. W. N. 1; 50 C. 338 (P. C.).

(8) 35 Ind. Cas. 190; 43 C. 895; (1916) 1 M. W. N. 443; 31 M. L. J. 155; 4 L. W. 69; 14 A. L. J. 638; 20 C. W. N. 925; 18 Bom. L. R. 664; 20 M. L. T. 242; 9 Bur. L. T. 125; 24 C. L. J. 314; 8 L. B. R. 458; 43 I. A. 122 (P. C.).

(9) (1859) Johns. 133; 123 R. R. 51; 70 E. R. 369.

(10) 6 Bom. L. R. 307; 28 B. 371.

*Page of 6 Bom. L. R.—[*Ed.*]

the absence of disentitling circumstances allowed." Here the main facts are that simple interest was paid up to the end of August 1918 though somewhat irregularly. Thus, according to the statement made from the receipts given on behalf of Awabai (Ex. X), payment of interest for April 1913 was not made until February 23, 1916, payment for May 1916 was not made until February 25, 1917, and payment for August 1918 was not made until August 13, 1919. The receipts given by Awabai, Ex. I, are all in the same form and merely acknowledge the receipt of the actual amounts paid as interest for specific months. These receipts are inconclusive on this point. They are not alone sufficient to show any waiver on the part of Awabai of her right to compound interest. They fall under the rule, of which *Keen* v. *Biscoe* (11) is an instance, that the mere receipt of interest after the due date is insufficient to show waiver. The general rule in regard to waiver is that there can be no waiver, unless the person against whom the waiver is claimed had full knowledge both of his rights and of the facts which would enable him to take effectual action for their enforcement. Again in *Keen* v. *Biscoe* (11) it is said that "where a right has accrued it can be waived, but to amount to waiver there must be something done which is inconsistent with the continuance of that right." In the present case putting it as favourable as possible to the mortgagor-defendant, all that can be said is that Musa had married Awabai's niece so that she might very likely be content with simple interest, and in fact she probably knew nothing whatever about the provision for compound interest contained in the mortgage-deed. I also think that, as contended by Mr. Desai, the present claim, which seeks to extort the utmost farthing of compound interest with effect from the year 1912, is an afterthought, of which evidence is afforded by the statement, Ex. 2, as compared with the statement Ex. J, and the omission of any specific mention of compound interest in the correspondence Ex. H. Even the notice of August 24, 1919, says nothing about compound interest though of course the expression "all arrears of interest" is wide enough to cover it. And again the letter of October 28, 1919, only says that the amount tendered is not the full amount due, though I think this might be due to compound interest not having been paid so as to cover a short period, in regard to which the plaintiff says that an extra sum of Rs. 18 is claimable. But is this enough to show waiver? In my opinion it cannot be said to be sufficient to show that Awabai intended to give up any claim that there might be to compound interest, for neither she nor her advisors did anything which was absolutely inconsistent with such a claim being made. On this general ground, though I have carefully scrutinised the circumstances with a view to give relief to the defendant if it were possible, I cannot find sufficient evidence to justify me in taking such a course. I may here notice briefly the fact that in the mortgage-deed after the provisions about compound interest to which I have already referred, it is further provided that the said mortgagor "will after the same shall be due upon demand pay to the said mortgagee any interest which shall be capitalised hereunder and any interest which shall accrue due thereon." Mr. Desai drew my attention to the words "upon demand" and I was at first inclined to think that this impliedly necessitated an express demand by the mortgagee for compound interest before any liability to pay it could be said to arise under the mortgage-deed. But against such a construction is the fact that the prior provisions expressly make the capitalized interest and the interest due thereon an addition to the lien secured by the mortgage property; and this subsequent clause about payment upon demand seems to me to provide merely a personal covenant by the mortgagor to pay such compound interest. It is difficult otherwise to see what was the necessity for inserting this provision. And then again, the words "on demand" do not necessarily mean that there must be an express demand, such as I have mentioned. Thus in *Perumal Ayyan* v. *Alagirisami Bhagavathar* (12), these words were construed as merely equivalent to "forthwith" or "immediately." So that I cannot see my way to holding that the Court can relieve the mortgagor against the express provisions in the deed about the payment of compound interest.

Next, in regard to the mortgagor's liability to pay interest in lieu of three months'

(11) (1878) 8 Ch. D. 201; 47 L. J. Ch. 644; 38 L. T. 286; 26 W. R. 552.

(12) 20 M. 245; 7 M. L. J. 222; 7 Ind. Dec. (N. S.) 174.

notice. Such liability is expressly recognized by ss. 60 and 84 of the Transfer of Property Act and the deed contains express provision for such payment. The deed qualifies the liability by these words:—

"It is hereby agreed and declared that if the time fixed for payment of Rs. 4,000 be allowed to pass and if thereafter the said mortgagor shall be desirous of paying off the said principal sum, then and in such case the said mortgagor shall give the said mortgagee three months' previous notice in writing of her desire, etc."

Mr. Desai rightly relied upon the practice in England which is referred to in Ashburner on Mortgages, page 355. This lays down that a mortgagee is ordinarily entitled to six calendar months' notice of the intention to pay off the mortgage or in default thereof is entitled to six months' interest in advance in lieu of notice, but if the mortgagee has given notice calling in the mortgage-debt, the mortgagor, even though he is a few days late in complying with the notice and tendering the money, is not bound to give six months' notice before redeeming. A similar statement of the law will be found in Halsbury's Laws of England, Vol. XXI, page 148. Mr. Inverarity argues that this rule does not apply here because this is merely a practice of the Court of Chancery in England, whereas here there is express provision on the point in the mortgage-deed. On the other hand, as stated in Gour's Law of Transfer in British India, 4th Edition, Vol. II, page 948, Art. 1419, "the object of the notice being to enable the mortgagee to find a new security for his money, he is entitled only to such notice as will enable him to find a new investment." That object is, I think, plainly recognized in this particular mortgage-deed by the qualification about the mortgagor being desirous to pay off the mortgage-debt, to which I have already referred; otherwise it is difficult to see what is the object in inserting these particular words. The mortgage-deed also contains subsequent provisions under which, when the mortgagee wants to get his money, he can give three months' notice to the mortgagor, and notice accordingly was in fact given on August 24, 1917. Therefore the mortgage-deed recognizes two different cases, first, where the mortgagor is the party who primarily wants to pay off the mortgage, and, secondly where the mortgagee is the party who is desirous of getting his money. The two cases seem to me to be mutually exclusive and consequently the main question seems to be, whose was the desire which actually led to the tender of payment? In my opinion, in view of the notice of August 1917, it must be taken that the main desire operating was that of the mortgagee to have his money back in pursuance of that notice, and that the subsequent action of the mortgagor in expressing a desire to pay off the mortgage-debt was a subsidiary one and does not bring the case under this provision for three months' interest in lieu of notice. No doubt it is the fact that the tender was made some two years after the expiry of the three months' notice, and of course that is a point which must be taken into consideration; but I think in this case it is really immaterial. No doubt the ordinary case, like that of *Edmondson* v. *Copland* (13), is one where there is a delay of only a few days, and I think that ordinarily a delay of two years would not bring the case under the rule I am dealing with. But here the delay of two years is fully explained by the Suit No. 13 of 1917, which complicated matters between the mortgagor and mortgagee, and it seems obvious that by mutual consent no action was taken upon the notice of August 1917 pending the settlement or decision of this suit. The suit was not decided until 1919, and then it was that the mortgagor took action to pay up in accordance with the notice of August 1917; so that I do not consider that this particular delay deprives the Court of jurisdiction to allow the mortgagor's contention that she is not liable to pay three months' interest in lieu of notice. I think the equities of the case are on her side, and that the Court should accordingly allow that claim.

I now come to the question of the validity of the tender of October 14, 1919 (Issue No. 4). It is admitted that there was actually a tender of Rs. 4,494 and this was properly made to the mortgagee's Solicitors in accordance with the notice of August 1917. It is unnecessary, therefore, to go into the question whether Ardeshir or Musa is correct as to the actual circumstances surrounding this tender. But there is no doubt that, in view of my finding that the mortgagor was liable to pay the costs of Suit No. 13 of 1917, the amount tendered

(13) (1911) 2 Ch. 301: 80 L. J. Ch. 532; 105 L. T. 8; 55 S. J. 520; 27 T. L. R. 446.

was insufficient; so that, supposing s. 84 of the Transfer of Property Act to apply, the amount remaining due on the mortgage was not actually tendered, so as to make interest cease under that section. Mr. Inverarity, therefore, naturally contended that interest did not in fact cease; but in the course of the arguments I drew his attention to s. 14 of Bombay Regulation V of 1827, which provides that, if a debtor can prove that he has tendered to a creditor the whole or any portion of the amount due, all further interest shall cease on the amount tendered. The question is whether this section affects the tender in this case and if so to what extent. The word "debtor" in s. 14 is certainly wide enough to cover a debtor who has given security by way of mortgage, and this is in fact, I think, shown by s. 15 of the same Regulation, which deals with the case of an usufructuary mortgage or pledge and speaks of a creditor and of the debt. Similarly in Act No. XXVIII of 1855, providing for the Repeal of the Usury Laws, s. 6 speaks of the lender and borrower of money upon any mortgage, so that there is no reason to suppose that s. 14 (if literally construed) would not cover the case of a mortgagor and mortgagee. But the question is how far this is reconcileable with the ordinary principle that a mortgage cannot be redeemed piecemeal. Here it must be remembered that the defendant-mortgagor was seeking to pay off the entire mortgage debt, with a view to redeeming the property and obtaining a re-conveyance. And it has for instance been held in the case of *Lachmi Narain* v. *Muhammad Yusuf* (14) that even in a case where a mortgagee has allowed his mortgagor to pay a portion of the mortgage-debt and realise a proportionate part of the mortgaged property, that does not thereby entitle the mortgagor or his representative to redeem the rest of the mortgaged property piecemeal. Again I may refer to the case of *Ainsworth* v. *Wilding* (15) which gives reasons for holding that a mortgagee is not bound to accept payment by driblets. If the question was merely one of an ordinary simple money debt, then this s. 14 does seem to me to provide a clear authority for allowing a debtor to tender not the entire debt that he owes his creditor, but a part of that debt, subject to the qualification, which I shall deal with later, that he tenders it as a part payment and not in full satisfaction of his debt, and that thereupon all further interest shall cease on the amount that he has actually tendered. It is still good law, for it was declared by s. 5 of the Laws Local Extent Act, XV of 1874, to be in force in the whole of the Bombay Presidency, except the scheduled districts such as Sind, and even in Sind it is in force, as it was subsequently extended thereto by another notification. It is not repealed by the Transfer of Property Act although it may be noted that the following s. 15 is so repealed; nor is it repealed by the Indian Contract Act. Then under s. 2, cl. (*a*) of the Transfer of Property Act, and s. 1, last paragraph, of the Indian Contract Act, it is provided that nothing contained in either of those Acts shall be deemed to affect the provisions of any enactment not expressly repealed by either of them, so that there is very clear ground for saying that this s. 14 of Bombay Regulation of 1827 is still in force in the Presidency Town of Bombay, as well as the rest of the Bombay Presidency. It follows that the rule adopted in cases like *Watson & Co.* v. *Dhonendra Chunder Mookerjee* (16) about the tender of a part of the money debt, is clearly not good law, so far as regards simple money debts in the Bombay Presidency. In *Behari Lall* v. *Ram Ghulam* (17), the judgment of the Court says :—

"It seems to us that where no stipulation or covenant has been made between the contracting parties as to payment of a sum borrowed, the lender is entitled to decline to receive payment of a sum due to him in instalments, and he can claim that the whole sum due be paid at one and the same time. Such seems to us to be the principle which governs the payment of moneys lent in English Law, and we know of no opposite authority in the Indian law."

I respectfully submit that, so far as this Presidency is concerned, there is clear authority to the contrary in this s. 14. But coming back to the particular point that arises here, namely, in the case of a mortgagor seeking to redeem the entire mortgage and tendering only a part of the mortgage-debt really due, the question is whether this s. 14, so far as it

(14) 17 A. 63; A. W. N. (1895) 6; 8 Ind. Dec. (N. S.) 365

(15) (1905) 1 Ch. 435 at p. 440; 74 L. J. Ch. 256; 92 L. T. 679; 53 W. R. 281.

(16) 3 C. 6 at p. 16; 2 Ind. Jur. 209; 1 Ind. Dec. (N. S.) 596.

(17) 24 A. 461; A. W. N. (1902) 135.

relates to a tender of part of a debt, can be held to apply to a case of that kind. This only reported case that I have been able to discover where s. 14 of this Regulation is referred to is that of *Kamaya Naik* v. *Devapa Rudra Naik* (18). That was a case of a suit for redemption, where the mortgagors had admittedly offered to pay an insufficient amount and Mr. Bhandarkar in his arguments for the plaintiffs, who were the mortagors, says :—

"When we made the tender in 1890, s. 14 of Regulation V of 1827 was in force, and it laid down that as soon as tender was made, interest should cease. The notice we gave requested the defendant to go to a certain house and there receive Rs. 80. The tender was sufficient. The plaintiffs then believed that they had offered the whole amount that was due."

In the judgment of the learned Chief Justice Farran, no reference is made to this particular argument. The passage which relates to this offer merely says :—

"It follows that the offer to redeem by paying Rs. 80, which the plaintiff-mortgagor made by his registered letter in April, 1890 (Ex. 35), was an offer of an insufficient amount which the defendant was not bound to accept. The lower Courts have treated this offer as a tender, and no objection appears to have been made to its sufficiency as such by the defendant. A mere offer by letter to pay an amount is not, however, usually treated as a tender either in law or in equity—Fisher on Mortgages, page 912. In order to stop interest, a strict tender should be proved—Coote on Mortgages, page 959, (5th Ed)."

So that the judgment really proceeded on the ground that there had not really been a tender which could operate, and accordingly it was not necessary to consider how far, if at all, s. 14 of this Regulation applied to the case; unless at any rate, when the judgment says that the offer was one of an insufficient amount which the defendant was not bound to accept, it impliedly refused to accept the contention that s. 14 could apply to a case of that kind. Section 14 is expressed in very unambiguous terms and of course ordinarily it must be given its proper effect. There are also difficulties in the way of restricting its effect by the principles of construction which are often applied in such a case. Thus it might be said that s. 84 of the Transfer of Property Act is a special enactment in regard to the cessation of interest on tenders in the case of mortgage transactions, which constitutes an exception to the provisions of the general enactment contained in this s. 14; and that it constitutes an exception just in the same way as, when you get a Statute which contains a particular enactment and a general enactment, and the latter taken in its most comprehensive sense would overrule the former, the law of construtions is that the particular enactment must be operative, and the general enactment must be taken to affect only the other part of the Statute to which it may properly apply. On this point, reference may be made to Hardcastle's Statutory Law, pages 229 and 239 of the 3rd Edition. But in the way of such a contention come the provisions of s. 2 (*a*) of the Transfer of Property Act and s. 1 of the Indian Contract Act, to which I have already referred, and which say that nothing contained in either of these Acts shall be deemed to affect the provisions of an enactment not expressly repealed, such as s. 14 of Bombay Regulation V of 1827; for, if you say that s. 84 of the Transfer of Property Act is to be taken as an exception to the general provisions of s. 14 of the Regulation, you certainly do "affect" the latter enactment; so that I do not adopt that particular contention. But I think that obviously s. 14 should be qualified to some extent. In the first place, it must, I think, be read as if the words "in the absence of a contract to the contrary" preceded the operative words of the section. For it is a general rule that every man may renounce a benefit or waive a privilege which the law has conferred upon him, at any rate so long as it does not prejudice the rights of third persons: see Broom's Legal Maxims, 7th Edition, page 535; and, therefore, if a contract expressly provides that, in order that interest shall cease, the entire debt due must be tendered, I do not think that any Court would hold that the contract should not be given effect to.

But another point that I think is still stronger is this. It is a general rule of construction in England that Statutes which limit or extend common law rights must be expressed in clear and unambiguous language, and that general words are not to be so construed as to alter the common law, or the previous policy of the law, if a

(18) 22 B. 440; 11 Ind. Dec. (N. S.) 876.

sense or meaning can be applied to them consistent with the intention of preserving the existing policy untouched; see Halsbury's Laws of England, Vol. XXVII, Arts. 283 and 284, pages 150 and 152. Now, when a debtor tenders to a creditor really part of his debt, not the entire debt, and asks him to take that in full satisfaction of the debt, it is clear law that the creditor is entitled to refuse to accept the tender. because otherwise he would virtually preclude himself from saying that he had not been paid the full amount due: see Addison's Law of Contracts, 10th Edition, page 154. That is an obviously logical principle. which has been laid down from early days in English Law, and it is part of the common law which would clearly be given very great weight by any English Court in dealing with a provision of this kind. I am sure the Court would construe this s. 14, if possible. so as to be consistent with that part of the common law, and the same rule is in fact enacted for India by s. 38 of the Indian Contract Act, which says that an offer of performance must be unconditional. If you go and attach to your offer to pay a debt the condition that the creditor must accept it as full satisfaction, although really it is not the whole amount due, you attach a condition to your offer and the creditor is entitled to reject it. That is in fact the principle on which Wilson, J., decided a case of that kind in *Kanye Lall Khan* v. *Khetramoney Dossee* (19) and so far as s. 38 of the Indian Contract Act is inconsistent with s. 14 of the Regulation it might be said that s. 14 must be construed subject to the exception, which s. 38 provides for. But again the difficulty arises that if you do that, you are allowing s. 38 of the Indian Contract Act to "affect" the provisions of a Regulation which has not been expressly repealed by the Indian Contract Act, contrary to s. 1 of the Act. But against that I think the Court is fully justified in saying that s. 38 of the Indian Contract Act only reproduces what was the old law applicable not only in England but in India prior to the enactment of the Indian Contract Act, and that if this question had come before a Court prior to the enactment of the Indian Contract Act, the Court would inevitably have said that s. 14 of the Regulation cannot be construed in such a wide sense as entirely to abrogate this rule of common law. That at any rate is the view I take on the subject after careful consideration of the point. I think it would obviously lead to very great inconvenience and absurdity, if this general provision in s. 14 were construed otherwise. So that, even leaving out of account s. 38 of the Indian Contract Act and s. 84 of the Transfer of Property Act, I hold that, if a debtor-mortgagor tenders an insufficient sum in payment of the entire mortgage-debt due from him and asks (as the mortgagor did in this case) that the mortgagee shall accept that tender as being the full amount due to him under his mortgage, then s. 14 will not operate to allow cessation of interest on the insufficient amount tendered.

* * * *

Z. K. *Suit decreed.*

(19) 5 C. L. R. 105.

PATNA HIGH COURT.
FULL BENCH.

SECOND APPEAL No. OF 1924.

December 23, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, Justice Sir B. K. Mullick, KT., Justice Sir Jwala Prasad, KT., Mr. Justice Das, and Mr. Justice Foster.

KRISHNA MOHAN SINHA—PLAINTIFF—APPELLANT

versus

RAGHUNANDAN PANDEY—DEFENDANT - RESPONDENT.

Court Fees Act (VII of 1870), s. 5—Taxing Officer, whether has jurisdiction to determine valuation.

Held, per *Curiam* (*Das, J.*, dissenting).—The Taxing Officer or the Taxing Judge, as the case may be, is under s. 5 of the Court Fees Act the proper person to determine the fee payable on a memorandum of appeal presented to the High Court, and for this purpose he may investigate the question of proper valuation of the subject-matter of the appeal and his decision on the point is final. Even if he should make a manifest mistake in the exercise of his jurisdiction his decision is not subject to an appeal to, or review by, the Court itself. [p. 142, cols. 1 & 2.]

Per *Miller, C. J.* and *Mullick, J.*—It is desirable that the Taxing Officer in determining questions of valuation should not, as a rule, base his decision merely upon allegations in the plaint as to the annual profits of the property to be valued. In order to arrive at a proper decision of such questions it is better that the parties should be called upon to produce, in such manner as may be convenient, such documentary or other evidence as they may be prepared to tender to enable him to decide the question [p. 142, col. 2.]

Per *Mullick, J.*—Where the High Court has delegated its jurisdiction to a Taxing Officer, it has no jurisdiction left to do any of the acts which it could otherwise have performed, and if the Taxing Officer cannot decide a question of valuation no other authority can discharge that duty. [p. 149, col. 1.]

Per *Jawala Prasad, J.*—In order that the decision of the Taxing Officer or Taxing Judge should be final there must be a contest between the officer whose duty it is to see that proper Court-fee is paid and the suitor, and an opportunity must be given to the parties to the contest, namely, the suitor and the Government, to be heard. The decision cannot be final if the question is determined *ex parte* and without giving an opportunity to the suitor to show, by adducing evidence or otherwise, what the value of the subject-matter of the appeal, and consequently the amount of Court-fee payable, should be. [p. 145, col. 2.]

Per *Das, J.*—The Taxing Officer has no jurisdiction to decide a question relating to valuation for the purpose of determining the amount of Court-fee payable by the appellant either on his plaint or on his memorandum of appeal, and if he assumes jurisdiction to decide such a question the Court may ignore his decision. [p. 152, col. 2.]

Messrs. *N. C. Sinha* and *B. B. Ghosh*, for the Appellant.

The Government Advocate, for the Respondent.

JUDGMENT.

Miller, C. J.—The question for determination in this appeal is formulated in the Order of Reference thus:—"Has the Taxing Officer jurisdiction to decide a question relating to valuation for the purpose of determining the amount of Court-fee payable by the appellant either on his plaint or on his memorandum of appeal under s. 5 of the Court Fees Act and if he assumes such a jurisdiction has the High Court any power to interfere?"

The Taxing Officer has not in fact assumed any jurisdiction to determine the fee payable on the plaint or on the memorandum of appeal in the lower Courts. The only order he has made relates to the fee payable by the appellant on the memorandum of appeal in this Court and no question arises for determination as to the Taxing Officer's powers with regard to fees payable in the subordinate Courts. I propose, therefore, to confine my judgment to his powers with regard to the fee payable upon the memorandum of appeal presented in this Court.

The facts are as follows:—The plaintiff, who is the appellant before us, sued in the Court of the Munsif at Bhagalpur for a declaration of title and for possession, together with mesne profits for two years, in respect of 3 *bighas* 10 *cottahs* 2 *dhurs* of *jagir* land. The mesne profits claimed for two years were valued in the plaint at Rs. 146-12-0. The land was valued at Rs. 11 being ten times the Government Revenue proportionate to the land claimed, making a total of Rs. 157-12-0. The Court-fee was paid on that valuation. The Trial Court considered that the Court-fee payable on the land should be calculated not on the Government Revenue but on the market value as provided in s. 7 (*v*) (*d*) of the Court Fees Act. The plaint was then amended by valuing the land at Rs. 70. This valuation was accepted in the Trial Court and the deficiency of the Court-fee in proportion to the higher valuation was paid. The plaintiff succeeded in the Trial Court and the defendant appealed to the Subordinate Judge paying a Court-fee on his memorandum of appeal upon the value above stated. The appeal succeeded and the plaintiff-filed a second appeal to this Court paying a Court-fee on his memorandum of appeal based upon the same valuation. The Stamp Reporter whose duty it is to see that the proper fee is paid upon documents presented in this Court reported that the claim was under-valued because it was manifest that if the mesne profits amounted in round figures to Rs. 70 per annum as stated in the plaint the market value of the land must be more than Rs. 70. He considered that the value of the land based upon the yearly profits alleged in the plaint would not be less than Rs. 1,260 or 18 years' purchase. He reported that the memorandum of appeal in this Court was insufficiently stamped and that the plaint and memorandum of appeal in the Trial Court and the lower Appellate Court respectively were also insufficiently stamped. The appellant being aggrieved the matter was referred under s. 5 of the Court Fees Act, 1870, to the Taxing Officer who found that the Stamp Reporter had correctly valued the land and that the Court-fee was payable on the increased valuation. He allowed the appellant three weeks' time to make up the deficiency on the memorandum of appeal failing which he directed the appeal to be placed before the Bench for orders. The appellant considering that the Taxing Officer was acting without jurisdiction refused to pay the Court-fee within the time ordered and the case came before the Bench for disposal. The appellant contended that the Taxing Officer had no jurisdiction to consider the question of valuation of the subject-matter of the suit for the purpose

of deciding the amount of fee payable on the memorandum of appeal and that his order was *ultra vires* and not binding. It was contended on the other hand that the Taxing Officer had jurisdiction and that his order was final. The Bench before whom the case came, considered that the Taxing Officer had exceeded his powers and, differing from the earlier decision of this Court in *Ramsekhar Prasad Singh* v. *Sheonandan Dubey* (1), referred the case to a Full Bench formulating the question of law as above stated.

The Court Fees Act of 1870 as amended by subsequent legislation is divided into seven Chapters which, as indicated by their heading, purport to deal with different subject-matters. Section 5 under which the Taxing Officer acted in this case is included in Chapter II which is headed "Fees in the High Courts and in the Courts of Small Causes at the Presidency Towns." It provides as follows:—

"5. When any difference arises between the officer whose duty it is to see that any fee is paid under this Chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to the Taxing Officer, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court, or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf.

"When any such difference arises in any of the said Courts of Small Causes, the question shall be referred to the Clerk of the Court, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the First Judge of such Court.

"The Chief Justice shall declare who shall be Taxing Officer within the meaning of the first paragraph of this section."

In determining what is meant by fees paid under this Chapter the heading is important but reference must also be made to ss. 3 and 4. Section 3 provides as follows:—

"3 The fees payable for the time being to the clerks and officers (other than the Sheriffs and attorneys) of the High Courts established by Letters Patent by virtue of the power conferred by s. 15 of the Indian High Courts Act, 1861, or s. 107 of the Government of India Act, 1915,

or chargeable in each of such Courts under No. 11 of the first, and Nos. 7, 12, 14, 20 and 21 of the Second Schedule to this Act annexed;

and the fees for the time being chargeable in the Courts of Small causes at the Presidency Towns, and their several offices,

shall be collected in manner hereinafter appearing."

The reference to the Government of India Act of 1915 was added by an amending Statute passed in 1917. The mode of collecting the fees mentioned in s. 3 is dealt with in s. 25 which provides that they shall be collected by stamps. The fees mentioned in s. 3 are such as would be payable in the High Courts under their ordinary original jurisdiction or in appeals from orders or decrees passed in the exercise of such jurisdiction and this is indicated in the margin by the words "Levy of fees in the High Courts on their original sides." Section 4, on the other hand, as the marginal notes indicate deals with the fees on documents coming before the High Courts in the exercise of their appellate or revisional jurisdiction in cases coming from the subordinate Courts, or in their extraordinary original jurisdiction. It provides, in effect, that none of the documents mentioned in the First or Second Schedules of the Act as chargeable with fees shall be filed, exhibited or recorded in, or shall be received or furnished by a High Court exercising the jurisdiction named unless the same are sufficiently stamped as provided in the Schedules. The section is a prohibition against the use of improperly stamped documents and in that sense may be said to make the fees on those documents payable, at least in so far as they are payable in High Courts. Section 6 which comes under Ch. III contains a similar prohibition in respect to the subordinate Courts. It would seem, therefore, that s. 5 which is part of Ch. II is referring to those fees mentioned in s. 4 which are payable in the High Courts when it refers to the duty to see that any fee is paid under this Chapter. Such fees would include a memorandum of appeal presented in the High Court in appeals from subordinate Courts and, if such a document requires to be stamped and a

(1) 73 Ind. Cas. 43; 2 Pat. 198; 4 P. L. T. 71; 1 Pat. L. R. 25; (1923) A. I. R. (Pat.) 137.

question arises between the Stamp Reporter, who is the officer charged with the duty mentioned in s. 5, and the suitor as to the amount thereof, the Taxing Officer, who is the Registrar in this Court, is the proper person to determine the question and unless he refers it to the Taxing Judge his decision is final.

The first question is whether such a document repuires a stamp. If a memorandum of appeal presented in a High Court when exercising the jurisdiction mentioned in s. 4 is a document referred to in either of the Schedules then until sufficiently stamped as prescribed in the Schedule it cannot be received in the High Court and the appeal is not properly instituted.

A difficulty arises at the outset owing to the wording of Sch. I, Art. 1 which prescribes the stamp fee for, *inter alia*, a memorandum of appeal. The language of Art. 1 of Sch. I would appear to exclude such documents when presented in a High Court. The documents there mentioned are those presented in any Civil or Revenue Court except those mentioned in s. 3. The Courts mentioned in s. 3 are High Courts and certain of the Small Cause Courts. Section 4 carries the case no further, for the prohibition in that section against the reception of documents extends only to documents of the kinds specified in either of the Schedules. We are, therefore, driven back to the Schedules. If the documents specified in Art. 1, Sch. I, are those presented in Courts other than High Courts and Small Cause Courts, there would appear to be no provision for stamping a memorandum of appeal presented in a High Court. The Act can hardly have been intended to exclude so important a document as a memorandum of appeal presented in the High Court exercising appellate jurisdiction and so far as I am aware the point has not been definitely raised but it has always been assumed that it was included. The wording of this Act is in some respects certainly unscientific and difficult to interpret and its interpretation has been the subject of a multitude of decisions in the Courts. It seems to me that the intention was to include a memorandum of appeal presented in the High Court amongst the documents referred to in s. 4, the words "documents of any of the kinds specified in the First or Second Schedules" being a description of the documents mentioned in the Schedules without reference to the words of exclusion appearing in Art. 1 of Sch. I. Or it may be that Sch. I, Art. 1 was intended to exclude from the documents there named only those presented to the High Courts on their original sides and the Small Cause Courts. In either case the wording is unfortunate. But as the point was conceded in argument it need not be futher discussed.

The substantial question which was argued before us was whether in ascertaining the fee payable on the memorandum of appeal presented to the High Court on appeal from the subordinate Courts the question of valuation can be taken into account by the Taxing Officer to whom the matter has been referred, or whether the Taxing Officer is bound by the valuation appearing on the memorandum of appeal where such valuation has been accepted in the lower Court either without question or after contest.

The wording of s. 5 is undoubtedly wide enough to cover any question which may arise, including valuation, for the purpose of ascertaining the amount of fee payable in the High Court. It is contended, however, that all questions of valuation are under s. 12 to be determined by the lower Court and that the decision there arrived at is final and cannot be disturbed except under the express conditions referred to in the second clause of s. 12 which is contained in Ch. III. That Chapter is headed "Fees in other Courts and in Public Offices." Section 12 provides as follows:—

"I. Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this Chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.

II. But whenever any such suit comes before a Court of Appeal, Reference or Revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of s. 10, paragraph *ii*, shall apply."

It should be mentioned that ss. 9 and 10 in the same Chapter provide machinery

for ascertaining the value of land and houses, the subject-matter of a suit when the Court thinks that the value has been wrongly estimated to the detriment of the revenue. It was contended on behalf of the appellant that the power given under clause *ii* of s. 12 is confined to the Court of appeal in which the question arises and that the Taxing Officer is not the Court for the purposes of s. 12. Assuming without deciding that this contention is accurate it seems clear, in my opinion, that s. 12 has no application to a question of Court-fees payable on a memorandum of appeal presented to a High Court but only applies to the fees payable in other Courts. It is true the High Court would have the power conferred by clause *ii* but the fees dealt with or the fees paid in the lower Court, for the fees dealt with in Ch. III which includes s. 12 are stated to be the fees in other Courts and in Public Offices, that is in Courts other than those referred to in Ch. II, and questions relating to the fees payable in the High Court are not governed by any of the provisions in Ch. III unless it should appear from the context that they are necessarily included. It was suggested that Ch. III which includes ss. 6 to 19 does in fact in some cases, deal with fees payable in the High Court and s. 8 was referred to as an instance. This section deals with the fee payable on a memorandum of appeal against an order relating to compensation under any Land Acquisition Act for the time being in force, and under the land Acquisition Act of 1894 such appeals lie only to the Hight Court. The section, however, is not inconsistent with the heading of Ch. III, for in 1870, when the Court Fees Act was passed, by the Land Acquisition Act then in force such appeals lay to the District Judge and no inference can be drawn from this section that Ch. III was intended to deal with fees payable in the High Court. Section 15 was also referred to which provides for re-payment in certain cases of so much of the fee paid on an application for review as exceeds the fee payable on any other application to the Court under the Second Schedule, Art. 1, cl. (*b*) or cl. (*d*) where the Court reverses or modifies on review its former decision. Clause (*d*) in Art. 1 of the Second Schedule is an application presented to High Court. The fee, therefore, re-payable may be part of the fee paid upon an application for review in the High Court as the section now stands. But this also it must be remembered, is a piece of patch work legislation. In the Act as originally passed the words "plaint or memorandum of appeal" appeared instead of the word "application" and, although the word "application" was substituted in place of the words "plaint or memorandum of appeal" by a later Act of the same year, it would appear that the fee actually recoverable under the Act, as originally passed, was part of that paid on the plaint or memorandum of appeal. This was an obvious blunder and had to be rectified by an amending Act. As already stated in another connection the drafting of this Act is somewhat unscientific and its interpretation certainly gives rise to considerable difficulty, but even if there should be found in Ch. III an issolated instance of reference to fees payable in a High Court I think that the intention of the Act was to deal in that Chapter with fees payable in the subordinate Courts only unless the contrary must necessarily be inferred from the context.

The High Court may undoubtedly under the second clause of s. 12 require a party to pay an additional fee upon the plaint or memorandum of appeal in the lower Court and this power is conferred on the Court itself as distinguished from the Taxing Officer whose powers are confined under s. 5 to the fees payable in the High Court. Similarly, in my opinion, the fees mentioned in the first clause of s. 12 are those payable on a plaint or memorandum of appeal in the subordinate Courts and the section does not impose upon the High Court as distinguished from the Taxing Officer and the Taxing Judge the duty of deciding questions relating to valuation for the purpose of determining the amount of the fee chargeable in the High Court on a memorandum of appeal. The powers of the High Court in this respect in so far as the fees payable in that Court are concerned are delegated under s. 5 to the Taxing Officer and the Taxing Judge. It would be contrary to the intention of the Act to allow the High Court to go into questions of valuation when no machinery is provided in Ch. II similar to that given in Ch. III for determining such questions. Sections 9 and 10 of Ch. III give the other Courts power to issue a commission

to hold a local or such other investigation as may be necessary to determine the value of the subject-matter of suit but no express provision for this purpose is made in Ch. II. I am not much impressed by this argument, for once it is determined that the power of the High Courts to decide the amount of the fee payable on the memorandum of appeal presented in those Courts is delegated to the Taxing Officer and the Taxing Judge under s. 5 those officers could always if need be require evidence to be produced before them and to hold an investigation as to the value of the subject-matter for they would have all the powers incidental to the discharge of those duties which the High Court itself possessed.

In my opinion the Taxing Officer or Taxing Judge as the case may be, is under s. 5 the proper person to determine the fee payable on a memorandum of appeal presented to the High Court and, for this purpose, he may investigate the question of the proper valuation of the subject-matter of the appeal. Even under s. 12, cl. *i* it would appear that in the subordinate Courts it is the Appellate Court which alone can decide the question of valuation for the purpose of determining the amount of fee chargeable on the memorandum of appeal presented in that Court and for this purpose it could, if necessary, exercise the powers conferred by ss. 9 and 10. It can also, as can the High Court, exercise the powers conferred by cl. *ii* of s. 12 if it thinks the question has been wrongly decided in the Court below. It would, I think, be an anomalous state of affairs if the High Court alone had no power to decide the question of valuation for the purpose of determining the amount of the fee chargeable on the memorandum of appeal presented before it, a power which the lower Appellate Court possesses in determining the amount payable on its own memorandum of appeal. The scheme of the Act appears to me to be that in the subordinate Courts under s. 12 the Trial Court alone has power to decide what is the proper valuation for the purpose of determining the fee payable on the plaint and the Appellate Court alone has the like power with regard to the memoramdum of appeal presented in that Court even if the Trial Court has arrived at a different valuation, and each Court's decision is final subject to the provisions of the second clause of s. 12. Under s. 5 the High Court also has similar powers with regard to its own memorandum of appeal which powers, however, are delegated to the Taxing Officer or the Taxing Judge whose decision again is final. Even if those officers should make a manifest mistake in the exercise of their jurisdiction their decision is not subject to appeal to or review by the Court itself. In the present case I consider that the Taxing Officer was acting within his jurisdiction and his decision cannot be disturbed by this Bench. As the appellant has deliberately elected not to pay the fee ordered by the Taxing Officer after time was given to him for that purpose but has chosen to rely upon his right to question the Taxing Officer's jurisdiction I think that his memorandum of appeal should be rejected as not having been properly presented in time.

Before condluding this judgment I desire to point out that although there was some evidence before the Taxing Officer upon which he might arrive at a decision on the question before him it is essentially desirable that the Taxing Officer in determining questions of valuation should not, as a rule base his decision merely upon allegations in the plaint as to the annual profits of the property to be valued. It may be that such valuation was over-estimated in the plaint as some times happens. In order to arrive at a proper decision on such questions it would be better that the parties should be called upon to produce in such manner as may be convenient such documentary or other evidence as they may be prepared to tender to enable him to decide the question. He will then be in a position to deal adequately with the matters in dispute.

Jwala Prased, J.—The question referred to us for decision runs thus:—

Has the Taxing Officer jurisdiction to decide the question relating to valuation for the purpose of determining the amount of Court-fee payable by the appellant either on his plaint or on his memorandum of appeal under s. 5 of the Court Fees Act and if he assumes such a jurisdiction has the High Court any power to interfere."

Now, what is the power of the Taxing Officer under s. 5 of the Court Fees Act (Act VII of 1870)? That section occurs under Ch. II of the Court Fees Act headed "Fees in the High Courts and the Courts of the Small Causes at the Presidency Town," and it runs as follows:—

"When any difference arises between the officer whose duty it is to see that any fee is paid under this Chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to the Taxing Officer, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such Court, or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf."

We are not concerned with paragraph 2 of that section which relates to the Courts of Small Causes. Paragraph 3 of the section says that the Chief Justice shall declare who shall be Taxing Officer within the meaning of the first paragraph of the section. Under this paragraph the Chief Justice of this Court has appointed the Registrar as the Taxing Officer. The Stamp Reporter is the Officer whose duty under the first paragraph of the section it is to see that proper fee is paid under Ch. II of the Court Fees Act. Chapter II which relates to fees in the High Courts consists of three sections, namely, ss. 3, 4 and 5. Section 3 relates to levy of fees in High Courts on their original sides. This High Court has no original jurisdiction and therefore we are not concerned with that section.

Section 4 deals with fees on documents coming before the High Courts in the exercise of their appellate or revisional jurisdiction in cases coming from the subordinate Courts or in their extraordinary original jurisdiction. It provides that no document of any of the kinds specified in the First or Second Schedule of the Act chargeable with fees shall be filed, exhibited or recorded in, or shall be received or furnished by a High Court exercising the jurisdiction named, "unless in respect of such document there be paid a fee of an amount not less than that indicated in any of the said Schedule as the proper fee for such document." A memorandum of appeal is a document within the meaning of this section: *Balkaran Rai* v. *Gobind Nath Tewari* (2). Thus if a memorandum of appeal is filed in the High Court the Court-fee leviable will have to be determined with respect to Schs. I and II. Memorandum of appeal is mentioned in Art. 1, Sch. I and Arts. 11, 17, 20 and 21 of Sch. II. Articles 11, 17, 20 and 21 of Sch. II have prescribed fixed sums to be payable on memoranda of appeal filed in any Court and no question of valuation arises for the purposes of determining the Court-fee payable in those cases. Article 1 of Sch. I applies to memoranda of appeals presented to any Civil or Revenue Court except those mentioned in s. 3. Section 4 not having been excepted, a memorandum of appeal filed in the High Court will come under this article though it is not happily worded. The amount of fee payable under this Article depends upon "the amount or value of the subject-matter in dispute" as mentioned in column 2 of the Schedule. Therefore, in order to ascertain the amount of fee payable upon a memorandum of appeal under Art. 1, Sch. I, the amount or value of the subject-matter in dispute has to be determined.

In order to ascertain the fee payable upon a memorandum of appeal coming under the aforesaid Arts. 11, 17, 20 and 21 of Sch. II, the nature of the document has to be determined. For instance, in order to apply Art. 11 of that schedule it has to be ascertained whether the appeal is from a decree or an order having the force of a decree. If it is from a decree or an order having the force of a decree, Art. 11 does not apply and the Court-fee payable will be upon "the amount or value of the subject-matter in dispute" under Art. 1 of Sch. I. Similarly, in order to apply Art. 17 of Sch. II it will have to be ascertained as to whether the memorandum of appeal is with respect to suits enumerated therein. For instance, whether or not it is with respect to a suit to obtain a declaratory decree where no consequential relief is prayed. Likewise, the nature of the appeal will have to be ascertained in order to apply Arts. 20 and 21 of Sch. II. Therefore, in order to find out whether a memorandum of appeal filed in the High Court is properly stamped under the Schs. I and II, the nature of the suit, the nature of the decree or order appealed from or the amount or the value of the subject-matter in dispute as the case may be, will have to be determined. Upon the determination of this question will depend the proper Court-fee payable under Schs. I and II. There are certain documents which need not bear any Court-fee, such as, a written statement which does not plead

(2) 12 A. 129; A. W. N. (1890) 39; 6 Ind. Dec. (N. S.) 31.

a set off or a counter-claim. Therefore, the question as to the necessity of paying a fee with respect to a document filed in the High Court, say with respect to suits tried by the High Court in its extraordinary original jurisdiction, will have also to be determined and for this purpose the nature of the document has to be ascertained. Therefore, two questions arise with respect to a document filed, exhibited or recorded in or received, or furnished by a High Court, namely, (1) the necessity of paying a fee and (2) the amount of fee payable.

Reading s. 4 and Schs. I and II the fee payable upon a document filed in the High Court is a fee payable under Ch. II of the Court Fees Act.

Under s. 5 of the Act it is the duty of the officer appointed in this behalf by the High Court, say, the Stamp Reporter, to see whether and what fee is payable under Ch. II upon a document filed, exhibited or recorded in, or received or furnished by the High Court. His duty is to see under what Articles or Schs. I and II the aforesaid document falls. If it is a document with respect to which a fee is to be paid under the said Schedules it is his duty to find out the amount of the fee leviable upon it. Therefore, with respect to a memorandum of appeal filed in the High Court it is the duty of the Stamp Reporter as an officer of the Court to determine under which Article of the said schedules the document falls and the amount of fee payable with respect thereto. If he finds that the memorandum of appeal falls under Art. 1 of Sch. I of the Act, he has to find out "the amount or value of the subject-matter" as stated in column 2 of the Article in order to determine the amount of fee payable under column 3 of that Schedule. In other words, he has to determine the value of the subject-matter in dispute, for without it the amount of fee payable cannot be ascertained. Therefore, the question of valuation is involved in the determination of the amount payable upon a memorandum of appeal. If the suitor contests the amount fixed by the Stamp Reporter, a difference arises between him and the officer whose duty it is to see that proper fee is paid under Ch. II of the Court Fees Act upon the memorandum of appeal. When such a difference arises the question shall be referred to the Taxing Officer. This contest gives rise to an issue and that issue has to be determined by the Taxing Officer. The issue may be with respect to the nature of the document in order to find out in which category of the Schedules the document falls, or it may be as to the value of the subject-matter in dispute upon which the amount of fee payable depends. In the latter case the question of valuation is involved in the determination of the issue. The Taxing Officer has, therefore, jurisdiction to determine the question relating to valuation for the purpose of determining the amount of Court-fee payable under s. 5 of the Court Fees Act.

It has, however, been argued at the Bar that if the Legislature had intended to give jurisdiction to the Taxing Officer to determine questions of valuation under s. 5 of the Act, provisions similar to ss. 9 and 10 in Ch. III would have been made in Ch. II providing proper machinery for the purpose of determining valuation. As was pointed out in the Full Bench case of *Amjad Ali* v. *Muhammad Israil* (3), the procedure enjoyed by the Statute and the practice of the High Court and of the District Courts is so very different in these matters that no useful analogy can be drawn from them. The duty of determining the fees in the subordinate Courts, original and appellate, under s. 6, Ch. III of the Act rests in those Courts, whereas such a duty is cast upon the officer appointed under s. 5 of the Act with respect to fees payable on documents filed in the High Court. The subordinate Courts have been given powers under ss. 9 and 10 of Ch. III to determine the net profits or market value of the subject-matter in dispute. In the High Court the duty of determining the fee payable upon a document, such as memorandum of appeal presented to the High Court, is cast upon the officer appointed under s. 5 of the Act to see that proper fee has been paid. It is only when a difference arises between the said officer and the suitor that the matter is referred to the Taxing Officer for his decision. The power of deciding the question given to the Taxing Officer implies the power to make an enquiry as to the amount payable upon the document, and if the amount of Court-fee payable depends upon valuation the Taxing Officer has power to inquire into question relating to valuation. Therefore, in vesting the Taxing Officer with power to give decision with respect to a dispute

(3) 20 A. 11; A. W. N. (1897) 157; 9 Ind. Dec. (N. S.) 367.

between the suitor and the officer of the Court referred to therein as to the amount of fee payable depending upon the value of the subject-matter in dispute the Legislature has impliedly vested the Taxing Officer with power to make inquiries into the question of valuation and to fix the amount of Court-fee payable.

Lastly it has been argued that cl. (*ii*) of s. 12 gives power to the High Court to determine the question of valuation in order to determine the proper fee payable upon a plaint or memorandum of appeal when the matter comes before it in appeal, reference or revision. That clause relates only to plaint and memorandum of appeal filed in the subordinate Courts, and does not relate to memorandum of appeal filed in the High Court, and the power given thereunder can only be used when the question of valuation is wrongly decided by the Courts "to the detriment of the revenue." Therefore, the contention based upon s. 12 is not tenable. Besides, the language of s. 12 is different from that of s. 5. Under s. 12 it is merely the decision of the subordinate Courts as to valuation, and not as to the category in which the suit or appeal falls which is final, whereas under s. 5 the decision of the Taxing Officer is final as to the amount of fee determined by him to be payable upon the memorandum of appeal or other documents filed in the High Court: no matter how he arrives at his conclusion, namely, by determining the valuation or the cateogry: *Karan Singh* v. *Gopal Rai* (4), (Tudball, J.)

It would thus appear that the Taxing Officer has not only jurisdiction to decide questions relating to valuation but that his decision thereupon shall be final for the purpose of determining the amount of Court-fee payable by the appellant on the plaint or the memorandum of appeal under s. 5 of the Court Fees Act and a Division Bench has no right to question it. This High Court has taken this view in the cases of *Chanderbati Kuer* v. *Gorey Lal Singh* (5), (Mullick and Atkinson, JJ.,) and *Lagan Barat Kuar* v. *Khakhan Singh* (6). The other High Courts took the same view: *vide Khachera* v. *Kharag Singh* (7) (Tudball, J.); *Larkhur Chaube* v. *Ram Bhajan Chaube* (8), *Chhunnu Lal* v. *Bank of Upper India, Ltd., Delhi* (9), *Amjid Ali* v. *Muhammad Israil* (3), *Ranga Pai* v. *Baba* (10), Shephard and Davies, JJ); *Jugul Pershad Singh* v. *Parbhu Narain Jha* (11), *Badri Prasad* v. *Kundan Lal* (12),(Edge, C. J.) *Karan Singh* v. *Gopal Rai* (4), (Tudball, J.,) and *Balkaran Rai* v. *Gobind Nath Tewari* (2), (Edge, C. J.).

Now in order that the decision of the Taxing Judge shall be final, the following conditions would seem to be necessary: (1) there must be a contest between the officer whose duty it is to see that proper Court-fee is paid and the suitor, and (2) that an opportunity is given to the parties to the contest, namely, the suitor and the Government. Therefore, the decision of the Taxing Officer cannot be final if he determines it *ex parte* and without giving an opportunity to the suitor to show by adducing evidence or otherwise what the value of the subject-matter of the appeal and consequently the amount of Court-fee payable should be: *Jugal Prasad Singh* v. *Parbhu Narain Jha* (11), *Kasturi Chetti* v. *Deputy Collector, Bellary* (13), (Collins, C. J. and Benson, J.) and *Amjid Ali* v. *Muhammad Israil* (3).

Apart from authorities, upon general principles also there can be no decision upon a contest between two disputants if the aforesaid principels are violated. There must, therefore, be an inquiry into the questions such as those relating to valuation in order to determine the amount of Court-fee payable under s. 5 by the Taxing Officer.

Now, let us examine the decision of the Taxing Officer in the present case in the light of the aforesaid principles. The learned Taxing Officer says: "The learned Vakil for the appellant appears to dispute the corrections of the Stamp Reporter, asking that it should be referred to the Bench. This is, however, a matter for the Taxing Officer so far as the appeal is concerned." In my opinion the Stamp Reporter has "rightly assessed the value of the land in dispute at Rs. 1,406-12 including mesne profits and Court-fee is payable on it. I allow three weeks' time to make good the deficiency on the memorandum of appeal, failing which place before the Bench for orders."

(4) 4 Ind. Cas 123; 32 A. 59; 6 A. L. J. 972.
(5) 52 Ind. Cas. 508; 4 P. L. J. 790.
(6) 43 Ind. Cas. 521; 3 P. L. J. 92.
(7) 7 Ind. Cas. 315; 7 A. L. J. 842; 33 A. 20.
(8) A. W. N. (1903) 214.
(9) 40 Ind. Cas. 904; 106 P. W. R. 1917.
(10) 20 M. 398 at p. 401; 7 Ind. Dec. (N. S.) 283.
(11) 8 Ind. Cas. 1145; 37 C. 914.
(12) 15 A. 117; A. W. N. (1893) 45; 7 Ind. Dec. (N. S.) 792.
(13) 21 M. 269; 7 Ind. Dec. (N. S.) 546.

The appellant in the present case disputed the correctness of the stamp report. There was, therefore, a dispute as to difference between him and the Stamp Reporter as to the amount of fee payable. The Taxing Officer had, therefore, jurisdiction to determine the dispute and to give a decision thereupon under s. 5 of the Act. The suitor disputed the jurisdiction of the Taxing Officer and asked for a reference of the question to a Bench. The Taxing Officer refused this request and said that the matter was entirely for him to decide, and not for a Bench. So far it is all right. Thereafter, the Taxing Officer atonce says that in his opinion the Stamp Reporter rightly assessed the value of the land in dispute. It does not appear that the Taxing Officer exercised his mind to determine the question judicially, nor does he seem to have made any inquiry into the matter. The order sheet does not show that any opportunity was given to the appellant to prove the value of the land, that is, the subject-matter in dispute in the appeal. It is, therefore, doubtful whether his decision in the present case is in consonance with the principles enunciated above and whether his decision is final.

As set out in the beginning of the judgment the question referred to us for determination is a general one as to the jurisdiction of the Taxing Officer to decide the question relating to valuation for determining the amount of Court-fee payable by the appellant, and I would answer the question in the affirmative. I confess that I felt considerable difficulty in deciding this question. The difficulty felt by me was so insurmountable that I was almost inclined to say that the question raised by the Division Bench and referred to us for decision was incapable of solution, and it is after a long and careful consideration that I have tried to give effect to the plain words of the Statute in s. 5 of the Act. The Act is so inartistic and unscientific that upon every question of importance it hardly affords sufficient solution. For instance, there is no provision in the Act whereby the principles enunciated in s. 7 for the determination of the class applicable to suits and memoranda of appeals in the subordinate Courts can be applied to the memorandum of appeal filed in the High Court. Under s. 7 (5) the Court-fee payable is not upon the market value of the subject-matter of the land but upon the revenue assessed upon the land if it forms an entire estate or a definite share of an estate paying annual revenue to Government. Under s. 7 cl. (2) the Court-fee is payable not upon the value of the subject-matter of the suit but upon ten times the amount of maintenance or annuity payable for one year In other words, in certain classes of cases Court-fee is payable not upon the actual amount in claim but upon principles fixing some fictitious amount as the value of the suit. These principles are, however, in practice applied by the Stamp Reporter, the Taxing Officer and the Taxing Judge to appeals filed in the High Court, whereas under the strict construction of the law the amount of fee payable in the Courts below will be upon fictitious valuation under the principles enunciated in s. 7 and in the High Court in the appeals in those cases the amount of fee payable will be payable upon the actual amount or value of the subject matter in dispute under Sch. I, s. 7 not being applicable to the High Courts but only to the subordinate Courts. The power is given only to demand an additional fee in the interest of revenue and does not in any way give relief to a suitor from whom the subordinate Courts on account of any wrong decision as valuation have levied a higher fee than was payable upon the plaint or memorandum of appeal in those Courts, except in certain contingencies arising under s. 13 of the Act. It would appear that the Act does not purport to give any relief to a suitor from whom an improperly excessive fee has been taken in the subordinate Courts or in the High Court. Mr. Justice Mahmud while concurring with the decision of Chief Justice Sir John Edge in *Balkaran Rai* v. *Gobind Nath Tewari* (2) says: "The enactment, as the learned Chief Justice has explained, is most anxious to collect money from those who seek to obtain justice, but there is not one word in that Statute to enable the litigant who is to be subject to these stringent rules to re-obtain the sum of money which he, by dint of a wrongful user of the powers given to the Taxing Officer, does pay as Court-fee, say, for example, Rs. 3,000 instead of Rs. 10, as may be the case where difficulty may arise as to whether a suit or an appeal deals with a declaratory claim or a claim including reliefs of a consequential character. I mention this on purpose, as I hope that this enactment will soon be con-

sidered fit to be amended, and that a difficulty such as has arisen in this case may not arise in future, and that no pleas *admiseri-cordiam* such as were addressed in this very case might be made the subject of consideration by the Judges of a whole High Court established by Her Majesty's Charter. The stringency of the Act as it has been now interpreted is probably a good thing for the litigant, because it indicates the necessity of amendment in his behalf. I hold, following the views of Jeremy Bentham, that law taxes, the most stringent they are, the less do they achieve their aim, for they are stringent not in the interests of justice, but make the administration of justice difficult and in many cases impossible."

These are some of the anomalies, and I wish that the Act which is coming down from 1870 be soon placed on a scientific basis.

I have already discussed the actual question referred to us and I have indicated my answer. Accordingly, I agree with the learned Chief Justice in the answer proposed by him.

Mullick, J.—I agree with the judgment just delivered by the learned Chief Justice and I still think that the case of *Ram Sekhar Prasad Singh* v. *Sheonandan Dubey* (1), was rightly decided. The Court Fees Act in spite of its obscure drafting seems to me to lay down the following scheme for the taxation of plaints and memoranda of appeals.

Suits and memoranda of appeals are classified according to the subject-matter or the subject-matter in dispute or the nature of the relief claimed. Schedules I and II endeavour to give a comprehensive classification of the various kinds of suit with reference to these heads of classification. The Schedules also provide that the proper fee payable on some documents shall vary according to the Court in which they are filed and that in regard to others there shall be no such variance.

Again in Sch. II it is declared that the plaints and appeals in the suits therein specified shall bear the fixed fees prescribed, while in Sch. I are specified various suits in which the plaints and appeals shall bear an *ad valorem* fee. Article 1 of Sch. I provides that the fee payable on plaints and appeals in suits not otherwise provided for in this Act when presented to any Civil or Revenue Court except those mentioned in s. 3 of the Act shall be levied upon the amount or value of the subject-matter in dispute according to certain rates given in a table at the end of the Schedule. The words, "not otherwise provided for in this Act" refer to certain sections in the body of the Act and to the remaining Articles of Schs. I and II.

Section 3 of the Act which falls in Ch. II provides that in respect of certain proceedings in the Original Side of a Chartered High Court and in all suits in the Small Cause Courts in Presidency Towns court fees on plaints and applications shall be collected in the manner provided in Ch. V of the Act. The section is not a charging section and merely prescribes the mode of collection. The fees leviable on the Original Side of a Chartered High Court and in the Presidency Small Cause Courts are prescribed by enactment other than the Court fees Act.

Section 4 of the Act is a charging section and declares that no document, which is chargeable under Shcs. I and II, shall be received in the High Court in exercise of its Extraordinary Original Civil Jurisdiction or Extraordinary Original Criminal Jurisdiction, or Appellate Jurisdiction, or its jurisdiction as a Court of Reference and revision unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said Schedules as the proper fee for such document The language of the section when read with Art. 1, of Sch. I may raise a doubt as to the fee chargeable on a memorandum of appeal; but in my opinion the meaning of the Legislature is that the fee on a memorandum of appeal preferred in the High Court shall not be less than that which would have been payable on the document if it had been filed in the Courts referred to in Art. 1 Sch. I.

I next turn to Ch. III which deals with fees in Courts and Public Offices other than those referred to in Ch. II. Section 6 in this Chapter is the charging section and it declares that no plaint or memorandum of appeal shall be received unless in respect of it there be paid a fee of an amount not less than that indicated in Schs. I or II as the proper fee for such document.

Let us next refer to the procedure to be followed when a plaint or a memorandum of appeal is filed in a Court other than a Chartered High Court or a Presidency Small Cause Court.

The Court will first of all decide into which of the various classes enumerated in Schs. I and II the document falls. This has sometimes been called deciding the category of the suit. The process involves the construction of the plaint and a determination of the real relief prayed for. It is essentially judicial and requires the Court to be a Statute to see that reliefs are not so cast as to secure an evasion of the Court Fees Act. A familiar instance is when declarations are only asked when consequential relief is the real claim.

The Court will then proceed to see whether the proper fee is a fixed fee under Sch. II or an *ad valorem* fee under Sch. I. No question or valuation arises if the fee is a fixed fee; but if an *ad valorem* fee is leviable then the Court will proceed to value the subject-matter or the subject-matter in dispute or fix the amount of the relief claimed according to rules for computation set out in ss. 7 and 8 of the Act. If a local or further investigation is necessary the Court may proceed under s. 9. This computation is the valuation referred in s. 11 of Ch. III and the Court's adjudication on a question relating thereto is final in respect of a plaint or memorandum of appeal under the first clause of s. 12.

It has been held that a question of valuation does not include a question of category and although the two questions may in practice often overlap and a decision on a question of valuation for the purpose of determining the amount of fee chargeable may involve a decision on the question of category, it has been conceded here before us that a decision on a question of category is not final within the meaning of clause (*i*) of s. 12, while a decision on a question of valuation pure and simple as defined above is final as between the parties to the suit. The second clause of s. 12 however, gives a Court of Appeal power to collect deficit Court-fees in respect of fees payable in subordinate Courts, and it seems now settled that the High Court as a Court of Appeal, Reference and Revision is competent to exercise this power in respect of all Courts subordinate to it.

Section 12 does not apply to the Original Side of the High Court but does the first clause of it apply to the Appellate Side of that Court? I think the answer is in the negative.

The scheme of the Act does not permit us to hold that the first clause is applicable to High Courts, and the heading of Ch. III in which s. 12 falls specifically states that this Chapter applies to fees in Courts other than those referred to in Ch. II. It is true that s. 8 deals with the fee payable in land acquisition appeals which lie now exclusively to the High Court and that s. 15 which also falls under Ch. III deals with the refund of Court-fees upon applications for review in certain Courts including the High Court. I agree with the learned Chief Justice that s. 8 does not raise any difficulty. When that section was first enacted, appeals in certain land acquisition cases lay to Courts other than the High Courts and the inclusion of the section in Ch. III of the present Act merely means that in the event of the former jurisdiction of these latter Courts being restored, the Court fee shall be computed in accordance with the section. The section does not in terms provide for fees on a memorandum of appeal to the High Court and in my opinion the charging section for such appeals still remains s. 4 of the Act.

With regard to s. 15, it is to be observed that the section deals not with the payment of fees but with refunds, and it does not assist us in deciding whether the first clause of s. 12 is applicable to a High Court. Further I agree with the learned Chief Justice that the reference to a High Court in this section is probably due to some carelessness in drafting and it seems to me that the proper place for the section was in Ch. VI which deals with miscellaneous matters.

Next let us inquire who is the authority competent to determine a question of valuation or a question of category with respect to a memorandum of appeal presented to a High Court on the Appellate Side. In my opinion s. 5 designates the authority. It prescribes that in all High Courts there shall be, *firstly*, an officer whose duty it is to receive the memorandum; *secondly*, an officer who shall be the Taxing Officer; and *thirdly*, when the Chief Justice so directs a Judge of the High Court who shall be appointed to determine disputes arising between the suitor and the Taxing Officer. It is not necessary to consider what would be the position if there was no Taxing Officer appointed; but the law states in clear and unequivocal language that so long as there is a Taxing Officer his decision shall be final as regards the amount of the Court-fee payable. This decision must in-

clude a determination not only on the question of category but also on the question of valuation. It is conceded that the Taxing Officer of this Court has jurisdiction to decide the question of category, but it is urged that he has no jurisdiction to decide a question of valuation which requires the exercise of judicial functions, and it is suggested that by s. 12 the High Court is the only authority that can decide that question.

Now in the first place I have already expressed the opinion that the first clause of s. 12 does not apply to High Courts and in the second place if it is sought to create jurisdiction by the application of s. 107 of the C. P. C. the answer is that in view of the unrestricted language of s. 5 of the Act it must be assumed that the Legislature intended to divest the Court and to transfer its jurisdiction to the Taxing Officer. The decision of a question of category often requires the exercise of judicial powers of a higher order than the decision of a question of valuation this is recognized in s. 12 which confers finality only as to the latter, and it could not have been intended to grant to the Taxing Officer jurisdiction as to the more difficult question and to deny it as to the less difficult.

If on the other hand it is contended that the Taxing Officer has jurisdiction neither to determine a question of category nor a question of valuation, then his jurisdiction must be limited to an exercise in arithmetic only and this could not possibly have been intended by the Act.

But it is pointed out that the Act provides nothing of the nature of s. 9 for the Taxing Officer. The answer to this is that the jurisdiction to fix the amount of the Court-fee being given the law implies that the Taxing Officer shall have power to adopt such procedure as may be necessary for the exercise of that jurisdiction. Certainly a Taxing Statute must be strictly construed, but in this case the power to hold an inquiry is in aid of the subject and in no way to his prejudice; nor is it repugnant to the Act. The fact is that where the High Court has delegated its jurisdiction to a Taxing Officer, it has no jurisdiction left to do any of the acts which it could otherwise have performed, and if the Taxing Officer cannot decide a question of valuation no other authority can discharge that duty.

I agree, however, that in the case before us the inquiry has been too summary and that the Taxing Officer would have been well advised to have called upon the suitor to give further evidence of the value of the subject-matter in dispute. The Taxing Officer had power either to take evidence himself or to refer the matter to the Trial Court, but though it is unfortunate that he preferred to rely on the somewhat meagre materials on the record it cannot be said that he has acted without jurisdiction. His decision is, therefore, final.

Das, J.—I adhere to the opinion which I have expressed in the Order of Reference. The question for consideration is whether the words employed by the Legislature in s. 4 of the Court Fees Act are of sufficient amplitude to authorize the special officer brought into existence by s. 5 to investigate a question of valuation for the purpose of determining the amount of any fee chargeable on the memorandum of appeal in the High Court. The liability of the suitor to pay the fee is determined by s. 4; s. 5 provides for the procedure to be adopted in cases of difference between the officer and the suitor as to the necessity of paying a fee or the amount thereof. It is not open to doubt that, unless an enquiry into the question of valuation is implied in the terms of s. 4, there is no power in the officer under s. 5 to undertake that enquiry.

It seems to me that s. 4 is clear on this point. That section provides, *inter alia*, that no document of any of the kinds specified in the First or Second Schedule to the Act annexed as Chargeable with fees, shall be filed, exhibited, or recorded in the High Court in the exercise of its appellate jurisdiction unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said Schedules as the proper fee for such document. The memorandum of appeal in this case is undoubtedly comprehended within the terms of s. 4; as expressly provided by that section, it is necessary for the suitor to pay a fee of an amount not less than that indicated in one or other of the Schedules as the proper fee for the memorandum of appeal, before the memorandum of appeal can be filed in this Court.

This is not denied. What is denied is that the special officer can correct the valuation and require the suitor to pay the fee on the cerrected valuation. I shall presently deal with the problem whether it is possible for the special officer to

investigate the question of valuation in the absence of machinery enabling him to decide such a question. I am more concerned at the present moment to show that the authority to hold such an investigation is denied by the terms of s. 4.

Now I attach some importance to the words "such document" in the last clause of s. 4. In my opinion, these words clearly refer to the document sought to be filed exhibited or recorded in the High Court. Can it be said that the document as corrected or rectified by the officer is "such document", within the meaning of s. 4, in respect of which the officer is entitled to claim a fee from the suitor? In this case the appellants tendered a memorandum of appeal, valuing the subject-matter of the appeal at Rs. 70. The valuation is part of the document as tendered by the appellants ; and if I am right in the view which I have taken, all that the officer had to do was to refer to to the tables of rates of *ad valorem* fees in the Act and ascertain the fee payable by the appellants. But this is not the course which was adopted by the officer. He read the plaint and made the discovery that the appellants, who were the plaintiffs in the action, had claimed Rs. 70 per year as mesne profits due to them. He concluded that the appeal was undervalued, and he thought that the appeal should be valued at eighteen times the yearly profit. He directed the valuation to be corrected and he called upon the appellants to pay the fee on the memorandum of appeal as corrected by him.

In my opinion, there was no authority in the officer to adopt this course. To assent to the procedure adopted by the officer is to say that there is authority in the officer to rectify the document sought to be filed, exhibited or recorded in the High Court. For this view, I can find no justification in the terms of s. 4. In my opinion, the words "such document" (in respect of which the suitor is to be taxed) mean the document sought to be filed, exhibited or recorded, not the document as corrected or rectified by the officer.

A consideration of some of the provisions of the Third Chapter, lends strong support to the arguments advanced on behalf of the appellants. The Chapter deals with the question of fees payable in Courts other than the High Courts and Courts of Small Causes at the Presidency Towns. Now the terms of s. 6 are identical with those of s. 4, and must, in my opinion, receive the same construction. If the words, "fee of an amount not less than that indicated by either of the said Schedules" in s. 4 mean such fee as is payable, not on the memorandum of appeal as sought to be filed, but after an investigation of the question of valuation, then those words in s. 6 must receive the same interpretation, and would authorize the Court under s. 6 to deal with the question of valuation for the purpose of determining the amount of any fee chargeable. But this was clearly not the intention of the Legislature, for there is a special provision, contained in s. 12, which specifically deals with the question of valuation. If the interpretation put on the Statute on behalf of the Crown be right, then it was wholly unnecessary to enact the first paragraph of s. 12, with the exception of the words, "and such decision shall be final as between the parties to the suit", for an enquiry as to valuation has already been provided for in s. 6. A construction which will lead to such a conclusion ought to be avoided. I have no doubt that the subject to which ss. 3 and 6 apply is different from that to which section 12 applies. Sections 3 and 6 vest the officers with power to decide the amount of fee payable on the document sought to be filed. Section 12 vests the Court with power to hold a judicial enquiry into the question of valuation for the purpose of determining the amount of fee chargeable. The function to be performed under ss. 3 and 6 is ministerial ; the function to be performed under s. 12 is to be performed by the Court and is purely judicial.

But it will be objected that there is no provision corresponding to s. 12 in the Second Chapter of the Act; and that consequently, if the arguments on behalf of the appellants are to prevail, there are no means of compelling the suitor to pay so much additional fee as would have been payable, had the High Court the power to decide the matter. In my opinion, the second paragraph of s. 12 gives the High Court complete power in this respect. That paragraph runs as follows:—

(*ii*) But whenever any such suit comes before a Court of Appeal, Reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid

to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of s. 10, paragraph (*ii*) shall apply".

The words in s. 12 para. 2 are general, and, in my opinion, they authorize the High Court to require the suitor to pay an additional fee both on the plaint and on the memorandum of appeal in the High Court. Let me illustrate my meaning by a concrete example. A suitor files a suit in the Munsif's Court and values the subject-matter of the suit at Rs. 216-12. He pays a Rs. 16-8-0 as the fee due on the plaint. His suit is dismissed, and he files an appeal, paying Rs. 16-8-0 again on the memorandum of appeal. His appeal is dismissed, and he presents a second appeal to this Court, paying Rs. 16-8-0 again on the memorandum of appeal in this Court. This Court considers that the question of valuation was wrongly decided to the detriment of the revenue and comes to the conclusion that the subject-matter should have been valued at Rs. 1,406-12-0. Now this Court has complete power to require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided. Now had the question been rightly decided, Rs. 100 would have been payable by the suitor both on the plaint and on the memorandum of appeal in the Court below, and Rs. 135 would have been payable on the memorandum of appeal in this Court. The total loss to the revenue, amounting to Rs. 282-8-0, has flowed from the circumstance that the question was wrongly decided in the Court of first instance. In other words, had the question been rightly decided, an additional fee of Rs. 282-8-0 would have been payable by the suitor; and, in my opinion, the High Court, under the express provision of s. 12 para. 2, can require the suitor to pay the additional fee of Rs. 282-8-0 and stay the appeal until the additional fee has been paid.

I suggest that this is a far more reasonable interpretation of the Statute than that which is suggested on behalf of the Crown. The enquiry by the Stamp Reporter into the question of valuation can only be on speculative lines, since the Legislature has not provided him with the machinery appropriate to such an enquiry. A critical examination of the Act will show that whenever the Legislature has given any power to the appropriate authority to hold an enquiry into the question of valuation, it has also given it the power to examine witnesses and take evidence in the matter. Under s. 12 every question relating to valuation for the purpose of determining the amount of any fee chargeable under the Third Chapter has to be decided by the Court in which the plaint or memorandum of appeal as the case may be is filed. Section 9 provides the Court with the machinery appropriate to such an enquiry and empowers the Court to issue a commission to any proper person directing him to make such local or other investigation as may be necessary and to report thereon to the Court. Section 19H (2) deals with applications for Probate or Letters of Administration in the High Court. The fifth para. of s. 19H authorizes the Court to hold an enquiry into the value of the property of the deceased and the sixth para. empowers the Court to authorize a person to hold the enquiry and for that purpose to examine the petitioner on oath and to take such further evidence as may be produced to prove the true value of the property. It will be seen that the Legislature has shown some anxiety to secure a judicial enquiry into the question of valuation and I cannot regard the absence of such provision in connection with the power vested in the officer under ss. 4 and 5 as a mere omission to be supplied by the Court on an equitable construction of the Court Fees Act. It is well established that judicial function cannot be delegated without statutory authority and I can find no authority in the Court Fees Act in support of the proposition that the officers under ss. 4 and 5 can embark upon a judicial investigation for the purpose of determining the value of the subject-matter. The High Court has all the powers of the primary Court and undertakes the investigation under s. 12 (2) of the Act. But no express power has been given to the Stamp Reporter or to the Taxing Officer to take evidence or to direct a local enquiry and I do not see how it is possible for those officers to decide a question of valuation except on speculative lines. In this case the Stamp Reporter thought that as the suitor had claimed Rs. 70 a year as mesne profits due to him he should have valued the subject-matter of the suit at eighteen times the yearly profit. But the suitor valued his land at Rs. 70 is obvious that

either his valuation was wrong or he had exaggerated his claim for mesne profits, and I do not see how the Stamp Repoter could possibly have proceeded on the mesne profits claimed since it was not decided that the claim was well founded. We are entitled to expect the most scrupulous fairness in a proceeding between the Crown and the subject especially in a proceeding to tax the subject and I cannot assent to the method adopted by the officers for determining the value of the land.

But if this method is not to be pursued by the officers there is no other method available to them. I regard the omission on the part of the Legislature to provide the officers with a machinery appropriate to an enquiry into valuation as deliberate and as marking an intention not to vest them with a judicial function. It has been suggested that though no express power has been given to the officers to take evidence or to direct a local enquiry such a power must have been given to them by implication since where a Statute is passed for the purpose of enabling something to be done but omits to state in terms some detail which is of great importance (if not actually essential) to the proper and effectual performance of that which the Statute has in contemplation the Courts are at liberty to infer that the Statute contains that detail by implication. But there is high authority for the view that, if there be admissible in any Statute, what is called an equitable construction, such a construction is not admissible in a Taxing Statute where you can simply adhere to the words of the Statute. See *Parlington* v. *Att. General* (14). We are, therefore, not entitled to read into the Act words which are not there so as to hold that there is power in the officers under ss. 4 and 5 of the Act to take evidence or to direct a local enquiry for the purpose of deciding a question of valuation. If this be the right view then it is difficult to see how the Legislature could have intended that these officers should decide a question of valuation especially when it is remembered with what scrupulous care the Legislature has secured a judicial enquiry into the question of valuation whenever it has in express terms given power to undertake such an enquiry. It is a general rule of construction of Statutes that unless you are obliged to do so you must not suppose that the Legislature intended to do a palpable injustice see, *Ex parte Corbett, In re, Shand* (15). There is no question that a palpable injustice has been done to the suitors if the Legislature has authorized those officers to decide a question of valuation for the purpose of taxing the subject without giving them the power to hold a judicial enquiry.

I would answer the question put to the Full Bench as follows:—The Taxing Officer has no jurisdiction to decide a question relating to valuation for the purpose of determining the amount of Court-fee payable by the appellant either on his plaint or on his memorandum of appeal, and, if he assumes jurisdiction to decide such a question the Court may ignore it.

Foster, J.—I concur with the judgment of the learned Chief Justice. Any attempt to displace the generally accepted view must, I think, and only in conclusions which still remain open to reasonable controversy. The Court Fees Act is, I believe, about to be reconstructed; if so, the present question, if so far as it is a question of law, is of transitory importance.

Z. K. *Order accordingly.*

(14) (1869) 4 H. L. 100 at p. 122; 38 L. J. Ex. 205; 21 L. T. 370.

(15) (1880) 14 Ch. D. 122 at p. 129; 49 L. J. Bk. 74; 42 L. T. 164; 28 W. R. 569.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 312 AND 329 OF 1920.

January 16, 1924.

Present:—Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

IN APPEAL NO. 312 OF 1920.

CHOKKALINGHA PILLAI—PLAINTIFF—APPELLANT

versus

VELAYUDHA MUDALIAR AND OTHERS—DEFENDANTS NOS. 2 TO 4—RESPONDENTS.

IN APPEAL NO. 329 OF 1920.

VELAYUDHA MUDALI—PLAINTIFF NO. 2—APPELLANT

versus

RAMASAMI PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 21—Territorial jurisdiction, transfer of—Pending suits, effect on—Jurisdiction of Court to pass final decree—Waiver of objection—Suit to set aside decree, maintainability of.

Section 21 of the C. P. C. enacts an exception to the general rule that parties by mutual consent cannot confer upon a Court jurisdiction where it has not,

the exception enacted being that when the question is one of territorial jurisdiction the plea may be waived. [p. 158, col. 1.]

Where an objection to territorial jurisdiction is cured by waiver, it is cured not merely for the purpose of the Appellate or Revisional Court but cured entirely and for all purposes, whether there was want of jurisdiction at the institution of the suit or at any stage during the progress of it. [p. 156, col. 1.]

Zamindar of Ettiyapuram v. *Chidambaram Chetty*, 58 Ind. Cas. 871; 43 M. 675; 28 M. L. T. 75; (1920) M. W. N. 460; 12 L. W. 217; 39 M. L. J. 203, relied on.

In a suit on a mortgage, the preliminary decree was passed by the Kumbakonam Sub-Court. Subsequently in virtue of a Government Notification, the territorial jurisdiction over the place wherein the mortgage property was situated was transferred from the Kumbakonam Sub-Court to the Mayavaram Sub-Court, but nevertheless the former Court passed the final decree in the suit. In a suit by one of the mortgagors-defendants to set aside the decree as being absolutely void for want of jurisdiction:

Held, that the objection to want of jurisdiction had been waived and s. 21, C. P. C., cured it and the decree could not, therefore, be challenged as being without jurisdiction even in collateral proceedings. [p. 155, col. 2.]

Per *Phillips, J.*—When a case has been properly instituted in a Court and is pending, the mere transfer of territorial jurisdiction affecting that case does not transfer the proceedings which were actually pending in the Original Court. [p. 154, col. 2.]

The jurisdiction of a Court consists in its power to entertain suits. Once the suit has been entertained, the remaining proceedings taken therein are not taken by reason of any particular territorial jurisdiction, but in the exercise of the powers vested in the Court to try suits generally and consequently the only time at which the territorial jurisdiction comes into operation is at the time of filing the suit. [p. 155, col. 2.]

Subhiah Naicker v. *Ramanathan Chettiar*, 22 Ind. Cas. 899; 37 M. 462; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251, *Suni Nadan* v. *Muthaswamy Pillai*, 53 Ind. Cas. 213; 42 M. 821; 11 L. W. 63; 37 M. L. J. 284; 26 M. L. T. 223; (1919) M. W. N. 640, *Sadasiva Pillai* v. *Kalappa Mudaliar*, 24 M. 39, *Vedavalli Narasiah* v. *Mangamma*, 27 M. 538; 14 M. L. J. 340 and *Subbaraya Mudaliar* v. *Rakki*, 1 Ind. Cas. 73; 32 M. 140; 5 M. L. T. 27, relied on.

Appeals against a decree of the Court of the Subordinate Judge, Mayavaram, in O. S. Nos. 29 and 34 of 1917 respectively, dated 12th July 1920.

ARGUMENTS.—Mr. *S. Srinivasa Aiyengar* (with him Messrs. *K. Bhashyam Aiyengar* and *K. Narasimha Aiyengar*), for the Respondents.—The suit on the mortgage was pending till the final decree. The change of territorial jurisdiction by general notification to Mayavaram Court cannot take away the jurisdiction of the Court over the suits pending in the Kumbakonam Court. The principle really is that unless pending suits are also expressly transferred by the notification, the Court in which the suit was instituted does not cease to have jurisdiction merely by the notification. Where once the suit was validly entertained by a Court, the party has got the right to have his case heard by that particular Court to which he originally went under the then law and that right cannot be taken away by a change in the territorial jurisdiction by notification. *Colonial Sugar Refining Co.* v. *Irving* (1).

Though there is no direct case on this question of change of territorial jurisdiction by notification in the exact form it arises in the present case, there are other cases of jurisdiction on notifications under other Acts, wherein it has been held that pending suits are not affected by such notifications.

See *Subbaraya Mudaliar* v. *Rakki* (2) *Ramakrishna Chetty* v. *Subraya Iyer* (3) *Sadasiva Pillai* v. *Kalappa Mudaliar* (4) *Vedavalli Narasiah* v. *Mangamma* (5) and *Nana* v. *Sheku* (6).

In any case though s. 21, C. P. C., does not in terms apply yet the principle of the section clearly applies. In fact it has been applied to execution proceedings and there is no reason why it should not also be applied in reference to a suit to set aside such a decree. The plaintiff who was a party in the other suit is estopped from raising the question of jurisdiction. The objection has been clearly waived. The waiver operates for all purposes including an independent suit to set aside the decree.

See *Veerappa Chetti* v. *Ramaswami Chetti* (7) *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (8) *Suni Nadan* v. *Muthuswamy Pillai* (9).

In either view the Kumbakonam Sub-Court had jurisdiction to pass the final

(1) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.
(2) 1 Ind. Cas. 73; 32 M. 140; 5 M. L. T. 27.
(3) 18 Ind. Cas. 64; 38 M. 101; 24 M. L. J. 54; (1913) M. W. N. 303.
(4) 24 M. 39.
(5) 27 M. 538; 14 M. L. J. 340.
(6) 32 B. 337; 10 Bom. L. R. 330.
(7) 53 Ind. Cas. 579; 43 M. 135; 26 M. L. T. 271; 37 M. L. J. 442; 11 L. W. 232.
(8) 58 Ind. Cas. 871; 43 M. 675; 28 M. L. T. 75; (1920) M. W. N. 460; 12 L. W. 217; 39 M. L. J. 203.
(9) 53 Ind. Cas. 213; 42 M. 821; 11 L. W. 63; 37 M. L. J. 284; 26 M. L. T. 223; (1919) M. W. N. 640.

decree even after the territorial jurisdiction was transferred to the Mayavaram Sub-Court and that final decree was, therefore, valid.

Mr. *T. M. Krishnaswami Aiyar* (with him Mr. *K. Sankara Sastriar*), for the Appellant.—Under ss. 3 and 10 of the Madras Civil Courts Act the Local Government may vary the local limits of the jurisdiction of any Court and the venue is changed from the date of notification. All suits pending as well as those to be instituted must be tried by the Court to which the new jurisdiction has been conferred. The word "district" in s. 3 is material and must be given its due significance.

Territorial jurisdiction must subsist in the Court with regard to subject-matter till judgment is delivered whatever may be the case with regard to personal jurisdiction. The jurisdiction as to subject-matter of the suit must exist throughout the proceedings. If the Court loses its jurisdiction during the pendency of the proceeding, it cannot pronounce a decision and if one is pronounced it is void for want of jurisdiction.

The principle that the state of things existing at the time of the institution of the suit is sufficient to determine jurisdiction is applicable only to cases of local jurisdiction. The cases referred to by the respondents were all cases dealing what may be called "vested rights" of appeal or right of suit in a Civil Court and it was held that Statutes cannot ordinarily retrospectively affect the vested rights, substantive or remedial.

With regard to s. 21 and principle thereunder is that objection to territorial jurisdiction can be waived. It is true it has been applied to execution proceedings but with special reference to the words "which passed the decree" in ss 37 and 38 of the C. P. C. Those cases, therefore, have no applicability to the present case—a case of pending suit. Being an exception to the general rule that a Court should try a suit must have territorial jurisdiction over the subject-matter, s. 21 must be strictly construed and applied and should not be widely extended.

Setrucherla Ramabhadraju v. *Maharaja of Jeypore* (10), *Prem Chand Dey* v. *Mokhoda Debi* (11), C. R. P. No. 344 of 1921, not printed *Monna Gurusamy Naicker* v. *Sheikh Muhammadhu Rowther* (12), *Srinivasa Rao* v. *Hanumantha Rao* (13).

Mr. *S. Srinivasa Aiyengar* in reply explained the two cases in *Jyoti Prokash Chatterjee* v. *Bagala Kanta Chodhury* (14) and *Setrucherla Ramabhadaraju* v. *Maharaja of Jeypore* (10). On the ground that in those cases it was really a case of the change of the subject-matter, relating to cognizability by a Court rather than a change of mere territorial jurisdiction.

JUDGMENT.

Phillips, J.—This suit (O. S. No. 27 of 1917) has been brought to set aside the final decree in (O. S. No. 15 of 1903) in the Kumbakonam Sub-Court and for recovery of the properties comprised therein. The first question we have to deal with in this appeal is whether that decree can be set aside as being absolutely void for want of jurisdiction. It is a decree in a mortgage suit instituted in 1903 when the Kumbakonam Court had jurisdiction over the place wherein the mortgaged property is situated. In 1907 the jurisdiction over this particular place was transferred from the Kumbakonam Court to the Mayavaram Court; and, at the time of passing the final decree, the Kumbakonam Court had no jurisdiction over the place where the mortgage properties lie. The Subordinate Judge, relying on *Subbiah Naicker* v. *Ramanathan Chettiar* (15) has held that this decree was absolutely viod, but has for other reasons, dismissed the plaintiff's suit.

In urging the appeal, the respondents support the decree on the ground that this finding of the lower Court is not correct; and it is argued that when the case has been properly instituted in a Court and is pending, the mere transfer of territorial jurisdiction affecting that case does not transfer the proceedings which were actually pending in the Original Court. It is also argued that inasmuch as the plaintiff

(10) 51 Ind. Cas 185; 42 M. 813; 17 A. L. J. 694; 35 M. L. J. 11; (1919) M. W. N. 502; 26 M. L. T. 127; 21 Bom. L. R. 914; 30 C. L. J. 209; 23 C. W. N. 1033; 10 L. W. 362; 46 I. A. 151 (P. C.).

(11) 17 C. 699; 8 Ind. Dec. (N. S.) 1008.

(12) 86 Ind. Cas. 650; 43 M. L. J. 713; 16 L. W. 748; (1922) M. W. N. 743; (1923) A. I. R. (M.) 92; 46 M. 83.

(13) 65 Ind. Cas. 727; 42 M. L. J. 344; 15 L. W. 458; (1922) A. I. R. (M.) 10; (1922) M. W. N. 349; 31 M. L. T. 79; 46 M. 1.

(14) 70 Ind. Cas. 822; 36 C. L. J. 724; (1922) A. I. R. (C.) 274.

(15) 22 Ind. Cas. 899; 37 M. 462; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251.

not only consented to the jurisdiction of the Kumbakonam Sub-Court but actually invoked its jurisdiction in this particular case, he is barred by the principle of s. 21, C. P. C., from raising the objection now. No doubt in *Subbiah Naicker* v. *Ramanathan Chettiar* (15) it was observed that, "unless the authority which changes the venue reserves the right to the Court which has lost the jurisdiction to continue pending proceedings (affecting the property so transferred to another jurisdiction), such proceedings also *ipso facto* transferred by the change of venue to the new Court."

This observation in this particular case was made *obiter*; and when this case was considered by another Full Bench in *Suni Nadan* v. *Muthuswamy Pillai* (9) some of the *obiter dicta* in *Subbiah Naicker* v. *Ramanathan Chettiar* (15) were overruled, although this one was not particularly specified. So long ago as 1900 in *Sadasiva Pillai* v. *Kalappa Mudaliar* (4) it was held that the right of appeal which existed when the suit was filed in a District Court was not taken away by a subsequent notification which removed the jurisdiction of the District Court to try such a suit and in the course of the judgment we find the following.—

"The District Judge held, quite rightly, that notwithstanding the notification he had jurisdiction to hear the suit on the ground that it had been instituted before the notification came into force."

Similarly in *Vedavalli Narasiah* v. *Managamma* (5) it was held that where the jurisdiction of Civil Courts was taken away by s. 33 of Act II of 1894, this did not affect the suit which had been filed in a Civil Court before that section became applicable to the subject-matter of the suit. Again in *Subbaraya Mudaliar* v. *Rakki* (2) it was held that the Madras Estates Land Act did not take away the jurisdiction of Civil Courts to hear and determine suits which had been taken cognizance of by them before the Act came into operation. It is difficult to discover any difference in principle between those cases and the present case where the territorial jurisdiction has been altered; and in fact, it would appear that when the entire jurisdiction of the Civil Court has been taken away, such removal would apply with more force to pending suits than in a case where the jurisdiction of the Court over the particular place in which the property is situated has alone been removed. A large number of cases have been cited which deal with the jurisdiction of a Court to execute a decree properly passed by it, when territorial jurisdiction has been taken away after the passing of the decree. I do not think that much importance can be attached to these cases because there are certain special sections of the C. P. C. *i.e.*, 37, 38, 39 and 150 which specifically deal with this point and there is no special provision in the Act which deals with pending suits. The jurisdiction of a Court consists in its power to entertain suits, and when once a suit has been properly entertained, it is difficult to understand how that jurisdiction is removed unless it is specifically so done by the order of a competent authority. Once the suit has been entertained, the remaining proceedings taken therein are not taken by reason of any particular territorial jurisdiction, but in the exercise of the powers vested in the Court to try suits generally and consequently the only time at which the territorial jurisdiction comes into operation is at the time of filing the suit. Once the Court has seisin of the case, it has jurisdiction to try it to its conclusion, unless there is any reason for holding that that jurisdiction has been removed. If this be the right principle and, I think it is, it would account for the fact that there is no provision in the C. P. C. for the trial of suits, pending in a Court which had territorial jurisdiction at the time of their institution, after such jurisdiction has been removed before the trial is concluded. In this view, it appears to me that the final decree passed in this suit was not passed without jurisdiction.

Support to the view that territorial jurisdiction is not more important than and in fact probably not so important as the other form of jurisdiction of a Court is given by the provisions of s. 21, C. P. C. Under that section unless objection is taken to the place of suing, which has been held to mean territorial jurisdiction, at the earliest possible opportunity, no objection can be taken in appeal or in revision. That section is not strictly applicable to the present case for this is not an appeal from the original decree but it has been extended in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (8) to execution proceedings and in that case, it was held that

the effect of the section is, that objections which the Appellate or Revisional Court is thereby precluded from entertaining must be considered cured for all purposes unless taken before the passing of the decree in the Original Court. In principle, there is no distinction between applying the provisions of s. 21 to execution proceedings and applying them to a suit specially brought for the purpose of setting aside a decree. The principle underlying the section is that waiver of territorial jurisdiction is recognised by law, whereas it has been consistently held that other forms of jurisdiction such as jurisdiction of the subject-matter or pecuniary jurisdiction cannot be waived by consent of parties. If territorial jurisdiction can be thus waived, it has admittedly been waived in the present case. I would, therefore, hold that for this reason also, the final decree was passed with jurisdiction and it is, therefore, binding upon the plaintiff who was a party thereto.

[His Lordship then dealt with questions of fact not material for the report and concluded:—]

I would, therefore, allow the appeal in part and give plaintiff a decree for the recovery of one *veli* of land out of the five *velis* mortgaged and order the parties to pay and receive proportionate costs.

It follows that Appeal No. 329 of 1920 must be dismissed with costs.

Venkatasubba Rao, J.—This appeal raises two questions, first, a question of law which refers to the entire subject-matter of the suit and, secondly, a question of fact which has a bearing only upon a portion of that subject-matter.

The point of law to be determined is, whether the final decree passed by the Subordinate Judge of Kumbakonam dated the 25th of January 1913 in O. P. No. 15 of 1903 is a nullity, for the reason that previous to the date of that decree, in virtue of a Government Notification dated the 24th August 1907 the Kumakonam Sub-Court had ceased to have jurisdiction over certain tracts within the limits of which the suit properties are situated. The learned Subordinate Judge has decided the question in favour of the plaintiff holding that the decree is void as it was passed without jurisdiction, but he gave findings adverse to the plaintiff on the other issues raised and dismissed his suit. In my view the lower Court's judgment can be supported on the ground that the decree is not a nullity and it is, therefore, unnecessary to deal with the other points adverted to in the judgment of the learned Subordinate Judge.

The facts are these. The suit properties belonged to Muthusami Pillai and his son Ramasami Pillai who mortgaged them to a certain person and the latter assigned the mortgage to one Venkatachala Chetty. A second mortgage was effected in favour of Ponnambala Chetty. Venkatachala Chetty filed a suit on the first mortgage without impleading the second mortgagee, obtained a decree, brought the mortgaged properties to sale and purchased them himself. Then Ponnambala Chetty filed O. S. No. 15 of 1903 on the file of the Sub-Court of Kumbakonam on the footing of the second mortgage impleading Venkatachala Chetty as 3rd defendant and the original mortgagors as defendants Nos. 1 and 2, Venkatachalam Chetty died and his son Ponnuswamy Chetty was brought on record as the 10th defendant. The suit was apparently dismissed by the Sub-Court and there was an appeal to the District Court. On the 22nd of April 1910, a preliminary decree (Ex. H) was passed by the District Judge of Tanjore which recites that there was an order of remand by the High Court dated 30th September 1909 and that there was a finding submitted by the Subordinate Judge's Court of Kumbakonam in pursuance of an order of the District Court dated 16th December 1909. The relevancy of the order of remand and the finding I shall show later on, but I shall now proceed with my narration of the fact. The preliminary decree passed by the District Court was confirmed by the High Court on 19th July 1912. The decree of the High Court is marked Ex. H1. It was ordered that the amounts due to the plaintiff and the 10th defendant in O. S. No. 15 of 1903 should be paid on or before the 19th of October 1912, and that on such payment being made, the 10th defendant was ordered to deliver the properties to the mortgagors and to execute in their favour a proper document of retransfer. The mortgagors, that is, defendants Nos. 1 and 2 in that suit, were not able to raise the money and on the 21st of October 1912, they entered into an agreement with Chockkalinga Mudali (Ex. I, dated 21st October 1912) whereby it was arranged that the latter should pay about Rs. 15,500 the amount due to the 10th defend-

ant who represented the first mortgagee, Rs. 2,000 to the plaintiff in that suit who was the second mortgagee and further pay Rs. 1,000 to the mortgagors, and that thereupon Chockkalinga Mudali should be entitled to all the remedies under the preliminary decree in the place of the mortgagors. Accordingly, on the same date Chockkalinga Mudali paid into Court about Rs. 15,500 the amount due on the first mortgage and he also settled the claim of the second mortgagee by executing to him a promissory note for Rs. 2,000 and the second mortgagee undertaking to enter up satisfaction of the decree to the extent to which it was in his favour (See Ex. 4). Thereupon, the mortgagors Muthusami Pillai and Ramasami Pillai presented a petition to the Court (Ex. 2) praying that a final decree might be passed in favour of Chockkalinga Mudali. As, however, it was pointed out that the application was defective in form inasmuch as the proper party to make it was Chockkalinga Mudali, an endorsement was made on the petition by Ramasami Pillai and by his Vakil that in due course Chockkalinga Mudali himself would apply and thereupon a record was made to that effect and the petition was thus disposed of. This was on the 2nd of December 1912. Three days later, Chockkalinga Mudali himself applied to the Court by Ex. 22 for being brought on the record and for a final decree being passed. Ramasami Pillai one of the mortgagors, filed a statement in Court Ex. 6-A stating that he had no objection. The 10th defendant who represented the first mortgagee filed another statement Ex 6-B also consenting. The second mortgagee, the plaintiff in the action, had of course no objection, because he had already treated the decree in his favour as satisfied. The only other person who could be heard in the proceedings was Muthusami Pillai the other of the mortgagors. He objected to the passing of the final decree on the ground that the agreement in favour of Chockkalinga Mudali was not an assignment of the preliminary decree but was only an agreement. That objection was overruled and on the 25th of January 1913, an order (Ex.6) was made directing that Chockkalinga Mudali should be added as the 11th defendant and that a final decree should be passed in his favour. Accordingly Ex. 8, the final decree, was passed on the same date. Cockkalinga Mudali applied for execution and obtained on 26th January 1913 delivery of the properties from the 10th defendant. He also later executed a deed of transfer in favour of the former. So far it will be seen that Chackkalinga Mudali did everything he was bound to do and obtained what was presumably a legal title to the property and also possession. At this place I may just pause to observe, in order to remove any possible confusion, that though it may look strange that the mortgagors whose right to redeem was extinguished by the decree in the suit of the first mortgagee were treated by the preliminary decree in question as having a subsisting right to redeem it was stated to us in the course of the argument by all the parties concerned that no objection would be taken to the preliminary decree on this score. To proceed with my narrative, Muthuswami Pillai died in June 1913 and owing to some misunderstanding with Chockkalinga Mudali, Ramasami Pillai ignoring the entire proceedings sold the suit properties to one Chockkalinga Pillai by Ex. A on 4th September 1915 and the latter has instituted O. S. No. 29 of 1917 for the recovery of the properties from Chockkalinga Mudali and his son. The appeal is from the decree of the Subordinate Judge dismissing the suit. I may also mention that Chockalinga Mudali instituted a counter suit O. S. No. 34 of 1917 to compel Ramaswami Pillai and his son to execute in his favour a sale-deed in terms of the agreement of 21st October 1912 and to this suit Chockkalinga Pillai was made a party. Both the suits were tried together and the second suit also was dismissed.

I shall now state the point of law raised. The Subordinate Judge's Court of Kumbakonam had jurisdiction to try O. S. No. 15 of 1903 when, it was filed in his Court. But the notification referred to already was passed on the 24th August 1907 and runs thus:—

"It is also hereby directed that the Subordinate Judge's Court of Kumbakonam shall after the said date (2nd September 1907) cease, to have and exercise jurisdiction over the Munsifs of Valangiman, Mayavaram and Shiyali and shall continue to have and exercise jurisdiction over the Kumbakonam Munsif only."

It is urged on behalf of Chockkalinga Pillai that the final decree passed by the Kumbakonam Sub-Court is not valid as that Court ceased to have jurisdiction over the mortgaged properties, and next it is said,

the final decree and all that followed upon it, being, therefore, of no effect, the plaintiff is entitled to ignore the whole proceedings and recover from Chochkalinga Mudali the properties.

On the question as to whether the old Court of the Subordinate Judge of Kumbakonam or the new Court of the Subordinate Judge of Mayavaram had jurisdiction to pass the final decree, a long argument was addressed to us. But I refrain from expressing any opinion on it as in my view it is immaterial which of the two Courts had jurisdiction to deal with the further proceedings in O. S. No. 15 of 1903 which included the passing of a final decree in it. The question that has been raised is a very important one and the law upon it is uncertain. Whatever may be the right view, so long as there remains any doubt in regard to the Court having jurisdiction, great inconvenience and in many cases grave injustice is bound to result and it is very essential that at an early date the Legislature should enact clearly which Court in such circumstances has jurisdiction to proceed with the suit.

I am disposed to base my judgment on the ground that there has been a waiver of the plea of want of jurisdiction. It was open to the parties to waive objection regarding want of territorial jurisdiction and in this case not only did the mortgagors waive the objection, but as will appear from my statement of the facts they themselves invoked jurisdiction of the Kumbakonam Sub-Court and it is not, therefore, open to the plaintiff Chockkalinga Pillai to impeach the decree on the ground of want of jurisdiction. The principle underlying s. 21 of the C. P. C. is that the plea of want of territorial jurisdiction may be waived. This section enacts an exception to the general rule that parties by mutual consent cannot confer upon a Court jurisdiction where it has not, the exception enacted being that when the question is one of territorial jurisdiction the plea may be waived. Section 21 runs thus:—

"No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice."

Under the section, objection will not be allowed unless it was taken at the earliest possible opportunity and unless there has been a failure of justice. The section in terms no doubt does not apply, because it refers to the disallowing of the objection by an Appellate or Revisional Court. But the principle is of general application and if in appeal or revision the decree cannot be impeached it is equally reasonable that in a collateral proceeding it should not be allowed to be attacked. I respectfully adopt the statement of the law contained in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (8) to the effect that the principle underlying s. 21 is that the objection to territorial jurisdiction is cured not merely for the purpose of the Appellate and Revisional Court but cured entirely and for all purposes. In my opinion, again, this section applies when there is want of jurisdiction not merely at the institution of the suit but at any stage during the progress of it. It is difficult to believe that a more stringent rule was intended to be applied to cases where there has occurred a cessation of jurisdiction than to those where there has been initial absence of jurisdiction.

There is another aspect of the case which should not be overlooked. The foundation of the plaintiff's title is the preliminary decree. But if his argument that the Sub-Court of Kumbakonam lost jurisdiction subsequent to the notification is correct, the preliminary decree based as it was on a finding submitted by that very Court, would be itself ineffectual and the plaintiff would thus be out of Court.

On the point of law, therefore, that this appeal raises, I concur with the finding of my learned brother.

[His Lordship then deals with the questions of fact, which are not material for the report.]

V. N. V. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 174 OF 1923.

December 18, 1924.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice B. B. Ghose.

Srimati DAYAMOYI *alias* BIDDUTLATA DEBI—DEFENDANT No. 1—APPELLANT

versus

SANKAR NATH MUKHOPADHYA—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

*Will, construction of—Devise of absolute estate—Alienation, restriction on, validity of—Religious endowment—Deity, foundation of, worship of—*Shebaitship, *devolution of, rule of—Subsequent grant, effect of—Procedure—Person interested in worship of idol, whether can maintain suit for declaration—Suit for declaration as* shebait*—Cause title, amendment of.*

Where a suit is brought by a plaintiff to recover possession of certain properties belonging to an idol, as *shebait* of the idol, the omission to describe the plaintiff in the cause title of the suit as *shebait* of the idol is a misdescription which may be cured at any stage by amendment of the cause title, without any hardship being caused to the defendant. [p. 160, col. 2.]

A person who is interested in the worship of an ancestral idol can maintain a suit for a declaration that certain properties are the *debuttar* properties of the idol. [*ibid.*]

A Hindu testator by his Will devised certain property to his daughter-in-law with power to make gift, sale, mortgage, or any permanent *morusi mukarrari* settlement. By a subsequent clause, however, it was provided that any transfer by the devisee should be made only with the consent of her husband and the other sons and grandsons of the testator:

Held, that the intention of the testator was to make an absolute gift in favour of his daughter-in-law and that the subsequent restriction on her power of alienation must be regarded as repugnant to the gift and consequently void. [p. 161, col. 1.]

When the worship of an idol has been founded, the *shebaitship* is vested in the founder and his heirs, unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution. If a donor subsequent to the foundation makes a grant of any property to the idol, it becomes the property of the idol, and unless conditions are attached to the gift, the existing *shebait* of the idol would have the power to manage that property on behalf of the idol. [p. 161, col. 2.]

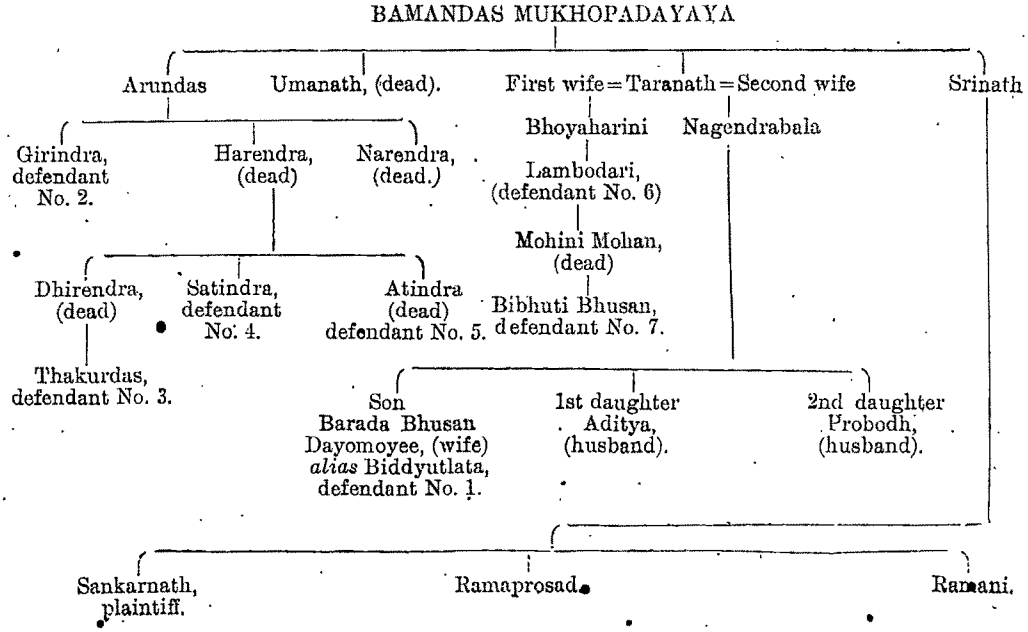
Appeal against a decree of the Officiating Subordinate Judge, Bogra, dated the 18th June 1923.

Messrs. *B. Chuckerbutty, G. C. Sen* and Babu *Bhupendra Kumar Ghose*, for the Appellant.

Babus *Mohendra Nath Roy, Rupendra Kumar Mitter, Rishindra Nath Sarkar, Pramatha Nath Bandopadhya* and *Satindra Nath Roy Chowdhury*, for the Respondents.

JUDGMENT.

Ghose, J.—This appeal arises out of an action in ejectment brought by the plaintiff on the allegation that the defendant No. 1 is in possession of certain properties as trespasser. In order to understand the facts, it is necessary to refer to the following genealogical table:



Bamandas Mukhopadhyaya died possessed of considerable property. He made a Will dated the 7th January 1875 making certain dispositions of his property. A portion of the property disposed of by the Will was given to his daughter-in-law Bhoyaharini—first wife of his son Taranath and this is the property now in dispute. Bhoyaharini died on the 18th November 1881 after having executed a Will dated the 16th November 1881. By cl. (1) of her Will, she dedicated certain properties as *debutter* to the ancestral Thakur of her father-in-law Sri Sri Sridhar Salagram Thakur and certain other properties for the performance of the ancestral *Durga Puja*, *Syama Puja* and Jagadhwatri Puja. After her death, her husband Taranath obtained Probate of her Will and he died on the 15th of August 1908 after having executed a Will on the 21st February 1908. Before Taranath obtained Probate of his wife's Will, some of the descendants of Arundas, the eldest son of Bamandas, had taken out Probate of that Will. But that grant was revoked on the application of Taranath and Taranath himself obtained Probate as already stated. Taranath, it is said, was in possession of the disputed properties and performed *Sheba* of the idol and the *Pujahs*. Taranath had a son named Barada Bhusan by another wife Nagendrabala. This Barada Bhusan died on the 10th March 1909. Defendant No. 1 is the widow of Barada Bhusan and she is in possession of the properties. After Barada's death, it appears that the present plaintiff Sankarnath who is one of the sons of Srinath—the youngest son of Bamandas Mukerji, applied unsuccessfully for Probate of the Will of Bhoyaharini on the allegation that he had been appointed executor. The Court found that there was nothing to administer and, on that ground, Sankarnath's application for Probate was refused. The present suit has been brought by Sankarnath on the ground that he is the sole *shebait* appointed under the Will of Bhoyaharini and is, therefore, entitled to possession of the *debutter* properties as against the defendant No. 1 who has no right to possession. The plaintiff has impleaded in the suit all the descendants of Arundas and the daughter and daughter's grandson of Bhoyaharini as defendants. He appears to have brought the suit in his personal capacity. In the body of the plaint, however, he describes himself as *shebait* and the principal prayers in the plaint are, (1) that a decree be given declaring that the properties mentioned in schedules *ka* and *kha* are *debutter* properties according to the Will of Bhoyaharini Debi, and, (2), that it may be declared that the plaintiff has a right to the said properties as manager or *shebait* and that a decree be given to him for *khas* possession of those properties by evicting the defendant No. 1. The other prayers are subsidiary to these two principal prayers.

The defendant No. 1 resisted the plaintiff's claim on various grounds which it is unnecessary to mention in detail.

A large number of issues were framed in the lower Court; but the Subordinate Judge has decided the three main points. He has found, first, that the properties in dispute are absolute *debutter* properties created by the Will of Bhoyaharini, secondly, that the plaintiff was appointed *shebait* and, thirdly, that as such *shebait*, the plaintiff is entitled to possession by ejecting the defendant No. 1.

The defendant No. 1 appeals to this Court and some formal grounds have been taken on her behalf; (1) that the plaintiff's suit has not been properly constituted as he has brought the suit in his personal capacity and (2) that there is defect of parties as the two brothers of the plaintiff have not been joined as defendants. It is also stated that there is no allegation in the plaint that the plaintiff asked the *pro forma* defendants to join as plaintiffs in the suit and they refused to do, so and on that ground the suit ought to fail. In my judgment, none of these grounds is sufficient for the dismissal of the suit. The omission to describe the plaintiff in the cause title as *shebait* of the idol is certainly a misdescription but it may be cured by amendment without any hardship to the defendant. With regard to the other objections, the answer seems to be that the plaintiff alone can maintain a suit for declaration that certain properties are the *debutter* properties of his ancestral idol, he being a person interested in the worship of that idol.

Of the principal points, that were urged on behalf of the appellant the first was that the properties were not *debutter* on the ground that Bhoyaharini had no right to dedicate the properties as she had no absolute title in them. It is contended that the object of Bamandas in making the gift in favour of his daughter-in-law was

that she should hold the property for the benefit of the heirs of Taranath and that she was in the position of a mere trustee. Reliance has been placed upon a passage in the second clause of the Will of Bamandas that any transfer by Bhoyaharini should be made only with the consent of Taranath and the other sons and grandsons of Bamandas. In the previous portion of that very clause of the Will, however, the property was given to Bhoyaharini with power to make gift, sale, mortgage or any permanent *maurasi mukurari* settlement. That clearly shows that the intention of the testator was to make an absolute gift in favour of the lady. The subsequent restrictions must, therefore, be considered as repugnant to the gift. In my opinion there was an absolute gift to the lady. Further, her husband Taranath himself took out Probate of the Will of Bhoyaharini by which the properties were dedicated for *devasheba*. The defendant No. 1 claiming through Taranath as the heiress of his son Barada Bhusan can hardly raise any question as to the validity of the dispositions made under the Will of Bhoyaharini. I am of opinion that the decision of the Subordinate Judge that a valid *debutter* was created by Bhoyaharini by her Will is correct.

The next question that arises is whether the plaintiff can claim the properties as the sole *shebait* of the Thakurs. This claim is based upon the fourth clause of the Will of Bhoyaharini where she names a number of persons besides her husband Taranath as executor. It is contended on behalf of the appellant that assuming that under that clause Bhoyaharini had appointed the plaintiff as *shebait*, she could not appoint a new *shebait* of the ancestral idols, the *shebaits* of those idols being all the heirs of the original founder of the worship according to Hindu Law. The question has been considered by this Court in two recent cases. *Kali Krishna Roy* v. *Makhan Lal Mukherjee* (1) and *Ananda Chandra Chakrabarti* v. *Broja Lal Singha* (2). In the last mentioned case, it was held that when the worship of an idol has been founded, the *shebaitship* is vested in the founder and his heirs, unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution; and the cases of *Gossami Sri Girdharji* v. *Ramanlalji Gossami* (3) and *Jagadinra Nath Roy* v. *Hemanta Kumari Debi* (4) were cited in support of that proposition. It has been endeavoured on behalf of the plaintiff-respondent to distinguish these cases on the ground that in those cases there was some pre-existing property of the idol and any grant to the idol by a person other than the founder is only an accretion to the pre-existing endowment and the subsequent donor cannot, therefore, appoint new *shebaits*. It is contended that there being no evidence in this case that the idols had any endowed property prior to the gift by Bhoyaharini she was entitled to appoint *shebaits* for the idols who would manage the property. But it seems to me there is really no difference in principle between the two positions. Where the worship of an idol has been founded there must be some *shebait* of the idol and, if any donor subsequent to the foundation makes a grant of any property to the idol, it becomes the property of the idol and unless conditions are attached to the gift the existing *shebait* of the idol would have the power to manage that property on behalf of the idol. In that view, the plaintiff and all the heirs of the founder of the Thakurs including the defendant No. 1 are *shebaits* of the idols in question and have the power to manage the properties on behalf of the Thakurs. Further, it seems to be extremely doubtful whether by cl. (4) of her Will Bhoyaharini purported to appoint any *shebait*. It may be conceded that the meaning of the word "executor" is not properly understood in the *muffussil* and in some cases it may include the office of a *shebait* having reference to the contest. But in cl. (4) of her Will, Bhoyaharini does not mention anywhere that the executors will perform the *sheba* of the idols and in cl. (5), the duties imposed upon the executors with reference to the *debutter* properties are laid down and they do not include the *sheba* of the idols. That being so, it cannot be held that plaintiff is the sole *shebait* and the defendant No. 1 cannot be considered to be a trespasser being herself a *shebait* of the Thakurs as the heir of her husband, a descendant of

(1) 72 Ind. Cas. 688; 50 C. 233; 36 C. L. J. 441; 27 C. W. N. 411; (1923) A. I. R. (C.) 160.
(2) 74 Ind. Cas. 793; 50 C. 292; 36 C. L. J. 356; (1923) A. I. R. (C.) 142.
(3) 17 C. 3; 16 I. A. 137; 13 Ind. Jur. 211; 5 Sar. P. C. J. 350; 8 Ind. Dec. (N. S.) 541 (P. C.).
(4) 32 C. 129; 31 I. A. 203; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. 698 (P. C.).

the founder. On these grounds the suit for ejectment must fail. It must, however, be declared that the properties dedicated by Bhoyaharini Debi are *debutter* properties of the Thakurs mentioned in cl. (1) of her Will.

The appeal is, therefore, allowed in part and the decree of the Subordinate Judge is modified in this way: It is declared that the property mentioned in schedule *ka* of the plaint is the *debutter* property of Bamandas Mukerji's ancestral diety Sri Sri Sridhar Salagram Thakur and that the property mentioned in schedule *kha* is the *debutter* property for Bamandas Mukerji's ancestral *pujahs* of Durga, Syama and Jagatdhatri Thakurs, and that the plaintiff as well as the defendant No. 1 along with all the other heirs of Bamandas are *shebaits* of those Thakurs. The decree of the Subordinate Judge allowing ejectment of the defendant No. 1 is set aside and the plaintiff's suit in that respect is dismissed. As the plaintiff's suit in ejectment has failed, the defendant No. 1 appellant will be entitled to recover her costs in this Court from the plaintiff-respondent. We assess the hearing fee at twenty gold *mohurs*. But as the defendant No. 1 resisted the suit on the ground that the properties were secular properties and as that contention has failed she will not be entitled to the costs of the Court below and each party should bear his own costs in that Court. The other parties will bear their own costs throughout.

Walmsley, J.—I agree.

Z. K. *Appeal partly allowed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 221 OF 1924.

February 17, 1925.

Present:—Mr. Justice Mukerji.

KANHAI—PLAINTIFF—APPLICANT

versus

AMRIT—DEFENDANT—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Art. 75—Instalment bond—Stipulation to pay total amount on default in payment of one instalment—Suit to recover amount of bond—Limitation, commencement of—Waiver, what amounts to.

An instalment bond contained a stipulation that in case of default in the payment of any instalment the obligor would pay the entire amount due on the bond irrespective of the instalments. None of the instalments were paid. In a suit to recover the amount of the bond:

Held, (1) that the suit was governed by Art. 75, Sch. I to the Limitation Act and that limitation for the suit began to run from the date of the default in payment of the first instalment; [p. 162, col 2.]

(2) that the mere omission of the creditor to sue the debtor on the occurrence of a default in payment of an instalment did not amount to such waiver as was contemplated by Art. 75 of Sch. I to the Limitation Act. [p. 163, col. 2.]

Jadab Chandra Bakshi v. *Bhairab Chandra Chuckerbutty*, 31 C. 297 at p. 299, *Hurri Pershad Choudhury* v. *Nasib Singh*, 21 C. 542; 9 Ind. Dec. (N. S.) 992 and *Abinash Chandra Bose* v. *Bama Bewa*, 4 Ind. Cas. 17; 13 C. W. N. 1010, referred to.

Civil revision from an order of the Judge of the Court of Small Causes, Budaun, dated the 19th August 1924.

Mr. *Baleshwari Prasad*, for the Applicant.

Mr. *S. S. Sastry*, for the Opposite Party.

JUDGMENT.—This is an application in revision against a judgment of a Court of Small Causes under the following circumstances.

The applicant was the plaintiff in the Court below. He held an instalment bond by which he was to receive from the respondent a sum of Rs. 11 every year for eight years. There was a stipulation in the bond by which the obligor agreed that in case of any default in the payment of any instalment he would pay the entire amount due on the bond, irrespective of the instalments. None of the instalments were paid. The plaintiff stated in the plaint that his claim with respect to three of the instalments was barred by time, that he did not want to sue for the entire sum due and thus, leaving out the last two instalments, he sued for three which according to him fell due within three years of the institution of the suit.

The respondent met the claim with a plea of limitation. The learned Judge of the Court below held that the suit was time-barred, there being no evidence of any waiver.

In this Court it is contended that the applicant had an option to sue either for the whole money or for some of the instalments as he was advised and that as he waived his right to sue in respect of the first three instalments he came within the period of limitation as laid down by Art. 75 of Sch. I of the Limitation Act.

Article 75 of the Limitation Act lays down that a suit based on an instalment bond which provides that in case of default made in payment of one or more instalments

the whole shall be due, the period of limitation would be three years and would begin to run from the date of default, unless there has been a waiver with respect to any such default. It provides that where there has been a waiver in respect of any defaulted instalment the period would run from such default in respect of which there is no waiver. In the case before me there is no allegation that on a default having occurred any payment was made after the default and was accepted. There is no allegation whatsoever as to the parties having in any way agreed to change the terms of the bond. It is, however, argued that the mere fact that the plaintiff did not sue for the first three instalments amounted to waiver and the plaintiff's suit was within time.

As I read the provision of column 3 of the Limitation Act I do not think that it was ever meant to lay down that the question of waiver would depend on the sweet will of the plaintiff. If that were the meaning the result would be this, *on the same facts* if a claim be made for a portion of the amount due the suit would be within time, but if a claim (equally maintainable on the terms of the bond) be made for the entire amount due on the bond, the suit would be timebarred.

Waiver is a technical word and so far as I am aware the word has never been applied to a circumstance which amounts to nothing more than this that the plaintiff has stayed his hands in seeking his remedy. In Wharton's Law Lexicon, 12th Edition, the word "waiver" is defined as follows:

"The passing by an occasion to enforce a legal right whereby the right to enforce the same is lost; a common instance of this is where a landlord waives a forfeiture of a lease by receiving rent, or distraining for rent, which has accrued due after the breach of covenant causing the forfeiture became known to him.....Mere lying by is not waiver for this purpose there must be some positive act on the part of the landlord, which act, however, if done, is a waiver in law, notwithstanding any protest."

The question of waiver was considered in some Calcutta cases and it was laid down that a mere staying of the hand in enforcing the remedy could not amount to a waiver. In the case of *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty* (1), at page 299* the learned Judges remark as follows:—

"It is argued in support of the rule that his (plaintiff's) abstinence from suing amounts to a waiver of his right to sue for the whole. We do not agree with that contention, but we agree with the observation made by the learned Judges, who decided the case of *Hurri Pershad Choudhury* v. *Nasib Singh* (2)."

The same opinion was re-iterated in the same Court in the case of *Abinash Chandra Bose* v. *Bama Bewa* (3) by two other learned Judges. It was held that mere omission to sue was not such a waiver as was contemplated by Art. 75 of Sch I of the Limitation Act.

The law of waiver has been considered in its various aspects by Lord Halsbury in his work, *viz.* "Laws of England." With respect to a contract the law laid down would appear in Volume VII at page 423, Art. 868. I need not quote all that is considered there. But what has been said there leads me to think that waiver is, in effect, a substituted contract for the previous one. This may be express or implied. As an illustration it is said that where one party consents, at the request of the other, to extend the time for performance or to accept performance in a different mode from that contracted for etc. there is a waiver. Again the same authority in Volume XIII of the book, page 165, Art. 197, lays down rules with respect to a waiver when it relates to enforcement of a right. It is said that waiver of this kind depends upon consent and the fact that the other party has acted upon it is sufficient consideration. Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right. It is pointed out there that where the right is a right of action, an express waiver depends upon the same considerations as a release. I need not labour the point any further. But it seems clear to me that a mere abstinence from enforcing a right at the time when the cause of action arose will not amount to waiver.

As I have already said, if we accept the argument advanced on behalf of the applicant the result would be that, on the same facts, if a claim is made for a part of the amount

(1) 31 C. 297.

(2) 21 C. 542; 9 Ind. Dec. (N. s.) 992.
(3) 4 Ind Cas. 17; 13 C. W. N. 1010.

*Page of 31 C.—[Ed.]

due it would be within time, while, on the same facts, if the claim be made for a larger amount which is also due the suit must be treated as barred by time. This is a position which could not have been contemplated by the Legislature, nor does such position follow from the language used. If the language used had compelled the Courts to come to the conclusion contended for, the matter would have been different.

On behalf of the applicant reliance has been placed on the case of *Ajudhia* v. *Kunjlal* (4). In that case the language to be found in the bond was materially different from the language in the bond before me. There it was expressly stated that in case of default the creditor "would be entitled to sue for the whole amount due etc." The learned Judges of this Court were of opinion that it would go very hard with the debtor if he was deprived of the benefit, which the creditor was prepared to give him, of his forbearance. At page 125* their Lordships remarked as follows:—

"It is conceivable that a bond might be so worded as to compel a creditor to sue for the whole amount immediately if any default occurred."

This remark really distinguishes the case of *Ajudhia* v. *Kunjlal* (4) from the case before me. Under the circumstances I need not express any opinion as to the value of that case as an authority.

The result is that the application in revision fails and it is hereby dismissed with costs.

Z. K. *Revision dismissed.*

(4) 30 A. 123; 5 A. L. J. 72; A. W. N. (1908) 36.

*Page of 30 A.—[*Ed.*]

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 299 OF 1923.

October 15, 1924.

Present:—Mr. Dalal, J. C.

LAL BAHADUR SINGH—PLAINTIFF—APPELLANT

versus

MATHURA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Possession of Hindu widow, nature of—Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Suit to recover possession from Hindu widow—Limitation applicable.

Where the widow of a deceased co-parcener in a joint Hindu family took possession of certain plots of *sir* land and a house belonging to the joint family, set up her own independent title thereto, was continuously shown in the village records as *sir* holder, realized rents and made transfers:

Held, that the possession of the widow was adverse to her deceased husband's co-parceners. [p. 165, col. 2.]

Under certain circumstances the possession of a Hindu widow may be adverse to the reversioners of her deceased husband to the extent only of a widow's estate, but where she has no right to a widow's estate when she takes possession and there is no allegation on the other side that she is holding property on a widow's estate, and she makes transfers of the property as absolute owner thereof, her possession must be regarded as that of an absolute owner and not as that of a Hindu widow. [p. 165, col. 2.]

Obiter dictum.—To a suit for possession involving the question as to whether possession of certain property by a Hindu widow is in lieu of her maintenance or is adverse the Article applicable is Art. 144 and not Art. 142 of Sch. I to the Limitation Act. [p. 165, col. 1.]

Second appeal from the decree of the Second Additional District Judge, Lucknow, dated the 3rd July 1923, preferred against that of the Sub-Judge, Unao, dated the 18th October, 1921.

Mr. *Ishri Prasad*, for the Appellant.

Mr. *A. P. Sen*, for Respondents Nos. 1 and 2.

JUDGMENT.—The facts are not marshalled in the judgment of the lower Appellate Court and there has been in both Courts an unnecessary insistence on the application of Art. 142 of the Limitation Act. The parties are Lal Bahadur Singh plaintiff and the defendants are the widow of his deceased brother Drigpal Singh and the transferees of this widow and of *Musammat* Girja Kuar deceased widow of another deceased brother. The real question at issue is whether these widows have been in possession of certain plots of *sir* land by way of maintenance from Lal Bahadur or adversely to him. A house is also in dispute and admittedly the widows have been in possession thereof. The claim of Lal Bahadur Singh was for possession of a certain share of *zemindari* property and in the alternative for a declaration that certain transfers made by the defendant *Musammat* Rukmin Kuar be declared to be inoperative as against him on her death. Both the lower Courts gave a decree for possession of the share of the *zemindari* property but excluded from it certain *sir* plots of which they held the widow to have been in possession adversely to Lal Bahadur.

The property in dispute here, therefore, consists of the house and certain number

of *sir* plots. The learned Judge of the lower Appellate Court proceeded only on the ground of burden of proof. He argued that the plaintiff himself came to Court saying that he was formerly in possession of the property and had been dispossessed, so Art. 142 of the Limitation Act applied and it was incumbent on him to prove that he had been in possession within 12 years of the institution of the suit. He held as a fact that no such proof was forthcoming and dismissed the appeal. In my opinion the case of the widows or rather of the transferees is much stronger than that. As the matter is not essential to be decided in this appeal I refrain from giving my opinion as to whether Art. 142 or Art. 144 should apply. If judgments of their Lordships of the Privy Council in similar cases are referred to, it will be found that there is a tacit admission of the application of Art. 144. In *Satgur Prasad* v. *Raj Kishore Lal* (1), the question was as to the nature and effect of the possession of property by a Hindu widow whether the possession was in lieu of her maintenance or adverse and their Lordships observed at page 155* of the report that the period prescribed by the Limitation Act, 1877, s. 144 of Sch. II, as that within which a suit for possession has to be brought was 12 years from the time when the possession of the defendant became adverse to the plaintiff. In the case of *Sham Koer* v. *Dah Koer* (2), a similar question arose for decision before their Lordships and they considered it from the point of view of the application of Art. 144. It is quite true, as pointed out by the learned Counsel for the defendants-respondents, that no argument as to the distinction between the two Arts. 142 and 144 was raised in either appeal. At the same time if I had been called upon for a decision of the question I should have been inclined to apply Art. 144. The incident at issue in a case like the present is not of the dispossession of the plaintiff but of the nature of the possession of the widow.

In the present case, even if Art. 144 is applied, the Court must arrive at the same result. The plaintiff did not enter the witness-box and there is no evidence of any arrangement under which the widows took possession of the *sir* plots in lieu of maintenance. On the other hand there is definite evidence that the widows set up their own independent title as far back as 1906. A certain sale of part of the property of which the widows took possession was effected jointly by Lal Bahadur and the widows in favour of one Sheo Dulare. Sheo Dulare sued for foreclosure of the property on foot of two mortgages, one executed by Lal Bahadur and the other by *Musammat* Bhagole, mother of Lal Bahadur and by the three brothers of Lal Bahadur who were deceased husbands of the widows who took possession. In that suit the widows at first pleaded that they had no interest in the property. This was obviously a collusive defence so that the second mortgage executed by *Musammat* Bhagole and her three sons other than Lal Bahadur may prove ineffective. Subsequently the suit was compromised and Lal Bahadur and the three widows executed the sale-deed declaring that the defence of the widows in the suit was false. This is very strong evidence of full proprietary possession of the widows against Lal Bahadur. Subsequently the widows were shown in the village records continuously from 1313-1324 *Fasli* as *sir* holders of the plot in dispute here. They realized the rents and as noted already made transfers of the property unhindered by Lal Bahadur. I hold that the possession of the widows was adverse ever since 1905, when they took possession of the plots, and of the house in dispute in this appeal.

The learned Counsel for the plaintiff raised an ingenious argument that even if the possession of the widows be adverse it would be adverse to the extent of a widow's estate. This may happen under certain circumstances but is not the case here. The widows had no right to a widow's estate when they took possession because their husbands were joint with Lal Bahadur. In the plaint no allegation was made that the widows were holding a widow's estate. There is no such mention of a widow's estate in the transfer made to Sheo Dulare in 1906. This argument will not prevail.

In the result I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 55 Ind. Cas. 486; 42 A. 152; 22 Bom. L. R. 451; 2 U. P. L. R. (P. C.) 55; (1920) M. W. N. 3; 24 C. W. N. 394; 38 M. L. J. 259; 18 A. L. J. 235; 11 L. W. 384; 46 I. A. 197; 27 M. L. T. 200 (P. C.).

(2) 29 C. 664; 29 I. A. 132; 6 C. W. N. 657; 4 Bom. L. R. 547; 8 Sar. P. C. J. 280 (P. C.).

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BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 4729 OF 1922.

March 6, 1923.

Present :—Mr. Justice Mulla.

BACHOO BHAIDAS—PLAINTIFF—

versus

VELJI BHIMSEY & CO.—

DEFENDANTS.

Execution of decree—Erroneous decree—Damages, action for.

No action will lie against any person for issuing execution or otherwise acting in pursuance of a judgment or order of a Court of Justice even though it is erroneous. A valid order, however erroneous in law or in fact, is a sufficient justification for any act done in pursuance of it. [p. 168, col. 1.]

FACTS.—*V. & Co.* sued *B.* and his two minor brothers as surviving members of a joint family, to recover Rs. 510 due on a promissory note executed by the *B.*'s father. A decree by consent was passed and the decretal amount was made realizable from such property of *B.*'s father as might have come to the hands of *B.* and his brothers as heirs and legal representatives. On the motion of the decree-holders, a notice was issued under O. XXI, r. 22 of the C. P. C., requiring *B.* and his brothers to show cause why the decree should not be executed against them. None of them appeared on the date of hearing but the defendants appeared by one of their partners *T.* and the Court ordered "execution to issue against 1st defendant only," *i. e.*, *B.* This order was endorsed on the notice and on the decree, and the decree with the endorsement was given to *T.* who thereupon consulted his Pleader and on being advised that he could proceed both against the person and property of *B.* got a warrant issued for the arrest of *B.* in pursuance whereof *B.* was arrested and brought before the Registrar of the Small Cause Court. The Registrar held that the warrant was illegal and directed *B.* to be released. *B.* then filed the present suit to recover Rs. 2,000 as damages for wrongful arrest and imprisonment.

Mr. *M. V. Desai*, for the Plaintiff.

Mr. *Setalvad*, for the Defendants.

JUDGMENT.—[After stating the facts his Lordship proceeded as follows :—] It was not suggested at the hearing of the suit before me that the defendants were actuated by malice or that there was absence of reasonable or probable cause in suing out the writ, Counsel for the plaintiff took his stand on the fact that the decree being against the estate of the plaintiff's father in the hands of his sons, the Court had no jurisdiction to direct a writ to issue against the person of the plaintiff. In support of his contention he relied on *Brooks* v. *Hodgkinson* (1) and *Barker* v. *Braham* (2). On behalf of the defendants it was contended that the writ was justified by the order of the Court and reliance was placed on *Raj Chunder Roy* v. *Shama Soondari Debi* (3) and *Thakdi Hajji* v. *Budrudin Saib* (4). I do not think that either of the two Indian cases has any direct bearing on the present case.

Section 52 of the C. P. C., 1908, which relates to enforcement of decrees against legal representatives, is as follows :—

"(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally."

At the hearing of the suit it became material to inquire how it was that the learned Judge came to pass the order which he did, namaly, "Execution to issue against first defendant only." But the evidence of what happened when the order was made is very meagre. The notes taken down by the learned Judge are as follows :—

"Defendants absent. Tokersey plaintiff No. 3 s. a. proves service and claims. Execution to issue against defendant No. 1."

Tokersey, who appeared to me to have seen very little of litigation, stated in his evidence before me as follows :—

(1) (1859) 4 H. & N. 712; 29 L. J. Ex. 93; 7 W. R. 735; 157 E. R. 1021; 118 R. R. 708.
(2) (1773) 3 Wils. K. B. 368; 95 E. R. 1104.
(3) 4 C. 583; 2 Ind. Dec. (N. S.) 370.
(4) 29 M. 208.

"That notice was returnable on 24th June 1922. On that day I appeared before the learned Judge Mr. De Quadros. I had not engaged any Pleader. I do not remember whether the defendant appeared on the notice. My name was called out and I entered the witness-box. The interpreter asked me what I wanted. I said 'as the Judge orders.' The interpreter then said 'Execute the decree against the 1st defendant.' I then left the Court. I had a piece of paper and the interpreter made an endorsement on it and gave it to me."

Mr. Ishwarlal says in his evidence that the Judge has the decree before him when orders are made on notices issued under O. XXI, r. 22. The piece of paper referred to in the evidence of Tokersey was evidently the decree of the Court. I have no reason to disbelieve Tokersey's evidence and I accept it.

I do not understand what the learned Judge meant by "claim" mentioned in his notes. I am not sure whether it refers to the defendant's claim to proceed against the plaintiff personally. But the fact stands that the writ, which the Registrar pronounced illegal, had the order of the learned Judge behind it, and in this respect the present case differs from the two English cases cited by Counsel for the plaintiff, which I proceed to consider.

In *Brooks* v. *Hodgkinson* (1), the defendant had obtained a judgment against the plaintiff for £13:. The defendant caused a writ of *ca sa* sued, and the plaintiff was arrested under the writ. The writ was issued in disregard of the Statute 7 & 8 Vic. c. 96, s. 57, by which it was provided that "no person shall be taken or charged in execution upon any judgment whereon the sum recovered shall not exceed the sum of £20." Section 59 of the Statute enabled the Judge who tried the cause to order the defendant to be taken in execution even if the judgment was for less than £ 20, if it appeared that he had obtained credit from the plaintiff under false pretences. No order to take or detain the plaintiff in execution upon the judgment was made under s. 59. The plaintiff brought an action for damages against the defendant for false imprisonment, and it was held that he was liable, It is to be observed that in *Brooks case* (1), the writ was issued not under any order of the Judge, but on the application of the defendant's Solicitor. This point is brought out prominently in the replication, and it is expressly mentioned in the head-note of the case. Further, the writ in *Brooks case* (1) was issued in spite of the statutory prohibition contained in the enactment referred to above.

In *Barker's case* (2), a judgment was obtained by Mrs. Braham against the plaintiff, who was the administratix of the estate of her deceased husband, for £ 400 to be recovered out of the assets of the husband. Mrs. Braham employed a Solicitor who first sued out a writ of *fi fa*, and the Sheriff seized the plaintiff's husband's goods worth about £ 164. For the balance, the Solicitor without obtaining any order of the Court sued out a *ca sa* against the plaintiff and himself delivered the same to the Sheriff, and gave orders and directions to the Sheriff to take and arrest the plaintiff. The plaintiff was thereupon arrested and committed to prison. The plaintiff brought an action against the defendant for damages for wrongful arrest and imprisonment. It was held that both Mrs. Braham and her Solicitor were liable. In the course of his argument Counsel for the plaintiff laid great stress on the fact that the writ was not supported by any order of the Court. De Gray, C. J., said (page 376*):

"A Sheriff, or his officers, or any acting under his or their authority, may justify themselves by pleading the writ only, because *that* is sufficient for their excuse, although there be no judgment or record to support or warrant such writ; but if a stranger interposes and sets the Sheriff to do an execution, he must take care to find a record that warrants the writ, and must plead it; so must the party himself at whose suit such an execution is made..... Mr. Norwood (the Attorney) has pleaded not guilty; but could not justify by a special plea, because there is no record to warrant a *capias ad fatisfaciendum* against Mrs. Barker (the plaintiff); nor could he have justified himself by pleading that he ignorantly sued out the writ, for ignorance is no excuse."

In the present case there is a record (Ex. No. 2) that warranted the writ. It was the direction of the learned Judge that execution do issue against the first defendant. It may be that the learned Judge had no materials before him to

*Page of 3 Wils. K. B.—[*Ed.*]

justify the order which he passed. But assuming it was so, the case is one of an erroneous order passed by a Court, and not one of absence of jurisdiction. It is well-established that no action will lie against any person for issuing execution or otherwise acting in pursuance of a judgment or order of a Court of Justice even though it is erroneous. A valid order, however, erroneous in law or in fact, is a sufficient justification for any act done in pursuance of it. I, therefore, hold that the plaintiff has no cause of action against the defendants and dismiss the suit with costs.

K. S. D. *Suit dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 859 OF 1924.
November 19, 1924.
Present :—Mr. Justice B. B. Ghose.
KALI CHARAN GHOSE—
PETITIONER
versus
Sreemutty Rani SARAJINI DEBI AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXI, r. 15—Execution of decree—Attachment—Claim petition, whether can be heard after sale.

An application for the release of certain property from attachment cannot be heard after the property has been sold.

Rule against an order of the Munsif, Third Court, Diamond Harbour, 24-Parganas, dated the 29th March 1924, in Claim Case No. 1 of 1924.

Mr. *M. Syed Nasim Ali*, for the Petitioner.

Babu *Bijan Kumar Mukherjee*, for the Opposite Parties.

ORDER.—The petitioner before this Court was the claimant in the claim case. His claim was rejected on the ground that it could not proceed as the property with regard to which the claim had been preparad had already been sold in execution of the decree. It appears that the claim was put in shortly before the date of the sale of the property. The petitioner must have satisfied the Court that he had not designedly or unnecessarily delayed in making his claim. Afterwards, the petitioner applied for an adjournment of the sale; but his application was rejected and the sale took place. The petition of claim subsequently came up for hearing and it was, as already stated rejected.

It is contended by the learned Vakil for the petitioner that the petitioner's case was not heard not on account of any fault of his but because of the Court rejected his petition for stay of the sale pending the disposal of his claim case and that he was thus placed in a disadvantageous position. It seems to me, however, that there was no help for the situation that arose. After a property which had been attached in execution of a decree has been sold, it seems to me that the Court has no jurisdiction to hear an application putting forward a claim which, if successful, would have only one result, namely, the release of the attached property. That position cannot take place after the property has been actually sold. As the learned Munsif observes, the claimant has other remedies and he may possibly have recourse to such remedy as he may be advised. Under these circumstances, the Rule must be discharged. I make no order as to costs.

Z. K. *Rule discharged.*

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 14 OF 1924.
January 20, 1925.
Present:—Mr. Dalal, A. J. C., and Syed Wazir Hasan, A. J. C.
MAYA RAM AND OTHERS—
DEFENDANTS—APPELLANTS
versus
SARJOO BRAHMAN—PLAINTIFF —RESPONDENT.

Oudh Rent Act (XXII of 1886), ss. 126, 138—Joint estate—Lambardars, *several*—Lambardar, *single, right of, to recover arrears of rent*—*"Third person", in s. 138, meaning of.*

Ordinarily the power in regard to the recovery of arrears of rent cannot be exercised by a co-sharer or a single *lambardar* when there are more *lambardars* than one in a joint estate. [p 170, col. 1.]

Nidha v. *Ram Prasad*, 46 Ind. Cas. 6; 5 O. L. J. 176, referred to.

The expression "third person" in s. 138 of the Oudh Rent Act means a person who has not the ostensible right to recover the rent and cannot include a co-*lambardar* who has a legal title to recover it. [p. 170, col. 2.]

A thing is deemed to be done in good faith where

it is in fact done honestly and there can be no question of honesty where rent is paid to a person who has a legal title to receive it. As between a tenant and his landlord there is no doubt that a co-*lambardar* has such a title. [p. 170, col. 2.]

Appeal from a decree of the Officiating Third Additional Judge, Lucknow at Sitapur, in Regular Rent Appeal No. 25-52 of 1923, dated the 24th April 1924.

Mr. *Ali Zaheer*, for the Appellants.

Mr. *B. K. Bhargava*, for Appellant No. 4.

Mr. *G. N. Misra* for Mr. *B. N. Srivastava*, for the Respondent.

ORDER OF REFERENCE.

Wazir Hasan, A. J. C.—(*December* 8, 1924).—This appeal involves a point of general importance arising with reference to the construction of s. 138 of the Oudh Rent Act. It is argued on behalf of the appellants that the provisions of that section do not apply to a case where a tenant has paid his rent to a person who had admittedly a legal title to receive it. In support of that argument reliance is placed upon a decision of a Single Judge of this Court in the case of *Mahadei Kuar* v. *Sant Bakhsh Singh* (1). On the side of the respondent reference was made to the case of *Nidha* v. *Ram Prasad* (2). I think it advisable that the matter should be decided by a Bench consisting of two Judges. I make the Order of Reference accordingly.

JUDGMENT.—This is the defendants' appeal in a suit by the plaintiff-respondent for the recovery of arrears of rent under s. 108, cl. (2), of the Oudh Rent Act, 1886, for the years 1324, 1325 and *Kharif* 1326 *Fasli*. The plots in respect of which the rent is claimed are situate in one of the *thoks* of village Nahwaiya, *Pargana* Gondlamau, *Tahsil* Misrikh, District Sitapur. The total amount of the rent claimed was Rs. 356-0-6. The original defendant to the suit was Govinde tenant. He died during the pendency of the suit in the Court of first instance. On his death his sons, Maya Ram, Ajudhia Prasad and Gajadhar Prasad, were substituted on the record in place of their deceased father and finally by an order of this Court dated the 20th December 1921 one Randhir Singh was also made a defendant to the suit. The plea in defence raised by Govinde was one of payment.

The Court of first instance held that the plea was established except as regards the sum of Rs. 35-7-0. The result was that a decree for the amount just now mentioned was passed in favour of the plaintiff and the rest of the claim was dismissed. In deciding the suit the Court of first instance found that the tenant Govinde had paid the rent to Randhir Singh. The plaintiff appealed against the decision of the First Court. The learned Additional District Judge of Sitapur has given no definite finding as to the actual payment of the rent in suit by Govinde to Randhir Singh. On this question of fact our finding in agreement with the Court of first instance is that the rent was paid by Gobinde to Randhir Singh.

The lower Appellate Court accepted the plaintiff's appeal, reversed the decree of the Court of first instance and granted a decree to the plaintiff in terms of the claim. The three sons of Govinde and Randhir Singh are the appellants before us. The lower Appellate Court has found and the finding is accepted on both sides that Randhir Singh is a joint *lambardar* of the *thok* of 8-annas in which the lands in question are situate with the plaintiff. It has further found that in the years previous to those in respect of which the rent is claimed Govinde paid rent to the plaintiff. The ground of the decision of the lower Appellate Court may be stated in its own language: "It is true there are certain receipts to show that the rent for the period in question was realized by the fourth respondent (Randhir Singh) but a tenant has no right to depart from the previous practice and to pay his rent for the period in suit to a third person [*Nidha* v. *Ram Prasad* (2)] and in the absence of any evidence justifying the departure it cannot be said that the payments by Govinde were made in good faith." This ground is challenged in second appeal and we are of opinion that the appeal succeeds.

The decree of the lower Appellate Court was sought to be supported by the learned Advocate for the respondent, *firstly*, on the ground that under an arrangement subsisting between the two *lambardars* the plaintiff is entitled in virtue of that arrangement to realize the rent payable to Govinde for the lands in question. In this connection reference was made to a compromise dated the 19th March 1915 (Ex. A-4) and to the finding of the lower Appellate Court that in the years previous to those now in suit the plaintiff realized

(1) 26 Ind. Cas. 237; 1 O. L. J. 570.
(2) 46 Ind. Cas. 6; 5 O. L. J. 176 at p. 178.

rent from Govinde. The answer to this argument is that no such arrangement was pleaded. The plaint is wholy silent even as to the fact that Randhir Singh was a co-*lambardar*. Ordinarily the power in regard to the recovery of the arrears of rent shall not be exercised by a sharer or a single *lambardar* when there are more *lambardars* than one in a joint estate—*vide* s. 126 of the Oudh Rent Act, 1886. It would, therefore, seem to follow that had there been any such arrangement as is now put forward on behalf of the respondent it would have been placed at the fore-front of the plaint. As to the compromise of 1915 (Ex. A-4), it was entered into between Govinde and the respondent's father in a suit brought by Govinde to contest a notice of ejectment issued by the father of the respondent. To this compromise Randhir Singh or his predecessor-in-interest was no party. Besides, Govinde professed to accept the tenancy of the lands in suit from the plaintiff at a certain rate of rent mentioned in the compromise and did no more.

As to the 'practice' in the years previous to those in suit, there is an important piece of documentary evidence filed by the defendants and validly proved, which the lower Appellate Court entirely ignored to consider. This evidence diminishes to a large extent the evidential value of the so-called practice. This is Ex. B-1. It is a receipt for rent paid by Gobinde and is signed both by Randhir Singh and Madhoram. Madhoram is the uncle of the plaintiff. The Court of first instance was also of opinion that there was no valid arrangement amounting to a division of the joint lands or of the tenants concerned. We, therefore, reject the contention advanced on behalf of the respondent.

The second line of argument of the learned Advocate for the respondent was based on the provisions of s. 138 of the Oudh Rent Act and this is the argument which seems to be the basis of the decision of the lower Appellate Court. It is contended that Randhir Singh is the "third person" to whom the tenant Govinde has paid the rent but not in good faith because according to the finding of the lower Appellate Court he paid the rent to the plaintiff in the years previous to those in suit. We are of opinion that the "third person" in the section means a person who has not the ostensible right to recover the rent and cannot include a co-*lambardar*, who has also a legal title to recover it. A thing is deemed to be done in good faith where it is in fact done honestly and there can be no question of honesty where rent is paid to a person who has a legal title to receive it. As between a tenant and his landlord there is no doubt that a co-*lambardar* has such a title.

On behalf of the respondent reliance was placed upon a decision of a Single Judge of this Court in the case of *Nidha* v. *Ram Prasad* (2): "The answer is that no such point was raised for decision."—*Per* Viscount Haldane, L. C., in *Secretary of State for India* v. *Moment* (3).

We, therefore, allow this appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs throughout.

Z. K. *Appeal allowed.*

(3) 18 Ind. Cas. 22; 40 I. A. 48; 13 M. L. T. 53; 17 C. W. N. 169; (1913) M. W. N. 45; 15 Bom. L. R. 27; 11 A. L. J. 49; 17 C. L. J. 194; 6 Bur. L. T. 1; 24 M. L. J. 459; 40 C. 391; 7 L. B. R. 10 (P. C.).

CALCUTTA HIGH COURT.

CIVIL RULE No. 1160 OF 1924.

November 24, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Cuming.

SOROJ BASHINI DEBI—PETITIONER

versus

GIRIJA PROSHAD BHATTACHARJEE —OPPOSITE PARTY.

Government of India Act, 1915, (5 & 6 Geo. V, c 61), s. 107—Civil Procedure Code (Act V of 1908), s. 24—Transfer of case, application for—Dismissal by District Judge—High Court, power of.

The High Court has general powers of superintendence over all inferior Courts and in the exercise of such powers it can direct the transfer of a case, where a District Judge has refused to exercise the power vested in him by law under s. 24 of the C. P. C.[p. 171, col. 2:]

Hari Nath Biwas v. *Debendra Nath Biswas*, 5 Ind. Cas. 771; 11 C. L. J. 218, referred to.

Rule issued in the matter of transfer of Money Suit No. 1099 of 1923 pending in the Court of the Munsif at Kalna, for trial with Title Suit No. 11 of 1924 pending in the Court of the Sub-Judge, Burdwan.

JUDGMENT.—In this Rule we are invited to transfer a case pending in the Court of the Munsif at Kalna to the Court of the Subordinate Judge of Burdwan. The

petitioner is a Hindu widow and her case is that the opposite party managed the properties which she and her co-widow inherited from their husband from the years 1320 to 1329. A suit was brought by the opposite party in the Munsif's Court at Kalna upon a hand-note alleged to have been executed by the petitioner in 1325. The defence taken by the petitioner in the hand-note suit is that the opposite party was managing her property during the time the hand-note is alleged to have been executed and that she had occasion to sign blank papers in the course of the litigations connected with the properties and that the opposite party got the hand-note fabricated in his favour. This suit was instituted by the opposite party in the Court of the Munsif at Kalna on the 27th November 1923 and the petitioner instituted her suit in the Subordinate Judge's Court at Burdwan on the 1st February 1924 for account from the opposite party for the period during which she alleges he was in management of her properties. The petitioner subsequently applied to the District Judge of Burdwan for transfer of the suit at Kalna to the Court of the Subordinate Judge of Burdwan, so that both the suits might be tried together. The learned District Judge refused that application but has assigned no reason for doing so. We are asked to transfer the Kalna case to Burdwan on the ground that the same issue is to be tried in both the Courts, namely, whether the opposite party was in charge of the properties belonging to the petitioner; and if so, whether the opposite party had occasion in the course of such management to have papers signed by the petitioner and to have fabricated the hand-note on one of them.

A preliminary objection is taken to the hearing of this Rule on the ground that the learned District Judge having refused to act under s. 24, C. P. C., this Court will not in the exercise of its concurrent jurisdiction deal with the same question. This is urged on general principles, especially in matters criminal, that where two Courts have been given concurrent jurisdiction and if one of them exercises that jurisdiction, the other ought not to exercise the same jurisdiction. This point came up for consideration in the case of *Hari Nath Biswas* v. *Debendra Nath Biswas* (1). The learned Judges there held that even though the District Judge refused to exercise the power vested in him by law under s. 24, C. P. C., this Court had jurisdiction to act under that section. Had we felt bound to investigate this point we would have tested the correctness of this view, but we think that we have general power of superintendence over all inferior Courts and our such powers are not limited by any course taken by the District Judge. We, therefore, propose to examine this case on its merits.

There is one issue common between the two cases, namely, whether the opposite party acted as agent of the petitioner. If we allow the two suits to be tried separately the issue as to the genuineness of the hand-note will have to be tried in both the suits. It is directly in issue in the hand-note suit before the Munsif and it will be directly in issue if the account suit is decided in the petitioner's favour and it is held that the opposite party is accountable to the petitioner. It will, therefore, be convenient to both parties to have the Kalna suit transferred to Burdwan so that the evidence on this point may not have to be given twice over.

There is another view of the matter. If the Munsif decides against the petitioner, she has yet the right to re-open the matter before the Subordinate Judge in the account suit and the decision of the Munsif will not have the legal effect of a decision of a Court of equal jurisdiction. Taking all the circumstances into consideration we think that the suit pending in the Court of the Munsif at Kalna (being Suit No. 1099 of 1923) be transferred to the Court of the Subordinate Judge at Burdwan. But in order to avoid delay in the hearing of the suit brought by the opposite party against the petitioner at Kalna for an indefinite period and to the inconvenience of examining witnesses on the same point twice over we recomend that the learned Subordinate Judge will find it convenient to try both the suits together.

The Rule is made absolute. We make no order as to costs.

Z. K. *Rule made absolute.*

(1) 5 Ind. Cas. 771; 11 C. L. J. 218.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 34 OF 1924.

February 4, 1925.

Present:—Mr. Daniels, J. C.

KANDHAI LAL—PLAINTIFF—APPELLANT

versus

ANANTU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VII, r. 10, O. XLI, r. 25, O. XLIII, r. 1 (a) Order returning plaint for presentation to proper Court Appeal - Remand order, legality of - Procedure.

The plaint in a suit was returned by the Subordinate Judge for presentation to the proper Court on the ground that the relief had been overvalued and that the suit was cognizable by a Munsif. An appeal was preferred against this order to the District Judge before whom it was admitted by both parties that the Trial Court's decision on the question of valuation was erroneous. The District Judge accepted the appeal and remanded certain issues to the Subordinate Judge for findings under O. XLI, r. 25 of the C. P. C.:

Held, (1) that the order of remand was entirely illegal as the appeal which was preferred to the District Judge was not an appeal from a decree but an appeal from an order;

(2) that the proper order for the District Judge to pass was an order setting aside the order of the Court below and directing the Subordinate Judge to re-admit the suit to its file and dispose of it on the merits.

Second appeal against the decree of the District Judge, dated the 22nd December, 1923, modifying that of the Sub-Judge, Fyzabad, dated the 29th March 1923.

Mr. *Radha Krishan*, for Mr. *Haider Husain*, for the Appellant.

Mr. *M. Wasim*, for Respondents Nos. 1 and 2.

JUDGMENT.—In this case a preliminary plea is raised by the plaintiff-appellant that the order of remand of the Court below against which the appeal is filed was passed without jurisdiction. This plea was not originally taken in the grounds of appeal, but as it raises a question of jurisdiction I have allowed the appellant to urge it and have heard respondent against it. The facts out of which it arises are as follows: The suit is one for possession of property formerly in possession of *Musammat* Bhagwanta. One of the principal questions in controversy was whether *Musammat* Bhagwanta held house No. 298 with absolute right or merely with a widow's estate. It was said that the other house never belonged to her at all. The Subordinate Judge framed seven issues. He decided the issue of the nature of *Musammat* Bhagwanta's ownership against the plaintiff, but he then went on to hold on the 6th issue that the relief had been overvalued and that the suit was cognizable by a Munsif. He, therefore, returned the plaint for presentation to the proper Court under O. VII, r. 10, C.P.C. An appeal was preferred to the District Judge under O. XLIII, r. 1 (1), C. P. C. Before the District Judge it was admitted by both parties that the Trial Court's decision on the question of valuation was erroneous. The proper order for the District Judge to pass was, therefore, an order setting aside the order of the Court below and directing the Subordinate Judge to re-admit the suit to his file and dispose of it on the merits. Instead of this the learned District Judge tried the appeal as an appeal from a decree and remanded issues for findings under O. XLI, r. 25. This order was clearly illegal. By the terms of s. 2, C. P. C., an order returning a plaint for presentation to the proper Court is not a decree. It is an order for an appeal against which special provision is made in O. XLIII. In my opinion the learned District Judge acted without jurisdiction in passing the order which he did pass. It has, no doubt, been held in a number of cases that where an Appellate Court remands a case under O. XLI, r. 25, where it should have been remanded under O. XLI, r. 23, or passes an order under r. 23 in a case not strictly covered by the rule, this is a mere defect in procedure and not a question of jurisdiction. The distinction between these cases and the present case is that in all those cases the Appellate Court was dealing with an appeal from a decree. It, therefore, had complete jurisdiction to make an order of remand and an error as to the precise grounds on which the remand is allowed or as to the precise rule under which the remand should be made is merely a question of procedure and not of jurisdiction. In the present case there being no decree the learned District Judge had no jurisdiction to make a remand at all. I am, therefore, reluctantly compelled to set aside his order. It is not necessary, nor does the appellant desire, that the evidence should be recorded all over again. After the remand the Subordinate Judge did what he would have done if the proper order had been passed, namely, he heard evidence and recorded a decision on all the issues. The only difference between what he did and what he would have done if the correct order had been

passed is that instead of embodying these findings in a judgment and decree from which an appeal could be preferred in the usual way he clothed them in the form of findings submitted to the Appellate Court in connection with the previous appeal. There has thus been no decree of the Trial Court at all. I, therefore, set aside the order of the learned District Judge and direct the Trial Court to record a judgment and decree in the case on the evidence which is already on the record after hearing arguments from the parties. In view of the late stage at which this objection has been made I allow no costs to the appellant.

Z. K. *Order set aside.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 1074 OF 1924.

November 11, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

HEM KANTA GHOSH AND OTHERS—PETITIONERS

versus

Srimati MONOJ PROVA SINGHA AND ANOTHER—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 115, O. XXII, r. 9, O. XLIII, r. 1 (k)—Limitation Act (IX of 1908), Sch. I, Art. 171—Abatement, order setting aside—Appeal, whether lies—Limitation, period of, failure to take into consideration—Revision.

No appeal lies from an order setting aside an abatement. [p. 174, col. 1.]

Where a Court in dealing with an application to set aside an abatement fails to take into consideration the period of limitation fixed by law for a party to apply to set aside an order of abatement, the order is bad and is liable to be set aside in revision. [*ibid.*]

Rule against an order of the Additional District Judge, Howrah, dated the 27th June 1924.

Babus *Surendra Nath Ghosal* and *Jatindra Nath Batabyal*, for the Petitioners.

JUDGMENT.—This Rule is directed against an order of the District Judge of Howrah, dated the 27th June 1924 rejecting the appeal preferred by the petitioners on the ground that no appeal lay from the order of the Court below and in the alternative the Rule is directed against an order passed by the Subordinate Judge of Howrah dated the 28th July 1923 (wrongly mentioned as dated the 8th July 1923 in the order-sheet issuing the Rule). No one appears on behalf of the opposite parties, though the service upon them has been found to be in order. The facts are that one Becharam Singh instituted a suit against the petitioners in the Court of the Subordinate Judge of Howrah. Subsequent to the institution of the suit he died, according to the petitioners, on the 21st February 1922 and according to the opposite party, on the 21st March 1922. On the 2nd June 1922, an application was made on behalf of the widow for substitution in place of the deceased plaintiff on the allegation that the plaintiff had died on the 21st March 1922. On the 7th June 1922, the learned Subordinate Judge passed an *ex parte* order granting the application and ordering substitution as prayed for. On the 2nd August 1922 the defendants-petitioners applied to have that order set aside on the ground that on the date on which the application for substitution was made by the opposite party the suit had already abated and in proof of it they produced a copy of the extract from the Register of births and deaths kept by the Calcutta Corporation. The learned Subordinate Judge, by his order dated the 12th August, held that, as a matter of fact, Becharam had died on the 21st February 1922 and that the suit had abated on the date on which the application was made. On the 16th September 1922 the opposite party again filed an application purporting to be one under O. XXII, r. 9, C. P. C., to set aside the order of abatement and to direct substitution of her name in place of the deceased plaintiff. That application was heard after a long time *ex parte* in the absence of the petitioners. The learned Subordinate Judge granted that application on the 28th July 1923 holding that the petitioners' right to apply under O. XXII, r. 9, C. P. C., for substitution and to pray for extension of time under cl. (3) of that rule was not lost by the previous order of his predecessor holding that the suit had abated. The learned Subordinate Judge found that the opposite party was not aware of the death of her husband within three months of his death. He accordingly set aside the order of abatement and restored the suit to its file in the original number and ordered the issue of summonses upon the defendants. The petitioners thereupon filed an appeal to

the District Judge who held that no appeal lay to him. We have heard the learned Pleader who appears for the petitioners and have gone through the papers in connection with this case and have come to the conclusion that the order passed by the learned District Judge is a correct one and cannot be disturbed. Under O. XLIII, there is no appeal from an order setting aside an abatement. Besides the petition that was filed on the 16th September 1922 by the opposite party was virtually one for review of the order passed on the 12th August 1923; but the application itself does not purport to be one for review. The prayer made in the application was that the order holding that the suit had abated might be discharged under O. XXII, r. 9 and substitution made. The Subordinate Judge before whom the matter came held that the petitioners had still the right to apply under O. XXII, r. 9 for setting aside the order of abatement. Be that as it may, the real question that we are called upon to decide is whether the order passed by the Subordinate Judge on the 28th July 1923 is one under O. XXII, r. 9, C. P. C. We are of opinion that the order is bad in law. The learned Subordinate Judge has not taken into consideration the period of limitation that is fixed by law for a party to apply to set aside an order of abatement passed under O. XXII, r. 9. The period fixed for the purpose under Art. 171 is two months from the date of abatement. In the present case the abatement took place on the 21st May according to the petitioners or on the 21st June according to the opposite party. Whichever date is taken, the application filed by the opposite party for setting aside the order of abatement on the 16th September 1923 must be held to be barred by limitation. In this view we do not think that the learned Subordinate Judge was right in allowing the application of the opposite party for setting aside the order of abatement.

The result is that this Rule is made absolute and the order passed by the Subordinate Judge of Hooghly on the 28th July 1923 set aside. We make no order as to costs.

Ż. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 66 OF 1924.

January 23, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Ryves

RAM SUNDER MISRA *alias* MAHUWA MISRA—PLAINTIFF—APPELLANT

versus

JAI KARAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Procedure—Offer made by party to suit, acceptance of, effect of—Terms of offer, compliance with, effect of.

It is open to a litigant, be he plaintiff or defendant, at any stage of the proceedings to make an offer to the other side to bring litigation to a close, and if the offer is accepted and its terms are complied with accurately and fully, the promise made by the offerer must be carried out by him. [p. 175, col. 1.]

During the pendency of a suit the defendant made an offer that if a certain witness who was about to be examined on behalf of the plaintiff would eat food cooked by a certain woman and served by the plaintiff, the plaintiff's suit may be decreed. The offer was accepted by the plaintiff and the witness named in the offer ate food cooked by the woman named in the offer and served by the plaintiff:

Held, that the offer having been accepted and its terms having been carried out, the Court was bound to decree the suit. [p. 175, col. 2.]

Letters Patent Appeal against the judgment of Mr. Justice Daniels, dated the 12th February 1924, printed as 79 Ind. Cas. 353, preferred against the decree of the Sub-Judge, Jaunpur, dated the 14th August 1922.

Mr. *U. S. Bajpai*, for the Appellant.

Mr. *S. S. Sastry*, for the Respondents.

JUDGMENT.—This is an appeal which raises a rather interesting point. One Badal owned a certain property and he left behind him a widow *Musammat* Talashi. On her death disputes arose as to who was the heir of Badal, and two claimants came forward, one Ram Sunder and the other Bhawani Prasad. In mutation proceedings the Court declared in favour of Ram Sunder, and proceedings were taken with regard to the redemption of a mortgage, and there was an arbitration and an award which as between mortgagee and mortgagor fixed the price of the redemption of this mortgage at Rs. 250-8-0. Bhawani Prasad disregarded the mutation proceedings and the award by which the property could be redeemed on payment of Rs. 250-8-0 and sued for redemption. He included in that action Jai Karan Singh and Ram Sunder. He withdrew the action against Ram Sunder, and came to a compromise with Jai Karan Singh, which compromise was embodied in a decree and provided that he (Bhawani Prasad) might claim redemption.

Thereupon Ram Sunder commenced a suit asking that the compromise decree above mentioned was not binding upon him, and he, undoubtedly, set himself up as having been the legal heir of Badal, and as the property had by virtue of the compromise decree passed into the hands of Bhawani Prasad, Ram Sunder sought possession of that property on payment of Rs. 250-8-0. In that action the principal and, indeed, from looking into the record, the only substantial issue was whether Ram Sunder was the legitimate son of Bhikha? He contended that he was. Bhawani Prasad said he was not, and that he was an illegitimate son. In support of his legitimacy Ram Sunder put one Dukharan Dube into the box. Dukharan Dube was obviously going to support Ram Sunder, and thereupon Bhawani Prasad made, with the permission of the Court, an offer to the plaintiff through his Vakil, which offer was reduced to writing. Bhawani Prasad offered that if Dukharan Dube, a member of the *biradri*, would eat *kachcha* food cooked by *Musammat* Pargashi and served by Ram Sunder, "the plaintiff's suit may be decreed." That offer was accepted by the plaintiff, and the hearing of the suit temporarily suspended. *Musammat* Pargashi cooked food, it was served by Ram Sunder and eaten by Dukharan Dube, and on the acceptance of that offer and due performance of all the conditions the Munsif, in our opinion, with perfect propriety decreed the suit. Bhawani Prasad was a man who put forward that offer upon the advice of his Vakil, and it was an offer which could have been accepted, and all conditions that he made were complied with, and he having made the offer expressed his willingness that the plaintiff's suit should be decreed if the conditions were complied with. It is surely open to a litigant, be he plaintiff or defendant, at any stage of the proceedings to make an offer to the other side to bring litigation to a close. That is all that Bhawani Prasad did. If the offer made by him had not been accepted, he would have relied on its refusal as a strong ground for rejecting the evidence of Dukharan Dube and that was the advantage which he sought to gain. That was no doubt the purpose that he sought to get by making the offer. He cannot now be heard to say, every thing having been done by the offeree, the person to whom the offer was made, that the promise that he made that the suit should be decreed should not thereafter take effect. The learned Single Judge of this Court looking at the matter said, "Apart from authority, I should have been disposed to accept the view taken by the Courts below." But he felt himself overborne by a decision in which cases of this kind were supposed to have some relation to "adjustment of suits" within the meaning of O. XXIII, r. 3 of the C. P. C. In our opinion this type of cases have nothing to do with adjustment of suits at all, but must be regarded in each case as an offer capable of acceptance or rejection by the person to whom it is made. If the offer is accepted in its terms and complied with accurately and fully, the promises made by the offerer must be carried out by him.

The result is that this appeal is allowed and the judgment of the lower Court restored with costs including fees of both hearings in this Court on the higher scale.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 151 OF 1924.

November 27, 1924.

Present :—Mr. Justice Daniels.

GANGA PRASAD AND ANOTHER —APPLICANTS

versus

Musammat KISHNI AND ANOTHER —OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 -Application for leave to withdraw suit—Formal defect, absence of—Order granting leave—Revision.

Where, on an application for leave to withdraw a suit with liberty to bring a fresh suit, which merely alleges that there is a formal defect in the plaint but does not specify what the defect is, the Court, without applying its mind to the question at all and without considering what the alleged formal defect is, grants leave for the withdrawal of the suit with liberty to bring a fresh suit, it acts with material irregularity and its order is liable to be set aside in revision.

Rahmat Ullah v. *Dharam Singh*, 64 Ind. Cas. 948; 20 A. L. J. 90; (1922) A. I. R. (A.) 15, *Rajendra Lal* v. *Atal Bihari*, 39 Ind. Cas. 969; 44 C. 454; 25 C. L. J. 455 and *Bai Kashibai* v. *Shidappa Anapa Pujari*, 21 Ind. Cas. 23; 37 B. 682; 15 Bom. L. R. 823, relied on.

Jhunku Lal v. *Bisheshar Das*, 46 Ind. Cas. 71; 40 A. 612; 16 A. L. J. 495, distinguished.

Civil revision from an order of the Additional Munsif, Hathras, dated the 25th April 1924.

Mr. *M. A. Aziz* (with him Mr. *Iqbal Ahmad*), for the Applicants.

Dr. *S. N. Sen*, for the Opposite Parties.

JUDGMENT.—This is a revision against an order passed by a Munsif allow-

ing a plaint to be withdrawn under O. XXIII, r. 1 of the C. P. C. It is admitted that the order cannot be supported on the merits. The question is whether any revision lies. In *Rahmat Ullah* v. *Dharam Singh* (1), Banerji, J., allowed an application in revision in precisely similar circumstances. The Bombay and Calcutta High Courts have taken the same view in *Rajendra Lal* v. *Atal Bihari* (2) and *Bai Kashibai* v. *Shidappa Anapa Pujari* (3). It is urged for the respondent that the same Judge who decided *Rahmat Ullah* v. *Dharam Singh* (1) was a member of a Bench which held that no revision lay in *Jhunku Lal* v. *Bisheshar Das* (4). An examination of the two cases shows that they are not really contradictory. In *Jhunku Lal* v. *Bisheshar Das* (4), the plaintiff based his application upon the fact that formal proof of a certain plaint had not been given. The Court had to consider whether this amounted to a sufficient cause within the meaning of O. XXIII, r. 1. It applied its mind to the question and decided erroneously that it did. As the Court had applied its mind to a question which it had jurisdiction to decide, it was held that even though the decision was wrong no revision lay under s. 115 of the C. P. C. The facts here are different. The Court never applied its mind to the question at all. The plaintiff merely alleged that there was a formal defect in the plaint but did not specify what the defect was and, in fact, as is now admitted, there was no formal defect whatever. The learned Munsif in his judgment does not state what the formal defect is. He simply says in general terms "the frame of the suit is bad." Under these circumstances the decision in *Jhunku Lal* v. *Bisheshar Das* (4) is no bar to my holding, as I do hold, that the Munsif acted with material irregularity in allowing the suit to be withdrawn with liberty to file a fresh suit. I, therefore, set aside his order and direct him to restore the suit to his file and dispose of it according to law. If the plaintiff wishes to withdraw he must do so unconditionally. The respondents will have their costs of this revision.

Z. K. *Order set aside.*

(1) 64 Ind. Cas. 948; 20 A. L. J. 90; (1922) A. I. R (A.) 185.
(2) 39 Ind. Cas. 969; 44 C. 454; 25 C. L. J. 455.
(3) 21 Ind. Cas. 23; 37 B. 682; 15 Bom. L. R. 823.
(4) 46 Ind. Cas. 71; 40 A. 612; 16 A. L. J. 495.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 152 OF 1924.
January 30, 1925.
Present:—Mr. Daniels, J. C.

MOHAMMAD ZAKI KHAN AND OTHERS—PLAINTIFFS—APPELLANTS
versus
MUNNU SAHU AND ANOTHER—DEFENDANTS RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 54—Muhammadan Law—Transfer in lieu of dower, whether sale—Registration, whether necessary.

Where a transfer of property is made in lieu of a sum of money, whether the money is paid in cash or by the extinction of a dower debt, the transaction comes within the definition of sale contained in s. 54 of the Transfer of Property Act which is applicable to a transaction between Muhammadans. Where the value of the property transferred is over Rs. 100, the transfer must be effected by a registered instrument. [p. 177, cols. 1 & 2.]

Asalat Fatima v. *Shambhu Dayal*, 11 Ind. Cas. 928; 14 O. C. 214, *Ram Prasad* v. *Rahat Bibi*, 33 Ind. Cas. 622; 18 O. C. 367, *Fida Ali* v. *Muzzaffar Ali*, 5 A. 65; A. W. N. (1882) 175; 3 Ind. Dec. (N. S.) 85 and *Abbas Ali Shikdar* v. *Karim Bakhsh Shikdar*, 4 Ind. Cas. 466; 13 C. W. N. 160, referred to.

Second appeal against a decree of the District Judge, Fyzabad, dated the 7th January 1924, confirming that of the Subordinate Judge, Fyzabad, dated the 29th September 1923.

Mr. *Naim Ullah*, for the Appellants.

Mr. *A. P. Sen*, for Respondent No. 1.

JUDGMENT.—The question for decision in this appeal is whether a transfer by a Muhammadan husband of immoveable property of the value of over Rs. 4,000 to his wife in lieu of her dower debt which is said to have amounted to Rs. 6,000 requires a registered instrument or not. The question depends on whether it is a gift of the kind known in Muhammadan Law as *hiba-bil-ewaz* or a sale. The Chapter of the Transfer of Property Act which deals with gifts does not effect any rule of Muhammadan Law, whereas the provisions of s. 54 of the Transfer of Property Act are applicable to persons of all religions.

The suit arises out of execution proceedings. The property in suit was attached in execution of a decree as being the property of Jafar Khan to whom it originally belonged. The appellants are Jafar Khan's sons and daughter, and their case is that Jafar Khan made an oral gift of the property to their mother *Musammat* Maksuman Bibi in lieu of her dower debt. The Court below has held that the trans-

action amounted to a sale and could only be made by a registered instrument, and the only plea argued before me in appeal is that this finding is incorrect. The Court below relies on the decision in *Asalat Fatima* v. *Shambhu Dayal* (1). That decision is directly opposed to the appellants' contention. It lays down that a transfer of immoveable property of the value of over Rs. 100 in lieu of dower cannot be recognized unless made by a registered instrument. The appellants, however, rely on the decision in *Ram Prasad* v. *Rahat Bibi* (2), where a similar transaction was treated as one of *hiba-bil-ewaz*. I have, therefore, to consider which of these two decisions I should follow. I might have referred the decision to a Bench but I have not been asked by the parties to do so, and the question appears to me to be free from any real doubt. The decision in *Ram Prasad* v. *Rahat Bibi* (2) was given in a pre-emption case and the question whether a registered instrument was necessary did not arise. The decision was also a very short one, it does not contain any discussion of authority, and the contrary decision in *Asalat Fatima* v. *Shambhu Dayal* (1) does not appear to have been cited.

The appellants' learned Counsel has referred me to the discussion of the question of *hiba-bil-ewaz* in Tyabji's Muhammadan Law Second Edition, pages 460 to 463. The authority of that learned author is really against the appellants. He describes a *hiba-bil-ewaz* as consisting of two separate acts of donation, *i.e.*, of mutual or reciprocal gifts of specific property between two persons each of whom is alternately donor and donee. *A* makes a gift to *B* and *B* makes a gift in his turn to *A*, so that the gift is a return for the gift made to him by *A*. He says that such reciprocal gifts are quite familiar to us in modern times, though in these days the return gift would usually be made on a subsequent occasion and not immediately after the original gift. This is entirely different from the transfer of property in lieu of a money price even though that price consists of the extinction of a debt, and indeed the same learned author states on page 494 of the same book that the provisions of Ch. VIII of the Transfer of Property Act would, in his opinion, cover a gift of an actionable claim. Where the transfer of property is made in lieu of a sum of money, whether the money is paid in cash or by the extinction of a dower debt, the transaction comes within the definition of sale in s. 54 which is applicable to a transaction between Muhammadans. Besides the case of this Court the high authority of Mahmood, J., is in support of the same view. In *Fida Ali* v. *Muzzaffar Ali* (3) he held that a transfer in lieu of dower was a sale. There is a Calcutta decision to the same effect in which it was directly decided that s. 54 of the Transfer of Property Act applied to a transaction of this kind [*Abbas Ali Shikdar* v. *Karim Bakhsh Shikdar* (4).] The view taken by the learned Judge is supported both by principle and by authority. I affirm his decree and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 11 Ind. Cas. 928; 14 O. C. 214.
(2) 33 Ind. Cas. 622; 18 O. C. 367.
(3) 5 A. 65; A. W. N. (1882) 175; 3 Ind. Dec. (N. S.) 85.
(4) 4 Ind. Cas. 466; 13 C. W. N. 163.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 378 OF 1923.
February 19, 1925.
Present:—Mr. Justice Mukerji and Mr. Justice Boys.

Lala SHIAM LAL AND OTHERS—PLAINTIFFS—APPELLANTS
versus
MOOL CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 7, Sch. I, Art. 144—Hindu Law—Joint family—Eldest brother, whether represents minor brothers—Decree against father—Sale of family property in execution of decree—Suit by sons to set aside sale—Limitation.

Where several Hindu brothers constitute a joint family, the eldest brother represents the entire family and can give a valid discharge within the meaning of s. 7 of the Limitation Act on behalf of his minor brothers.

Rati Ram v. *Nadar*, 49 Ind. Cas. 990; 17 A. L. J. 649; 41 A. 435, followed.

After a decree was passed against a Hindu the latter died and his minor sons were brought on the record as his legal representatives. In execution of the decree property belonging to the family was attached and sold. More than twelve years after the sale of the property but within twelve years of the delivery of possession, the sons brought a suit to have the sale set aside on the ground that they were not properly represented in the execution proceedings and that the property could not be sold because the father having died as a member of a joint Hindu family, the property had become the sole property of the sons by

survivorship. At the date of the institution of the suit the eldest brother had attained the age of twenty-one years, while the youngest was just over eighteen years of age:

Held, that the suit was barred by limitation.

Second appeal from a decree of the District Judge, Agra, dated the 8th February 1923.

Mr. *N. P. Asthana*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT:—The plaintiffs' suit has failed in the Courts below, *inter alia*, on the ground of limitation.

It appears that a decree was obtained against the plaintiff-appellants' father by one Ram Prasad. In execution of that decree the property in suit was attached and sold. Before the attachment the father had died and his sons the appellants were brought on the record with the *Nazir* as their guardian for the suit. Over 12 years after the sale of the property, and just within 12 years of the delivery of possession, the appellants brought the suit out of which this appeal has arisen to have the sale set aside and to recover possession, on the ground that they were not properly represented in the execution proceedings and that the property could not be sold because the father having died as a joint member of a Hindu family it had become the sole property of the appellants.

The Court of first instance found that the debt was one which was binding on the plaintiffs. It found that there was no proper representation of the plaintiffs in the execution department but it found that the suit was barred by limitation.

On appeal the learned Judge found that there was a proper representation of the appellants in the execution department and he also found that the suit was barred by 12 years' limitation.

On the question of limitation we are clear that the decree of the Court below was right and we do not propose to consider the question of the proper representation by the *Nazir*. In this case, at the date of suit all the plaintiffs were majors two were more than 21 and the youngest of them was found to have been just over 18 years of age when the suit was filed. It is urged on behalf of the appellants that the youngest of the appellants could maintain his suit because he had three years from his attaining majority and as he could maintain the suit, the suits of his elder brothers would also be within time, the family being joint. This argument however is concluded by the recent case of *Rati Ram* v. *Nadar* (1). It was held that where there was an adult brother who could execute a decree on behalf of himself and the minor brother it must be assumed that the former could give a discharge within the meaning of s. 7 of the Limitation Act and that the younger brother could not execute the decree more than three years after the application of the elder brother. In other words it was held that a joint elder brother in a Hindu family represented the entire family and could, therefore, give a discharge within the meaning of s. 7 of the Limitation Act on behalf of his minor brother. This case, in our opinion, is on all fours with the case before us and the appeal fails and is, hereby, dismissed with costs which will include Counsel's fee in this Court on the higher scale.

Z. K. *Appeal dismissed.*

(1) 49 Ind. Cas. 990; 17 A. L. J. 649; 41 A. 435.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2602 OF 1921.

November 19, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

ANNADA CHARAN RAY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GIRINDRA KUMAR BANDAPADHAYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 67—Rent, arrears of—Tenancy created before Act—Interest, rate of—Undue influence, proof of—Construction of document—Lease—Heir, mention of, whether makes lease heritable.

Where a contract is challenged as providing a very high rate of interest, it is necessary to prove that one party had undue advantage over the other in the matter of the settlement of the rate of interest. [p. 179, cols. 1 & 2.]

Aziz Khan v. *Duni Chand*, 48 Ind. Cas. 933; 23 C. W. N. 130; 101 P. R. 1918; 165 P. W. R. 1918 (P. C.), *Balla Mal* v. *Ahad Shah*, 48 Ind. Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P C.), followed.

A lease creating a *raiyati* tenancy without any fixed period, before the passing of the Bengal Tenancy Act, is to be treated as a lease from year to year and a claim for rent under such a lease is governed by the provisions of that Act. Interest on arrears of rent

due under such a lease cannot, therefore, be recovered at a rate higher than that fixed by s. 67 of the Act. [p. 180, col. 1.]

Chandra Nath Sarma Motayed v. *Sheikh Inamdi*, 64 Ind. Cas. 118; 34 C. L. J. 369, referred to.

The use of the word 'heir' in a lease restricting the right of transfer of the "tenant and his heirs," does not necessarily mean that the lease is a heritable one. [p. 179, col. 2.]

Appeal against a decree of the Additional Judge, Noakhali, dated the 14th July 1921, reversing that of the Munsif, First Court, Lakshmipura, dated the 12th of June 1919.

Babu *Bipin Chandra Bose*, for the Appellants.

Babu *Jahnabi Charan Das Gupta*, for the Respondents.

JUDGMENT.—The only question raised in this appeal is what is the rate of interest on arrears of rent payable by the defendants to the plaintiff. The plaintiff-appellant has brought the present suit for arrears of rent against the defendants charging interest at the rate of 150 per cent. per annum in accordance with the terms of the *kabuliyat* dated 1874. Both the Courts below have held that the plaintiff is not entitled to recover interest at such high rate as 150 per cent. per annum on the ground that the rate of interest was hard and unconscionable. They further held that the stipulation as to payment of interest was penal and was inserted by way of threat and was not intended to be acted upon and was never acted upon. In this view they held that the stipulation was in the nature of penalty and fixed the rate of interest at 25 per cent. per annum.

The plaintiff appeals and argues that there is no evidence on the record to show that the bargain was hard and unconscionable or brought about by undue influence on the part of the plaintiff. We think that this contention is right. According to the recent decisions of the Judicial Committee reported in the 23rd Volume of the Calcutta Weekly Notes at pages 130, 233 and 918* [*Aziz Khan* v. *Duni Chand* (1) and *Balla Mal* v. *Ahad Shah* (2)] it is clear that where a contract is challenged as providing a very high rate of interest, it is necessary to prove that one party had undue advantage over the other in the matter of settlement of the rate of interest. As regard the stipulation being of a penal character, there is nothing to support it; and we do not think that it will be right to hold that in every case where there is a stipulation for payment of interest on non-payment of rent within a certain time, it must be taken to be penal. The ground upon which the decision of the Courts below is based is, therefore, unsustainable.

Hence we have to consider the question raised before us in the light of the documentary evidence produced by the parties. The claim is based upon a *kabuliyat* executed by the defendants' predecessors in favour of the plaintiff's predecessor so long ago as 1874. It is headed as a *raiyati kabuliyat*. The lease is not for any term. It lays down the mode of calculation of rent which is a progressive one from 1881 to 1886. Some of the terms of this lease are that the tenant and his heirs will have no right to transfer the holding by gift or sale or Will, nor will it be attached in execution of a decree against the tenant or his heirs. There is a condition that if the rent is not paid according to the instalments fixed in the document every month, interest will be charged at the rate of 2 annas in the rupee per month. The learned Vakil for the appellant argues that the tenancy having been created before the Bengal Tenancy Act came into operation it is governed by the terms in the *kabuliyat* as to the rate of interest and is not affected by the Bengal Tenancy Act. In the first place, it is contended that the *kabuliyat* creates an occupancy right, and secondly, it is argued that it creates a permanent heritable *raiyati* lease. As we understand the scope of the lease, we take it to be a lease creating *raiyati* tenancy without fixing any period of the lease. There is no word in the lease signifying permanancy nor are there any expressions which can be taken to mean that it was intended to be heritable. The use of the word "heir" in connection with the restriction of the right of transfer does not necessarily mean that the lease is a heritable one. It is possible that the landlord anticipating that he might not have any occasion to eject the tenant inserted the above condition that it

(1) 48 Ind. Cas. 933; 23 C. W. N. 130; 101 P. R. 1918; 165 P. W. R. 1918 (P. C.).

(2) 48 Ind. Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

* There is no case on page 918 of 23 C. W. N. The correct case is on page 980 of the same Volume which is of the Calcutta High Court, not of the Privy Council, *Ektar Sikdar* v. *Wajuddi Tati*, 52 Ind. Cas. 722; 23 C. W. N. 980.—[*Ed.*]

could not be transferred by the tenant himself or any one succeeding him. Such being the character of the lease the next question that arises for consideration is how far it is to be governed by the Bengal Tenancy Act. The Bengal Tenancy Act came into operation when the tenant had not acquired the right of occupancy. As we have said, there was no period fixed for the lease. It must, therefore, be considered to be a lease from year to year. In 1885 when the Bengal Tenancy Act came into force the tenant had the status of a *raiyat* holding the land from year to year. The consideration, therefore, which influenced the decision in the case of *Chandra Nath Sarma Motayed* v. *Shaikh Inamdi* (3) would, in our judgment, weigh in this case also. In that case there was a lease executed before the Bengal Tenancy Act for a certain period which had terminated before the Act came into operation. It was held that the tenant in that case was holding over and must be supposed to be a tenant from year to year and if rent is claimed for any period after the termination of the lease, the claim must be governed by the provisions of the Bengal Tenancy Act. We think the same principle will apply to the present case. Under s. 67, Bengal Tenancy Act, the plaintiff is not entitled to recover more interest than is fixed by that section. In this view of the matter we think that the plaintiff has been awarded more than what he would be entitled to under the law, and this appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

(3) 64 Ind. Cas. 118; 34 C. L. J. 369.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 93 of 1924.

January 21, 1925.

Present:—Mr. Dalal, A. J. C.

Musammat RAJVANTA—PLAINTIFF—APPELLANT

versus

RAMESHAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Mortgage by father—Necessity—Recital in mortgage deed, value of—Father, whether represents family in litigation—Suit against father—Sons, whether necessary parties—Limitation Act (IX of 1908), s. 22—Civil Procedure Code (Act V of 1908), O. I, r. 9.

The father of a joint Hindu family is competent to represent the family for purposes of litigation in suits. [p. 181, col. 1.]

Kishan Prasad v. *Har Narain Singh*, 9 Ind. Cas. 739; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; (1911) 2 M. W. N. 395; 38 I. A. 45 (P. C.), *Sheikh Ibrahim Tharagan* v. *Rama Aiyar*, 10 Ind. Cas. 874; 35 M. 685; 21 M. L. J. 508; (1911) 1 M. W. N. 442, *Hori Lal* v. *Nimanan Kunwar*, 15 Ind. Cas. 126; 34 A. 549; 9 A. L. J. 819 and *Kinkar Biswas* v. *Akhil Chandra Chaudhuri*, 35 C. 519; 11 C. W. N. 350; 5 C. L. J. 242; 2 M. L. T. 137, referred to.

A mortgagee of joint family property from the father brought a suit to recover possession of the property against the father. The Trial Court directed that the sons of the mortgagor should be brought on the record as defendants, and when they were so brought the suit was dismissed as barred by limitation on the ground that the sons were made parties to the suit more than twelve years after the date of the mortgage:

Held, (1) that the suit could be carried on properly against the father alone who represented the joint family for the purposes of the litigation and to whom it was open to raise the defence that though he admitted the execution of the mortgage deed the money due thereunder could not be recovered by sale of the joint family property unless the plaintiff proved legal necessity for the debt or payment of antecedent debts out of the loan; [*ibid.*]

(2) that, therefore, the sons were not necessary parties to the suit and the suit could not be dismissed as barred by time. [*ibid.*]

A recital in a deed of mortgage executed by the father of a joint family that the money has been borrowed for family necessity is merely a piece of evidence and in the absence of any other evidence it does not amount to proof of family necessity. [p. 181, col. 2; p. 182, col. 1.]

Ramman Lal v. *Ram Gopal*, 47 Ind. Cas. 987; 5 O. L. J. 629; 21 O. C. 200, referred to.

Appeal against a decree of the Additional Subordinate Judge, Fyzabad, dated 30th November 1923 confirming that of the Munsif, Akbarpur, dated 29th March 1923.

Mr. *Naimullah*, for the Appellant.

Mr. *S. M. Ahmad* for Mr. *H. N. Dass*, for the Respondents.

JUDGMENT.—The plaintiff *Musammat* Rajwanta sued Rameshar to recover possession as mortgagee over a certain area of land on foot of a mortgage-deed executed in her favour by Rameshar on 30th May 1910. The area mortgaged was 14 *bighas* of which 9 *bighas* are at present in the possession of the plaintiff mortgagee. The suit related to the balance of the area of 5 *bighas*.

The Trial Court directed that the sons of Rameshar, Chunni and Srinewas minor, under the guardianship of Chunni, may be brought on the record and when they

were so brought the Court held that the suit was barred by limitation because the sons were made parties to the suit more than 12 years after the date of the mortgage. That Court decided the other issues as well and held that legal necessity so as to make the consideration binding on the joint family property was proved to the extent of Rs. 510 out of Rs. 1,000 which was the consideration of the deed.

The lower Appellate Court on appeal by the plaintiff dismissed the appeal only on the ground of limitation. In this second appeal I am of opinion that the suit cannot be dismissed on the ground of limitation. If the sons do not desire to be parties to the suit, the suit can be carried on against the father who represented the joint family for the purposes of the litigation. The defence would be open to him alone to say that though he admitted the execution of the bond the entire money due thereon could not be recovered by sale of the joint family property unless the plaintiff proved legal necessity for the debt or payment of any antecedent debt out of the loan. Under O. I, r. 9, no suit shall be defeated by reason of non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

The principle of representation by the father of the joint family for the purposes of litigation is well recognised. In *Kishan Prasad* v. *Har Narain Singh* (1) their Lordships of the Privy Council laid down the principle of representation by the managing member of a joint Hindu family as regards the carrying on the joint family business and suits brought to enforce contracts made on behalf of the joint family. Earlier in the same year in 1911 Bench of the Madras High Court decided in *Sheikh Ibrahim Tharagan* v. *Rama Aiyar* (2) that the manager of a joint family property has, as such manager, the right to represent the family in suits. That was a case where the manager had brought a suit by himself and their Lordships were of opinion that a suit by such a manager on behalf of the joint family will be maintainable without making the other members parties to the suit. In the following year a Full Bench of the Allahabad High Court laid down in *Hori Lal* v. *Nimanan Kunwar* (3) that where in a suit for sale on a mortgage the defendants mortgagors were the managing members of a joint Hindu family who in that capacity had purchased the mortgaged property the family was sufficiently represented by the managing members and that the suit would not fail by reason of the non-joinder of the other members of the family. The case quoted by the other side of *Ram Kinkar Biswas* v. *Akhil Chandra Chaudhuri* (4) is not relevant to this discussion. It merely pointed out that the provisions of s. 22 of the Limitation Act would apply where new defendants were added to a suit. In the present case even if the suit be considered to be barred against the sons, relief can be granted to the plaintiff against the joint family property with only the father the manager of the family, as sole defendant to the suit.

Both the Subordinate Courts were influenced by an absence of the allegation in the plaint that Rameshar was sued as manager of joint family. Rameshar alone was sued at the time and no occasion had arisen then to make a statement as to his representative character. The sons themselves offered to be made parties on the allegation of the jointness of the family which necessarily implied that the father was the manager, so the plaintiff is merely adopting the case put forward by the defence.

The other issues may also be decided here. The Trial Court has given excellent reasons for holding that legal necessity for the debt, so as to bind the joint family property, is proved for part of the consideration only to the amount of Rs. 510. It was argued here that the recital by the father, the manager of the family, was binding on the sons and in support of this contention a Bench ruling of this Court in *Ramman Lal* v. *Rim Gopal* (5) was quoted. The judgment does not contain any such pronouncement. It merely says that such recital shall be evidence. In the absence of any other evidence the recital does not

(1) 9 Ind. Cas. 739; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; (1911) 2 M. W. N. 395; 38 I. A. 45 (P. C.).

(2) 10 Ind. Cas. 874; 35 M. 635; 21 M. L. J. 508; (1911) 1 M. W. N. 442.

(3) 15 Ind. Cas. 126; 34 A. 549; 9 A. L. J. 819.

(4) 35 C. 519; 11 C. W. N. 350; 5 C. L. J. 242; 2 M. L. T. 137.

(5) 47 Ind. Cas. 937; 5 O. L. J. 629; 21 O. C. 200.

amount to proof. It was the duty of the plaintiff to prove the prior mortgage-deed of 27th June, 1899 but he failed to do so and as regards the two sums of money amounting to Rs. 180 paid in cash to the manager, there is no evidence that the debt was contracted for joint family purposes.

I hold that the mortgage is binding on the joint family property to the extent of Rs. 510.

The appeal, however, cannot succeed because the plaintiff is already in possession of more than half mortgaged property. It will be inequitable to permit her to take possession of the balance of the property when only half the amount of the consideration of the mortgage was proved to be binding on the joint family property. It was suggested by the plaintiff's learned Counsel that the balance of the money Rs. 490 may be received from the plaintiff and possession granted to her of the balance of the mortgaged property. I do not think that would be fair method of deciding this case. The Court cannot order the father to enter into a fresh contract on behalf of the family when there is no family necessity for a further loan of Rs. 490.

In the result I dismiss the appeal but having regard to the plaintiff's success on the main question I direct that parties shall bear their own costs of all the Courts.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 802 OF 1923.

December 3, 1924.

Present :—Mr. Justice Mukerji.

LAKSHMI CHAND—DEFENDANT—APPELLANT

versus

LILA DHAR—PLAINTIFF—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 36—Ex-proprietary tenant, rent payable by—Agreement between parties, whether can be enforced—Specific Relief Act (I of 1877), s. 42—Declaratory decree when to be granted.

An agreement between a vendor and a vendee as to the amount of rent to be paid by the former as an ex-proprietary tenant is not by itself void. So long as a reasonable rent is fixed by the parties the Revenue Court can accept it as a fair estimate of the rent to be paid under s. 36 of the U. P. Land Revenue Act by the ex-proprietary tenant. The ultimate word on the question of the amount of rent, however, lies with the Revenue Court. [p. 183, col. 1.]

Jahangir v. *Karrar Husain*, 44 Ind. Cas. 513: 16 A. L. J. 212 and *Prag* v. *Sital Pershad*, 22 Ind. Cas. 965: 12 A. L. J. 136; 36 A. 155, followed.

The grant of a declaratory decree is a matter within the discretion of the Court and the Court is not bound to make a declaratory decree, simply because it is within its competence to do so. A declaratory decree should not be granted where the grant of the decree would be a useless affair. [*ibid.*]

Second appeal against a decree of the Subordinate Judge, Budaun, dated the 19th of March 1923.

Dr. *N. C. Vaish*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondent.

JUDGMENT.—This appeal must be decreed. The plaintiff is the respondent in this Court. He sold to the defendant-appellant certain *zemindari* property and became thereby an ex-proprietary tenant of certain *sir* lands. On the very day on which the sale-deed was executed the plaintiff executed an agreement of rent by which he agreed to pay a sum of Rs. 170 a year as the rent of the ex-proprietary holding. On foot of this agreement the purchaser made an application in the Revenue Court under s. 36 of the Land Revenue Act to have a rent assessed. The Revenue Court assessed it at the same sum of Rs. 170 as the plaintiff had agreed to pay. The order was an *ex parte* one. The plaintiff made an attempt to have the order to set aside and the case re-heard, but he failed. Thereupon he brought the suit, out of which this appeal has arisen.

The plaintiff alleged in the plaint that the *kabuliyat* had been obtained from him by exercise of undue influence and pressure. He also alleged that the rent fixed was much higher than the rent which could lawfully be fixed for the holding. The suit failed in the Court of first instance. The learned Munsif came to the conclusion that no case of fraud or undue influence had been made out. He was also of opinion that evidence was adduced to prove fraud of a kind other than that alleged in the plaint. The learned Subordinate Judge on appeal agreed with the Court of first instance that the plaintiff was not entitled to any relief on the ground of fraud. But he accepted the argument that the *kabuliyat* was void as a matter of law, the effect of it being a contravention of the provisions of s. 36 of the Land Revenue Act.

The sole question for determination in this appeal, therefore, is whether on the ground taken up by the Court below a declaratory decree could be granted in favour of the respondent.

There have been some cases discussing the question whether it was open to a vendee and a vendor to arrive at an agreement as to what rent should be paid by the vendor with respect to his ex-proprietary tenancy. The latest case on the point is that of *Jahangira* v. *Karrar Husain* (1). An earlier case is *Prag* v. *Sital Pershad* (2). In the former case it was held that an agreement between the vendor and the vendee as to the rent to be paid by the former was not by itself void. So long as it was a reasonable rent that was fixed by the parties the Revenue Court could accept it as a fair estimate of the rent to be paid under s. 36 of the Revenue Act by an ex-proprietary tenant. Thus, it is clear that an agreement by itself is not enforcible in a Court of justice. On the other hand it is not a void contract. The ultimate word on the question of the amount of rent must be said by the Revenue Court and that has been done in this case. The Revenue Court held definitely that the rent should be Rs. 170.

It is clear, therefore, that the plaintiff-respondent should not be granted any declaratory decree. The agreement by itself is not void and a prayer for its avoidance cannot be made the object of any suit. If it is allowed to stand it cannot do any harm to the plaintiff. Further, a mere declaratory decree should not be granted where the grant of the decree would be an useless affair. The grant of a declaratory decree is a matter within the discretion of the Court and the Court is not bound to make a declaratory decree simply because it is within its competence to do so.

The appeal is allowed, the decree of the Court below is set aside and the decree of the First Court is restored. The appellant will have his costs throughout. The costs in this Court will include Counsels fees on the higher scale.

Z. K. *Appeal allowed.*

(1) 44 Ind. Cas. 513; 16 A. L. J. 212.
(2) 22 Ind. Cas. 965; 12 A. L. J. 136; 33 A. 155.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 171 OF 1924.
January 27, 1925.
Present:—Mr. Dalal, A. J. C.

NAGESHAR SINGH—DEFENDANT—APPELLANT
versus
BALDEO SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Ejectment suit—Adverse possession, plea of—Entries in revenue papers describing defendant as tenant, effect of—Jurisdiction of Civil Courts.

Where in a suit for ejectment the only evidence consists of entries in the revenue papers describing the defendant as tenant of the plaintiff, they must be deemed to represent correctly the relation between the parties to the effect that the defendant is the plaintiff's tenant and not in adverse possession by right of being a proprietor. [p. 184, col. 1.]

Nadir Singh v. *Anpurna Kunwar*, 56 Ind. Cas. 759; 7 O. L. J. 282; 2 U. P. L. R. (O.) 113 and *Sheo Gobind* v. *Ambika Prasad*, 47 Ind. Cas. 930; 5 O. L. J. 455, distinguished.

Durga v. *Rampadarath*, 65 Ind. Cas. 749; 8 O. L. J. 495 at p. 497, referred to.

A tenant who claims to be in adverse possession of his holding can be ejected as a trespasser through the Civil Court. [p. 184, col. 1.]

Second appeal under s. 100, C. P. C., against a decree of the Subordinate Judge, Sultanpur, dated the 17th January 1924, setting aside the decree of the Munsif, Sultanpur, dated 23rd September 1922.

Mr. *Naimullah*, for the Appellant.

Mr. *Daya Kishen Seth*, for the Respondents.

JUDGMENT.—The plaintiffs sued for possession of five specified plots and the defence was so far as this Court is concerned only one of adverse possession. The Trial Court dismissed the suit as regards two plots and part of a third but on appeal by the plaintiffs the entire suit was decreed. The defendant Nageshar has instituted this second appeal.

No argument was advanced as regards plot No. 1533. As regards the other plots the only evidence of adverse possession on which the learned Counsel for the appellant has relied was the entry of Nageshar as tenant of the plots in suit during a large number of years in the *khasra* of the village from 1315 to 1326 *F*. When this is the only evidence it can be regarded as evidence of the defendant being a tenant of the plaintiffs and not of the defendant putting forward adverse title as proprietor as against the plaintiffs. I do not think I can accede to the learned Counsel's argument that I must look at the entries only

for the purpose of establishing possession and not as to the character of the possession. The rulings quoted by him are not applicable here. In *Nadir Singh* v. *Anpurna Kunwar* (1) the entry in the village record was of an under-proprietary title; so it was held there by a learned Judge of this Court that adverse possession as under-proprietor was established. In the other case of *Sheo Gobind* v. *Ambika Prasad* (2) it is not clear as to whether the evidence of adverse possession consisted of entires in the village record. There is no mention in the report of an entry of the name of the claimant by way of adverse possession in the column of tenants in a *khasra* of any village. I agree with the observations of my learned brother Saiyed Wazir Hasan in *Durga* v. *Rampadarath* (3) that the question in such a case is whether these facts establish adverse possession so as to give title to the claimant by prescription, and that in the absence of any evidence to the contrary the entries in the revenue papers must be deemed to represent correctly the relation between the parties to the effect that the claimant was tenant and not in adverse possession by right of being proprietor. The tenant now claims adverse possession so he can be ejected as a trespasser through the Civil Court. In my opinion the decision of the lower Appellate Court is correct.

I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 56 Ind. Cas. 759; 7 O. L. J. 282; 2 U. P. L. R. (O.) 113.
(2) 47 Ind. Cas. 930; 5 O. L J. 455.
(3) 65 Ind. Cas. 749; 8 O. L. J. 495 at p. 497.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 459 OF 1923.
December 3, 1924.
Present:—Mr. Baker, J. C.
BHIKU AND OTHERS—DEFENDANTS—APPELLANTS
versus
R. M. DOYE—PLAINTIFF—RESPONDENT.

Riparian owners, rights and liabilities of—Obstruction—Injunction, suit for—Cause of action—Present use of water, whether necessary.

Every riparian proprietor has, subject to similar natural rights of upper and lower proprietors, the right to have the water of a natural stream come to him in its ordinary and accustomed course, undiminished in flow, quantity and quality, and unaffected in temperature and to go from him without obstruction. The same principle applies to a natural stream flowing in an artificial channel. [p. 185, col. 1.]

Ram Kripal Singh v. *Hanuman Singh*, 59 Ind. Cas. 929; 6 P. L. J. 6; 2 P. L. T. 122, relied on.

An upper proprietor has, in the absence of a right acquired by contract or by prescriptive use, no right to dam back a river running through his land and impound as much of the water as he may find convenient for the purpose of irrigation, leaving only the surplus, if any, for the use of the proprietors below. [*ibid.*]

Debi Pershad Singh v. *Joynath Singh*, 24 C. 865 at p. 874; 24 I. A. 60; 1 C. W. N. 401; 7 M. L. J. 120; 7 Sar. P. C. J. 209; 12 Ind. Dec. (N. S.) 1245 (P. C.), followed.

In such a case in order to give a riparian owner a cause of action for a suit it is not necessary that the plaintiff or any other riparian proprietor should make any actual use of the water at the time of the suit; it is sufficient if he is prevented by the action of the defendant from any possible use of the water due to the obstruction caused by erecting the dam. [*ibid.*]

Appeal against a decree of the Additional District Judge, Bhandara, dated 31st August 1923, in Civil Appeal No. 5 of 1923.

Mr. *D. T. Mangalmurti*, for the Appellants.

Messrs. *G. L. Subhedar* and *S. B. Gokhale*, for the Respondent.

JUDGMENT.—The plaintiff, who is the landlord of *Mouza* Basipar, Tahsil Gondia, sued the defendants, who are the tenants of the same village, for the removal of a dam erected by them across a *nala* which flows from the plaintiff's tank through the land of the defendants and further down through the land of the plaintiff. The First Court dismissed the plaintiff's suit, but on appeal the Additional District Judge, Bhandara, set aside the decree and granted the plaintiff an injunction against the defendants, restraining them from obstructing the flow of the water by erecting a dam across the stream, and Rs. 5 as damages. No decree for removal of the dam was necessary as it had already ceased to exist at the time of the suit. The defendants make this second appeal.

There is very little to be said in this appeal. The learned Pleader for the appellants desired to argue that the lower Appellate Court was wrong because it treated the case as one of a natural stream, whereas it was really one of an artificial stream. I cannot however allow this argument to be raised because in the pleadings the defendants very clearly admitted on 18th January 1922 that the stream in question was a natural stream, and the case has been throughout tried on that supposition. The

defendants cannot, therefore, be allowed in second appeal to alter this position and contend that the stream is an artificial one. The appeal must, therefore, be decided on the basis of the stream being a natural one.

The law as regards natural streams is very clear and has been stated over and over again in a number of cases, both English and Indian. The defendants are the upper riparian proprietors, and the plaintiff is the lower riparian proprietor, and as a general proposition every riparian proprietor has, subject to similar natural rights of upper and lower proprietors, the right to have water come to him in its ordinary and accustomed course, undiminished in flow, quantity and quality, and unaffected in temperature, and to go from him without obstruction. A large number of cases on the point will be found collected in Peacock's Easements Law, 3rd Edition, p. 273. I need not repeat them here, but it has also been held in *Ram Kripal Singh* v. *Hanuman Singh* (1), that the same principle applies to a natural stream flowing in an artificial channel. Under no circumstances can the defendant claim to erect a dam across the stream, thus depriving the lower riparian proprietor of the use of water.

It has been contended that the plaintiff does not make any use of the water of the stream, and at the close of the case an application was put in, asking the Court to make a personal inspection of the place in order to satisfy itself that the level of the stream is such that the plaintiff's land cannot be irrigated from it. I refused this application because it is not necessary under the law that the plaintiff or any other riparian proprietor should make any actual use of the water at the time of the suit. It is sufficient if he is prevented by the action of the defendants from any possible use of the water due to the obstruction caused by erecting a dam. It was clearly laid down by the Privy Council in *Debi Pershad Singh* v. *Joynath Singh* (2), that an upper proprietor has, in the absence of a right acquired by contract or by prescriptive use, no right to dam back a river running through his land and impound as much of the water as he may find convenient for the purposes of irrigation, leaving only the surplus, if any, for the use of the proprietors below.

(1) 59 Ind. Cas. 929; 6 P. L. J. 6; 2 P. L. T. 122.
(2) 24 C. 865 at p 874; 24 I. A. 60; 1 C. W. N. 401; 7 M. L. J. 120; 7 Sar. P. C. J. 209; 12 Ind. Dec. (N. S.) 1245 (P. C.).

In these circumstances I see no reason to differ from the view taken by the lower Appellate Court and the appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 12 OF 1924.
January 26, 1925.
Present:—Mr. Daniels, J. C.

SHEO BAKHSH SINGH AND ANOTHER —PLAINTIFFS—APPELLANTS
versus
INDRA BAHADUR SINGH *alias* CHANCHOO SINGH AND OTHERS— DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 111 (1) (b)—Zemindari *belonging to joint family recorded in name of manager—Order directing institution of suit in Civil Court—Suit not filed within prescribed period—Suit by member of family, whether maintainable.*

It is a common practice in the case of a *zemindari* owned by a joint family for the name of the manager alone to be recorded in the revenue papers. In such cases the manager is recorded in a representative capacity, and it is really the joint family which is the recorded co-sharer. [p. 186, cols. 1 & 2.]

Sheo Shankar Ram v. *Jaddo Kunwar*, 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.), referred to.

Where a valid order is passed under s. 111 (1) (*b*) of the U. P. Land Revenue Act directing a party to institute a civil suit for the determination of a question of title and the suit is not brought within the period of three months, no subsequent suit for the determination of the same question of title can be entertained. [p. 186, col. 1.]

Dhanesh Prasad v. *Gaya Prasad*, 33 Ind. Cas. 365; 18 O. C. 343 and *Taimur Ali Shah* v. *Shah Mohammad Khan*, 57 Ind. Cas. 346; 41 A. 211; 17 A. L. J. 83; 2 U. P. L. R. (A.) 326, relied on.

Where a *zemindari* owned by a joint family is recorded in the name of the manager alone and an order is made under s. 111 (1) (*b*) of the U. P. Land Revenue Act against the manager and he fails to institute a suit within three months, a suit brought subsequently by another member of the family is not maintainable. [p. 186, col. 2.]

Second civil appeal against a decree of the Additional Subordinate Judge, Fyzabad, dated the 5th December 1923, confirming that of the Munsif, Haveli, Fyzabad, dated the 28th April 1923.

Mr. *Haider Husain*, for the Appellant.
Mr. *M. Wasim*, for Respondents.

JUDGMENT.—The plaintiff-appellants and their elder brother Jagga Singh

are members of a Hindu joint family. The name of the eldest brother Jagga Singh is alone recorded in the revenue papers. The present suit was brought for a declaration that the share of the joint family consisting of these three brothers is larger than the share recorded in their names in the *khewat*. The exact figures are given in the plaint but are not material for the purposes of this appeal. The question for decision is whether the plaintiffs are precluded from bringing this suit by reason of an order passed against them under ss 111 (1) (*b*) of the U. P. Land Revenue Act requiring them to institute a civil suit for the determination of the question of title within three months. Proceedings for the partition of this village had been instituted in the Revenue Court. In the course of these proceedings the plaintiffs filed an objection purporting to be under s. 111 of the Land Revenue Act raising the question of title which is raised in this suit. The Revenue Court purporting to act under cl. (*b*) of that section passed an order on 11th September 1922 requiring them to institute a civil suit within three months. They did not institute the present suit till 15th January 1923 nearly a month after the time given in the order had expired. It is established both by the authority of this Court and of the Allahabad High Court that where a valid order is passed under s. 111 (1) (*b*) and the suit is not brought within the period of three months no subsequent suit can be filed. This was laid down in *Dhanesh Prasad* v. *Gaya Prasad* (1) and *Taimur Ali Shah* v. *Shah Mohammad Khan* (2). The case of the plaintiff-appellants is that they are not recorded co-sharers in the *mahal* and, therefore, the order passed under s. 111 (*b*) was a nullity and is not binding on them.

The question turns on whether the plaintiffs can be treated as recorded co-sharers in virtue of the record of the name of their eldest brother Jagga Singh. It has been assumed by the Court below, and may fairly be presumed in the absence of anything to suggest the contrary, that Jagga Singh was manager of the joint family and that his name was recorded in that capacity. It is a common, though not an invariable, practice in the case of *zemindari* owned by a joint family for the name of the manager alone to be recorded in the revenue papers. It seems to me that in such cases the manager is recorded in a representative capacity, and it is really the joint family which is the recorded co-sharer. The power of the manager to represent the family in legal proceedings has been affirmed in a number of cases of which *Sheo Shankar Ram* v. *Jaddo Kunwar* (3) may be cited as an example. If this were not the case, the curious result would be reached that while the head and natural representative of the family was bound it would be open to any junior member of the family to re-open the whole partition at any time on the ground that his name was not recorded. Incidentally it may be noted that the plaintiffs acted on this view and filed their objection under s. 111 of the Land Revenue Act in the Revenue Court. It is only after they had failed to comply with the order passed that they thought of raising the plea that the order was not binding on them.

The case of *Bhagwan Dei* v. *Arjun Singh* (4) relied on by the appellants is not really in point. That case only held that s. 333 (*k*) of the Land Revenue Act did not bar a suit by a junior member of the family to contest an alienation by the manager on the ground that it was made without legal necessity. The question of the validity of an alienation is purely one between the manager and the contesting co-parcener or co-parceners and did not arise at all in the partition proceedings. On the other hand the case of *Ram Lakhan Singh* v. *Rampal Singh* (5) is direct authority in favour of the respondents. In that case the plaintiffs who were minor sons of the manager sought to file an independent suit on the ground that they were not recorded co-sharers. The Court held that being joint in estate with their father they were fully represented by him in the proceedings and were bound by any order which was passed against him. In my view the suit has been rightly dismissed by the Court below and I accordingly dismiss the present appeal with costs.

Z. K. *Appeal dismissed.*

(1) 33 Ind. Cas. 365; 18 O. C. 343.
(2) 57 Ind. Cas. 346; 41 A. 211; 17 A. L. J. 83; 2 U. P. L. R. (A.) 326.
(3) 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.).
(4) 42 Ind. Cas. 8; 4 O. L. J. 479; 20 O. C. 241.
(5) 63 Ind. Cas. 272; 24 O. C. 143 at p. 147.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1048 TO 1050 OF 1922.

October 21, 1924.

Present:— Mr. Justice Devadoss.

IN S. A. No. 1048 OF 1922

KODAVALI SUBBAMMA AND ANOTHER —DEFENDANTS—APPELLANTS

versus

KODAVALI PAPAYYA—PLAINTIFF—RESPONDENT.

IN S. A. No. 1049 OF 1922.

KODAVALI RAMANNA, MINOR, BY GUARDIAN K. SUBBAMMA—PLAINTIFF —APPELLANT

versus

PATTAPAGALU VENKAPPA—DEFENDANT No. 1—RESPONDENT.

IN S. A. No. 1050 OF 1922

KODAVALI RAMANNA, MINOR, BY GUARDIAN SUBBAMMA—PLAINTIFF—APPELLANT

versus

KALAPALA VENKAYYA AND OTHERS —DEFENDANTS—RESPONDENTS.

Construction of document—Will, or authority to adopt—Principles applicable—Hindu Law—Adoption by widow, effect of.

It is not proper to interpret one document in the light of words used in another document. Each document must be considered with reference to words and expressions used in it and where the question is whether the document is a Will or an authority to adopt, and the document when read as a whole gives an impression that the executant intended to dispose of his property by it and that it should take effect after his life, then whatever may be the words used in the document, the general intention should not be overlooked. In construing the terms of the document the main thing to be considered is whether the executant had an intention to devise his properties to any one, in other words, whether the document contains clear words as to a testamentary intention on the part of the executant. [p. 188, col. 1.]

A Hindu executed a document giving his wife authority to make an adoption after his death and the document contained the following clause "my whole property shall be divided into two equal shares, one share being enjoyed by the adoptive mother and the other share by the adopted son. During her lifetime, the mother shall enjoy the said property to her own liking. After her death the whole property in respect of the said share shall pass to the adopted son":

Held, that from the words of the document the intention to devise the property to the wife could be clearly gathered and that, therefore, the document was a Will and not an authority to adopt and consequently did not require registration. [*ibid.*]

Under the Hindu Law the moment an adoption is made by a widow she is divested of her estate and the adopted son gets the whole of the property. [*ibid.*]

Santhana Sooramma v. *Santhana Mangayya*, 18 Ind. Cas. 1006; (1913) M. W. N. 199 and *Tirugnanapal* v. *Ponnammai Nadathi*, 58 Ind. Cas. 228; 12 L. W. 660; (1920) M. W. N. 559; 28 M. L. T. 190; 25 C. W. N. 511 (P. C.), distinguished.

Second appeals against a decree of the Court of the Additional Subordinate Judge, Ellore, in Appeal Suits Nos. 157, 134 and 158 of 1921, preferred against that of the Court of the District Munsif, Kovvur, in Original Suits Nos. 105, 4 and 6 of 1919 respectively.

Messrs. *A. Krishnaswami Iyer* and *Ch. Raghava Rao*, for the Appellants.

Messrs. *P. Somasundaram* and *P. Satyanarayana*, for the Respondents.

JUDGMENT.

IN S. A. No. 1048 OF 1922.

The only question argued in this second appeal is whether Ex. I is a Will. The Subordinate Judge has held that Ex. I is not a Will but an *Anumathipatra* an authority to adopt and, therefore, it required registration; and being unregistered it did not empower the 1st defendant to make a valid adoption. The finding is that the 2nd defendant has been adopted by the 1st defendant. The only question, therefore, is whether the 1st defendant had authority to adopt. If Ex. I is a Will then her authority to adopt would be unquestioned; if Ex. I is not a Will then the authority to adopt not having been given by an instrument in writing and registered would be of no use. Exhibit I is headed as "Will executed on 18th May 1918, by Kodivali Pedarama Krishnamma's son Bullayya," and the closing lines of the document are "I am at liberty to cancel this Will. This Will is executed on my free will relating to these things, while of a sound state of mind."

The contention of Mr. Somasundaram on behalf of the respondent is that this document is not a Will and the Court should not attach importance to a few expressions here and there that the document is a Will. He contends that there is no disposition in the Will and, therefore, it should not be construed as a Will. He relies upon two cases one *Santhana Sooramma* v. *Santhana Mangayya* (1) and the other *Tirugnanapal* v *Ponnammai Nadathi* (2). In the former case the executant addressed his wife in the second person and gave her certain directions; in the second case the executant addressed his adopted boy in the second person and gave him a number of directions. In the former case, a Bench of

(1) 18 Ind. Cas. 1006; (1913) M. W. N. 199.

(2) 58 Ind. Cas. 228; 12 L. W. 660; (1920) M. W. N. 559; 28 M. L. T. 190; 25 C. W. N. 511 (C. P.).

this Court held that the document was not a Will, in the second case their Lordships of the Privy Council held considering the general tenor of the document that it was not a Will notwithstanding the use of the word "Will" in the document. In both cases the construction turned upon the expressions used in the Will. As I have observed in another case, it is not proper to interpret one document in the light of the words used in another document. Each document must be considered with reference to the words and expressions used in it, and if the document when read as a whole gives an impression that the executant intended to dispose of his property by it and that it should take effect after his life, then, whatever may be the words used in the document the general intention should not be overlooked in construing the terms of the document. In Ex. I, I think the intention of the executant to devise property to his wife is clear. The operative clause of the document is "my whole property shall be divided into two equal shares, one share being enjoyed by the adoptive mother and the other share by the adopted son. During her lifetime, the mother shall enjoy the said property to her own liking. After her death the whole property in respect of the said share shall pass to the adopted son." I think these words clearly indicate that the executant did intend that his wife should get a benefit under the document. Under the Hindu Law, the moment the adoption is made, the widow is divested of her estate and the adopted son gets the whole of the property. The adoptive mother will be entitled thereafter only to maintenance. In order to avoid trouble in future the executant of Ex. I provided that in case of disputes between his wife and the adopted boy, the adopted mother should have half of the property for her life. I think from the words of the document, the intention to devise property to the wife can be clearly gathered. As I said the main thing to be considered in a document of this kind is whether the executant had an intention to devise his properties to any one, in other words, whether the Will contains clear words as to the testamentary intention on the part of the executant. Reading Ex. I as a whole I have no hesitation in holding that it is a Will. This finding necessarily involves the consequence that the 2nd defendant's adoption is a valid one.

In the result the second appeal is allowed and Original Suit No. 105 of 1919 is dismissed with costs throughout.

IN S. A. Nos. 1049 AND 1050 OF 1922.

In consequence of the finding in the connected case, Second Appeal No. 1048 of 1922, that the adoption is a valid one, these appeals also are allowed but in the circumstances it is unnecessary to allow costs to the appellant.

The memorandum of objections is not pressed and is dismissed.

V. N. V. *Appeal allowed;*
Z. K. *Memo. of objections dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 81 OF 1924.
January 14, 1925.
Present:—Mr. Wazir Hasan, J. C.

SHEONATH AND ANOTHER—PLAINTIFFS —APPELLANTS
versus
Babu TULSI PAT RAM—DEFENDANT —RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 144, 148—Adverse possession—Mortgage—Mortgagee put in possession as purchaser—Registered-deed, absence of, effect of—Redemption, whether can be allowed.

Where a mortgagee is put in possession of the mortgaged property on the basis of an arrangement that the property is sold to the mortgagee in lieu of the interest due under the mortgage, the possession of the mortgagee is adverse to the mortgagor, and after the expiry of the statutory period the property cannot be redeemed on the allegation that in the absence of a registered deed of sale the transfer in favour of the mortgagee was invalid and that the mortgage still subsists.

Bashir Husain v. *Chandrapal Singh*, 68 Ind. Cas. 223; (1922) A. I. R. (O.) 133; 10 O. L. J. 1, followed.

Appeal against a decree of the Fourth Additional District Judge, Lucknow, dated the 12th November 1923, in an appeal preferred against that of the Munsif, North Lucknow, dated the 19th February 1923.

Mr. *Sailen Roy*, for the Appellant.

Messrs. *Wasim Girja Shankar* and *Ambica Datt Ram*, for the Respondent.

JUDGMENT.—This is the plaintiffs' appeal in a suit for possession of certain plots of land which together constitute a grove. The relief to possession is prayed by way of redemption of a mortgage which the plaintiffs' predecessor-in-interest made in favour of the defendant's ancestor in

the year 1887. The defence to the suit was that three years after the alleged mortgage the mortgaged property was sold by the mortgagor to the mortgagee in full satisfaction of the mortgage-debt. This defence has succeeded in both the lower Courts with the result that the suit for redemption has been dismissed.

The necessary facts are that on the 29th April 1887 a mortgage of the property in suit, simple in its nature, was made by the plaintiff's predecessor-in-interest in favour of the defendant's ancestor for a sum of Rs. 300. It is common ground that for a year or so the interest payable on the mortgage was paid by the mortgagor. It is also agreed that subsequently the mortgagor failed to pay the accruing interest and it is also common ground that on account of failure of the payment of interest the mortgagee was put in possession of the mortgaged property. The plaintiffs' case as set forth in the pleadings is that possession was delivered in lieu of interest, thereby converting the simple mortgage into a usufructuary one. The plea in defence was that the possession was delivered by virtue of a sale in satisfaction of the mortgage-debt. Both the Courts below are agreed that the plaintiffs have failed to establish their case as to the nature of the defendant's possession and they are also agreed that the defendant's plea as to the sale has been established.

The only ground on which this finding of fact could be challenged was that the sale not being evidenced by a registered instrument was invalid. That may be so but the sale having taken place as a matter of fact as is found by the Courts below it certainly gives a starting point for adverse possession in the character of purchaser. This is the view of law which was taken in the case of *Bashir Husain* v. *Chandrapal Singh* (1). With that view I agree. Both the Courts below have found that since the date of the invalid sale the defendant has been exercising proprietary possession over the property in suit and that finding holds good once the fact of the sale is established.

The result is that the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 68 Ind. Cas. 223; (1922) A. I. R. (O.) 133; 10 O. L. J. 1.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 646 OF 1924.

January 30, 1925.

Present:—Mr. Justice Madhavan Nair.

APPASWAMY CHETTIAR—CLAIMANT—PETITIONER

versus

N. BALAKRISHNA PILLAI AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 58—Execution of decree—Attachment—Objection, disposal of—Possession, question of, not gone into—Revision.

In a case under O. XXI, r. 58 of the C. P. C., the Court is bound to decide the question of possession, and if a case is disposed of without deciding such a question, the High Court ought to interfere under s. 115 of the C. P. C. to set the matter right.

Rangammal v. *Sevaugan Chetti*, 29 Ind. Cas. 228; 28 M. L. J. 327 and *Satkari Mandal* v. *Tirtha Narain Bhattacharjee*, 24 Ind. Cas. 62, relied on.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, to revise an order of the City Civil Judge, Madras, in C. M. P. No. 846 of 1924, in E. P. R. No. 281 of 1924, in S. C. S. No. 6974 of 1922, on the file of the Court of Small Causes, Madras.

Mr. *P. G. Krishna Iyer*, for the Petitioner.

Messrs. *Muhammad Ibrahim* and *G. Ramakrishna Iyer*, for the Respondents.

JUDGMENT.—I am asked in this civil revision petition to set aside an order by which the learned City Civil Judge has disallowed a claim under O. XXI, r. 61, C. P. C. The decree-holder in execution of the decree in Suit No. 6974 of 1924, on the file of the Court of Small Causes, Madras, attached house and ground No. 2150, in Swami Pandaram Street, Chintadripet, Madras, along with other properties, as properties belonging to the judgment-debtor. The claimant who is the petitioner before me, filed objections to the attachment, under O. XXI, r. 58 on the ground that he was in possession of the above house and ground, that it had been duly conveyed to him by its owners and that he had been in possession of it in his own right, ever since the sale. The learned City Civil Court Judge, holding that "he was not satisfied with the *bona fides* of the claim or of the sale in his favour" dismissed his petition.

I think the order of the learned Judge is wrong and must be set aside. In cases coming under O. XXI, r. 58, it has been held that the Court is bound to decide the

question of possession and that, if a case is disposed of, without deciding such question, the High Court ought to interfere under s. 115 of the C. P. C; see *Rangammal* v. *Sevaugan Chetti* (1).

In this case, it is clear from the order that the learned Judge did not pay any attention to the question as regards the actual possession of the house. In this connection, the following observations of the learned Judges of the Calcutta High Court in *Satkari Mandal* v. *Tirtha Narain Bhattacharjee* (2) may be usefully referred to:

"The Court cannot found its decision on the question of the validity of the claim, or the determination of the title to the property attached..... The Court below has thus refused to determine the one question it was competent to decide, namely, the question of possession and has, on the other hand, determined the question it was not competent to investigate, namely, the question of title."

As the learned Judge has failed to consider the question of possession, which he is bound to decide, under the Code, I would set aside the order of the learned Judge and direct him to restore the petition to his file and dispose of it, according to law, in the light of the above observations. The petitioner will get his costs here and in the Court below.

Z. K. *Order set aside.*

(1) 29 Ind. Cas. 228; 28 M. L. J. 327.
(2) 24 Ind. Cas. 62

ALLAHABAD HIGH COURT.

STAMP REFERENCE IN FIRST CIVIL APPEAL No. 310 OF 1922.

February 11, 1925.

Present:—Justice Sir Theodore Caro Piggott, KT.

MANNI LAL—DEFENDANT—APPELLANT

versus

THAKUR RADHEY GOPALJI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (iv) (c)—Suits Valuation Act (VII of 1887), s. 8—Suit for declaration and consequential relief—Valuation of reliefs—Court-fee payable.

In a suit falling under s. 7 (iv) (c) of the Court-Fees Act the valuation for purposes of Court-fees is to be determined first and that for the purposes of jurisdiction must follow on the same; but the plaintiff in such a suit cannot at one and the same time obtain the services of the highest Tribunal for the determination of his claim and evade the payment of *ad valorem* Court-fees. If for the purposes of jurisdiction he sets a high value on the relief by way of declaration and a merely nominal value on the relief by way of injunction, it is doing him no injustice to hold that the "relief sought", on which the Court-fee must be levied, is the sum total of the two reliefs. [p. 194, cols. 1 & 2.]

Mohendra Sundan Thakur v. *Dinobandhu Thakur* 21 Ind. Cas. 771; 19 C. L. J. 15, followed.

Plaintiff brought a suit on behalf of two idols for a declaration that the defendant had no power to supervise and manage the properties of the idols and that he was the lawful manager of the idols, and for an injunction restraining the defendant from supervising and managing the properties of the idols and for recovery of the moveables belonging to the idols. He valued the declaratory relief at Rs. 25,000, the relief for injunction at Rs. 1,000 and the relief for recovery of the moveables at Rs. 500. He paid *ad valorem* Court-fees on the reliefs with regard to the injunction and the recovery of the moveables but paid only Rs. 10 with regard to the declaratory relief:

Held, that the suit was one for a declaratory decree with consequential relief and fell within the purview of s. 7 (iv) (c) of the Court-Fees Act, and that the plaintiff having valued the different reliefs at Rs. 26,500 he was bound to pay *ad valorem* Court-fees on that sum and that the Court-fees payable on appeal must also be determined on the same basis. [p. 194, col. 1.]

Ghazaffar Husain Khan v. *Yawar Husain*, 28 A. 112 at pp. 117; 118; 2 A. L. J. 591; A. W. N. (1905) 208, followed.

Messrs. *L. M. Banerji* and *N. P. Asthana*, for the Appellant.

Dr. *S. N. Sen* and Mr. *S. C. Das*, for the Respondents,

OFFICE REPORT.—The suit out of which this appeal has arisen was brought for the following reliefs:—

(*a*) It may be held that the defendant has no power to supervise and manage the properties of plaintiffs Nos. 1 and 2 and it may be declared that the plaintiff No. 3 is the lawful manager of the plaintiffs Nos. 1 and 2.

(*b*) The defendant may be restrained by means of a perpetual injunction from supervising and managing the property of the plaintiffs Nos. 1 and 2 and from entering the property of the plaintiffs.

(*c*) The moveables of the plaintiff No. 1, that may be proved may be recovered.

(*d*) The costs may be awarded.

(*e*) Any relief other than relief (*a*) which it may be deemed just to grant with any addition or alteration, may be granted. The plaintiffs will pay on it any Court-fee that is deemed necessary to be paid.

The suit was valued for purposes of jurisdiction at Rs. 26,500 the value of the

property and the Court-fee was paid as follows:—

	Rs.	a.
Declaration of right valued at Rs. 25,000 ...	10	0
Issue of perpetual injunction valued by plaintiff at Rs. 1,000	75	0
Recovery of moveables and cash at Rs. 500 ...	37	8
Total ...	122	8

The injunction prayed for will be consequential relief and cl. iv, para. (c) of s. 7 of Court Fees Act VII of 1870 is applicable, *vide* an authority reported as *Jageshra* v. *Durga Prashad Singh* (1). Consequently the plaint should have been stamped with a Court-fee of Rs. 915. Rs. 122-8 having already been paid there is a deficiency of Rs. 792-8 payable by plaintiffs-respondents for the lower Court.

The lower Court passed a decree declaring that plaintiff No 3 was the manager and trustee of the estate of plaintiff No. 2 and perpetually restrained the defendants from managing the property of plaintiff No. 2 only or enter it. It further passed a decree for possession over moveable property of the value of Rs. 3-10. Against this decree the defendants preferred this first appeal valuing it at Rs. 4,000 and paying only Rs. 10 as Court-fee. The relief sought by the appeal is that the Hon'ble High Court will be pleased to allow the appeal and dismiss the suit with costs. The property of defendant No. 2 against which this appeal is preferred is valued by the appellant at Rs. 4,000. He should, therefore, pay an *ad valorem* Court-fee thereon which comes to Rs. 225. Rs. 10 having already been paid there is a deficiency of Rs. 215 payable by defendants-appellants for this Court.

The respondent has filed cross-objection with respect to the property of plaintiff No. 1 the value of which comes to Rs.21,000. He should, therefore, pay an *ad valorem* Court-fee which comes to Rs. 795. Deducting Rs. 47-8 already paid there is a deficiency of Rs. 747-8 for this Court.

The result is that the deficiency payable by the defendants-appellants for this Court is Rs. 215 and that payable by the respondent for this Court is Rs. 747-8 and for the lower Court is Rs. 792-8 in all Rs. 1,540.

(1) 24 Ind. Cas. 679; 36 A. 500; 12 A. L. J. 844.

Objection by Mr. *S. C. Das*, for the Respondents.

In order to determine the proper amount of Court-fee payable, the nature of the suit has to be looked at. In the present suit, no beneficial interest is claimed by plaintiff No. 3; the plaint alleged the property in suit to be endowed which was not seriously disputed by the defendant, who did not claim any personal interest in the property. In this connection the observations of Stanley, C. J., in *Ghazaffar Husain Khan* v. *Zawar Husain* (2) are very apposite: "As regards the Court-fee, in many cases the costs of such a suit as this fall on the trust estate, and...that as the decree in such a suit works no change in the beneficial ownership of the property, it would be a hardship to impose upon the trust estate the payment of the ordinary Court-fee payable in respect of a hostile suit for recovery of land on title." No question of transfer of title or ownership is involved in this suit.

The point now raised is exactly covered by *Mohendra Sundar Thakur* v. *Dinobandhu Thakur* (3). *Jageshra* v. *Durga Prashad Singh* (1) has no application to the facts of the present case, there the plaintiff was suing on his personal right and was claiming a beneficial interest in the mortgaged property. Then unless he could get the decree already passed out of his way, he was not entitled to any relief.

The present suit is, in substance, one by the idols, to prevent the defendant from meddling with their property and thus falls under s. 7 (iv) (*d*) of the Court Fees Act. Since the idols themselves are plaintiffs, it is sufficient for their purposes of obtaining the relief asked for, *i. e.*, the removal of the defendant if the defendant be not allowed to manage the *wakf* property, and it does not matter who else is authorised to act as *mutawalli*.

Relief (*a*) is not so much a declaratory relief as a reason for granting relief (*b*), 'Consequential relief' must be such as necessarily flows from and is inseparably connected with the declaration asked for, that is to say, if the declaration is refused the consequential relief falls with it. This is not so in the present case.

The plaintiffs valued their relief of

(2) 28 A. 112 at pp. 117, 118; 2 A. L. J. 591; A. W. N. (1905) 208.

(3) 21 Ind. Cas. 771; 19 C. L. J. 15.

injunction at Rs. 1,000 and have paid the right Court-fee.

I ask to be heard also on this point. The matter is one for the decision of the Bench hearing the appeal, as was done in *Jageshra* v. *Durga Prashad Singh* (1).

OFFICE REPORT.—The learned Vakil for the plaintiffs-respondents has based his objections to the deficieney report on the authority of two rulings:—

Ghazafiar Husain Khan v. *Zawar Husain* (2), *Mohendra Sundar Thakur* v. *Dinobandhu Thakur* (3).

The ruling reported as *Ghazaffar Husain Khan* v. *Zawar Husain* (1) applies to a case which is brought under s. 92 of the C. P. C., (s. 539 of the old Code) by any two persons interested in the trust with the sanction of the Legal Remembrancer. In such suits the plaintiff does not claim any right for himself and, therefore, the Court had held that an *ad valorem* Court-fee is not leviable. But in an ordinary suit like the present where the diety-plaintiff claims an injunction restraining the defendant from interfering with the management of the property, the plaintiff claims proprietary right in himself and in his own interest. The case under consideration, therefore, cannot be distinguished from the case of the ordinary plaintiff.

The ruling reported as *Mohendra Sundar Thakur* v. *Dinobandhu Thakur* (3) also does not apply, because, there it was the case brought by a *shebait* of a temple to have his rights declared and also asked for an injunction restraining the defendant from interfering with his exclusive possession. It was not a suit by the idol itself to enforce the proprietary rights. To such cases the ruling reported as *Ray Krishna Dey* v. *Bepin Behary Dey* (4) is applicable, in which it was held that in such suits the Court-fee should be paid on the amount which is specified for purposes of jurisdiction. Our own High Court in *Jageshra* v. *Durga Prashad Singh* (1) has taken the same view and the facts of that case are indistinguishable from the present case. If it were held that in all suits brought by, or in the name of, an idol claiming the personal right a fixed fee is leviable then even in suits to enforce a mortgage, or recover possession of landed property, or for accounts etc., as fixed fee would be payable which view would be absurd.

(4) 17 Ind. Cas. 162; 40 C. 245; 16 C. L. J. 194; 17 C. W. N. 591.

The cross-objection filed here has been grossly undervalued at Rs. 630. The correct valuation should be Rs. 25,000 (value of the property as given in the plaint) minus Rs. 4,000 (decreed by the Court below, in favour of the plaintiffs) that is to say Rs. 21,000. The learned Vakil for the respondents has said nothing at all as to this.

As regards the contention of the learned Vakil that the matter is one for the decision of the Bench hearing the appeal. I would submit that under the recent ruling of the Hon'ble Taxing Judge reported as *Bahal Kuar* v. *Narain Singh* (5) the Taxing Officer has full power to decide such questions.

I may note here that the learned Counsel for the defendant-appellant has raised no objection to the deficiency payable by him and is willing to pay that as soon as this objection is disposed of.

Submitted for favour of decision and order.

TAXING OFFICER'S REPORT.—The suit, from which this appeal has arisen, was brought by plaintiff No. 3 with and on behalf of plaintiffs Nos. 1 and 2, who are idols, for the following reliefs:—

(*a*) It may be held that defendant has no power to supervise and manage the properties of plaintiffs Nos. 1 and 2 and it may be declared that plaintiff No. 3 is the lawful manager of plaintiffs Nos. 1 and 2.

(*b*) The defendant may be restrained by means of a perpetual injunction from supervising and managing the property of plaintiffs Nos. 1 and 2 and from entering the property of the plaintiffs.

(*c*) The moveables of plaintiff No. 1, that may be proved, may be recovered.

(*d*) The costs may be awarded.

(*e*) Any relief other than relief (*a*), which it may be deemed just to grant with any addition or alteration, may be granted. The plaintiffs will pay on it any Court-fee that is deemed necessary to be paid.

The suit was valued for the purposes of jurisdiction at Rs. 26,500, as a value of the property, and the Court-fee was paid as follows:—

	Rs.	a.
Declaration of right, valued at Rs. 25,000 ...	10	0
Issue of perpetual injunction, valued at Rs. 1,000 ...	75	0
Recovery of moveables and cash at Rs. 500 ...	37	8

The lower Court passed a decree declaring that plaintiff No. 3 was the manager and trustee of the estate of plaintiff No. 2 and perpetually restrained the defendant from managing the property of the plaintiff No. 2 or entering it. It further passed a decree for possession over moveable property of the value of Rs. 3-10. Against this decree the defendant preferred this appeal, valuing it at Rs. 4,000 and paying only Rs. 10 as Court-fee, praying that the appeal be allowed and the suit be dismissed with costs.

The respondent has filed a cross-objection with respect to the property of plaintiff No. 1, valuing it at Rs. 630 and paying Rs. 10 for a declaration and Rs. 37-8 for an injunction.

As against the parties to the suit and the appeal and cross-objection, it is maintained that in the plaint relief (*b*) prayed for is consequential to the declaration prayed for in relief (*a*), that, therefore, for the purpose of estimating Court-fees s. 7 cl. iv, para. (*c*) of the Court Fees Act is applicable and an *ad valorem* duty should be paid in both Courts. On this contention there is a deficiency of Rs. 792-8 payable by the plaintiffs-respondents in the Court below. With regard to their cross-objection, it is maintained that it should have been valued at Rs. 21,000 and that there is thus a deficiency of Rs. 747-8 due from them in this Court. From the defendant-appellant there is a deficiency of Rs 215 due in this Court.

It is understood that the Counsel for the appellant has seen the deficiency report submitted by the office and has raised no objection to payment. The Counsel for the plaintiffs-respondents, however has, objected, that the suit does not fall under s. 7, cl. iv, para. (*c*) but para. (*d*) of the Court Fees Act. He points out that, as is stated in the judgment of the lower Court, the possession of the property by plaintiffs Nos. 1 and 2 is not in dispute, and that plaintiff No. 3 is not suing on his personal right and is not claiming any beneficial right in the property, and he relies on the case quoted in *Mohendra Sundar Thakur* v. *Dinobandhu Thakur* (3). There the plaintiff asked for a declaration that he was in possession as the sole *shebait* of certain endowed properties and that the defendants had not been validly appointed as such, and for an injunction to restrain the defendants from interfering with the management of the property. The Court held that the substantial relief claimed was this injunction and proceeded to decide whether the valuation placed on this relief was arbitrary or not. Counsel contends with some force that the case quoted exactly covers the points raised in the present suit, namely, whether in the first place the relief claimed is consequential or merely an injunction and, secondly, whether if it is held to be an injunction, the valuation put upon it is arbitrary or not.

Now whatever may be the relief claimed "in substance", the words actually used in the prayer (page 4 of the paper-book) appear to be capable of only one interpretation. I am of opinion that this is clearly a claim for a declaration with consequential relief. The right to obtain an injunction against the defendant flows from the declaration which the plaintiff seeks of his right to the management: "If the plaintiff has that right, he is entitled to an injunction in consequence. If he has not that right, he is not entitled to an injunction". *Bahal Kuar* v. *Narain Singh* (5), Daniels, J. The fact that in this case it is a question not of possession but of management does not seem to me to be strictly relevant. If it is pleaded that the plaint might have been worded differently, I would draw attention to the remarks of Piggott, J., in a similar case in *Rup Narain* v. *Bishwa Nath Singh* (6).

But assuming that the relief claimed is consequential, Counsel refers to the remarks of Stanley, C. J., in *Ghazaffar Husain Khan* v. *Zawar Husain* (2): "As regards the Court-fee, in many cases the costs of such a suit as this fall on the trust estate, and it seems to me that as the decree in such a suit works no change in the beneficial ownership of the property, it would be a hardship to impose on the trust estate the payment of the ordinary Court-fee payable in respect of a hostile suit for recovery of land on title". As a matter of fact this was not an issue in the case. The above words are merely the expression of an opinion and the learned Judge did not come to any finding on the point.

In view, however, of the judgment of Mookerji, J., in *Mohendra Sundar Thakur* v. *Dinobandhu Thakur* (3), and of the remarks

(5) 84 Ind. Cas. 822; 22 A. L. J. 1038; L. R. 6 A. 33 Civ.; (1925) A. I. R. (A) 184.

(6) 68 Ind. Cas. 265; 20 A. L. J. 587; (1922) A. I. R. (A.) 358; 4 U. P. L. R. (A.) 132; 44 A. 629

of Piggott, J., and Stanley, C. J., in the judgments referred to, I direct that this order be laid before the Hon'ble Taxing Judge for a decision of the issue whether this suit falls under para. (c) or para. (d) of cl. iv of s. 7 of the Court Fees Act, and for orders as to whether, if it falls under para. (c) the full *ad valorem* Court-fee is to be paid.

Should the learned Judge decide that the suit falls under para. (c) the second issue framed above need not be considered. On the other hand if the suit is held to fall under para. (d) it is contended that the valuation placed on the relief claimed by means of an injunction both in the lower Court and (in the cross-objection) in this Court is purely arbitrary, and that in the lower Court the valuation should have been that declared for purposes of jurisdiction, namely Rs. 25,000 and under the cross-objection, Rs. 25,000 less Rs. 4,000 the valuation of the appellant, *i. e.*, Rs. 21,000.

On this question the remarks of Mookerji, J., in the judgment above quoted appear to be applicable since the benefit that is to accrue to the plaintiffs, if plaintiff No. 1 is made sole manager of the property and the defendant is excluded, has not been shown to be above the valuation put upon the relief claimed. But since this issue depends upon the decision of the first issue framed, I am of opinion that it too should be left for the orders of the Hon'ble Taxing Judge.

Mr. *S. C. Das*, for the Respondents.

JUDGMENT.—I cannot read the plaint in this suit as anything but a claim for a declaratory decree, with consequential relief, under s. 7 (iv) (c) of the Court Fees Act, VII of 1870. This being so the case is covered by the ruling in *Jageshra* v. *Durga Prasad Singh* (1). I am not prepared to recommend a reconsideration of that decision. I can see the point that, on the wording of the section, it is arguable that the expression "the relief sought" means the "consequential relief" spoken of in sub-cl. (c). At the same time I do not think we ought now to unsettle the law laid down by a Bench of two Judges more than ten years ago. Moreover, I am impressed with the argument based upon s. 8 of the Suits Valuation Act, VII of 1887. I accept the contention that the valuation for purposes of Court-fees is to be determined first and that for purposes of jurisdiction must follow on the same; but the plaintiff in a suit in which consequential relief is prayed cannot at one and the same time obtain the services of the highest possible Tribunal for the determination of his claim and evade the payment of *ad valorem* Court-fees. If for purposes of jurisdiction he sets a high value on the relief by way of declaration and a merely nominal value on the relief by way of injunction, it is doing him no injustice to hold that the "relief sought", on which the Court-fee must be levied, is the sum total of the two reliefs. It is beside the point to suggest that different consequences would have followed if the plaintiff in the present case had asked for a declaration only, or for an injunction only, the question under the Court Fees Act must be determined upon the plaint as framed.

I affirm the report of the Stamping Officer, and allow the parties concerned one month in which to make good the deficiency.

Z. K. *Stamping Officers report affirmed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 273 OF 1922

AND

CIVIL REVISION PETITION No. 695 OF 1922.

November 11, 1924.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

T. A. BALAKRISHNA ODAYAR AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS IN A. A. O. No. 273 OF 1922 AND PETITIONERS IN C. R. P. No. 695 OF 1922,

versus

CHAKRAVARTHY V. JAGANNADA CHARIAR AND OTHERS—PLAINTIFFS NOS. 1 AND 2—DEFENDANTS NOS. 3 TO 6, 8 AND 9—RESPONDENTS IN BOTH.

Civil Procedure Code (Act V of 1908), ss. 92, 115—Trust—Scheme suit—Trustee, whether can be plaintiff—Revision—Interference in pending suit.

A trustee is a person interested in the trust within the meaning of s. 92 of the C. P. C., and there is nothing in the section to prevent his being one of the plaintiffs in a suit brought under the section, or even to prevent both the plaintiffs being trustees. The real plaintiff in such a suit, by whomsoever it may be represented, is the trust, and the representation may be either by the interested public or by a trustee and so long as the plaintiffs, whether trustees

or not, are vindicating a public and not an individual right, the suit is maintainable. [p. 196, cols. 1 & 2]

Subramania Pillai v. *Krishnaswami Somayajiar*, 53 Ind. Cas. 605; (1919) M. W. N. 522; 26 M. L. T. 143; 42 M. 668, followed.

Interference with findings in a suit not yet disposed of is not a matter which the High Court will view with favour and it will require very strong proof of want of jurisdiction or irregular exercise of jurisdiction to warrant interference. Where, however, it appears that a suit is not maintainable at all, it might in some cases be advisable for the High Court to interfere in revision and thus to prevent further waste of time and money, the ground of interference being that a Court has no jurisdiction to proceed with a suit which is not maintainable in law. [p 195, col. 1; p. 196, col. 1.]

Appeal and petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the Subordinate Judge, Kumbakonam, in S. A. No. 405 of 1920, and in O. S. No. 27 of 1920 respectively.

Messrs. *S. Muthiah Mudaliar* and *K. Narasimha Iyangar*, for the Appellants.

Messrs. *T. M. Krishnaswamy Iyer*, *S. Panchapakesa Sastriar* and *C. V. Rajagopalachari*, for the Respondents.

JUDGMENT.—In this Civil Revision Petition, defendants Nos. 1 and 2 in Original Suit No. 27 of 1920 on the file of the Sub-Court of Kumbakonam call for the interference of this Court in revision with certain findings of the lower Court on certain issues in that suit. The suit has not yet been disposed of. Interference with findings in a suit not yet disposed of is not a matter which the High Court will view with favour and it will require a very strong proof of want of jurisdiction or irregular exercise of jurisdiction to warrant interference. In this case the petitioners have before us restricted their case to three issues, on which the lower Court has given findings, Issues Nos. I, IV and V.

The suit is one under s. 92 of the C. P. C., for the removal of certain trustees of the Kumbakonam Sri Sarangapaniswami Temple, defendants Nos. 1 and 2, and for other reliefs. It is filed by two plaintiffs with the sanction of the Advocate-General. The first plaintiff is himself a trustee of the temple and the second is a member of the public interested in the trust. Issue No. IV relates to the prayer in the plaint for divesting the Devastanam Committee of its superintendence over the temple. The plaintiffs have also added as defendants the members of this Committee. Before the lower Court, the plaintiffs did not press that prayer. The petitioners, who are defendants Nos. 1 and 2, wish us to interfere now because they are afraid that the lower Court may not separate this relief from the others prayed for, and thus prejudice their defence. They seem to apprehend that the lower Court will not be able to distinguish the reliefs which the plaintiffs have given up and those which they retain, or to restrict the evidence at the trial to these reliefs which are still being sought for by the plaintiffs. But we really cannot hold that such a vague apprehension is any reason for interference in revision.

Issue No. V is an issue on misjoinder. That is with reference to the members of the Devastanam Committee being added as defendants. How this misjoinder, supposing that it is misjoinder, damnifies the petitioners, it is difficult to see. The Committee members themselves do not complain. Had any necessary defendants been excluded, these excluded defendants might have had some grievance, but the addition of extra defendants cannot hurt the present petitioners in any way. The three cases cited by the petitioners have no application. *Arunachalam Chettyar* v. *Arunachalam Chettyar* (1) and *Sitaramaya* v. *Ramappaya* (2) were cited. In the former case the plaintiff's suit was liable to dismissal, unless it complied with the order sought to be revised. In the latter, the plaintiff was forced to add parties against his will. But, in the present case, neither the plaintiffs nor the added defendants have any objection. *Shanmuka Nadan* v. *Arunachalam Chettiar* (3) was also cited. It is a case where defendants ordered by the lower Court to be struck out of the records, were added by order of this Court in revision. We cannot hold that these rulings are authorities for the proposition that the alleged misjoinder in this case is an illegal or irregular exercise of jurisdiction.

We are then left with Issue No. I, which contains the only point worth attention, since it refers to the actual maintain-

(1) 69 Ind. Cas. 966; 43 M. L. J. 218; 16 L. W. 175; (1922) M. W. N. 453; (1922) A. I. R. (M.) 436.

(2) 39 Ind. Cas. 160; 5 L. W. 207.

(3) 69 Ind. Cas. 961; 45 M. 194; 44 L. W. 642; (1921) M. W. N. 799; 42 M. L. J. 97; 30 M. L. T. 172; (1922) A. I. R. (M.) 332.

ability of the suit, and, so far as this suit is concerned, it is a pure question of law. If a suit is not maintainable at all; it might in some cases be advisable for this Court in revision to interfere and thus to prevent further waste of time and money, the ground of interference being that a Court has no jurisdiction to proceed with a suit which is not maintainable in law. From that point of view, we shall consider this issue. The contention is that the first plaintiff, being himself a trustee, is not entitled to be one of the "two persons having an interest in the trust", as required by s. 92 of the C. P. C. Now, clearly a trustee is a person interested in the trust, and *prima facie*, therefore, there is nothing in the section to prevent his being one of the plaintiffs or even to prevent both the plaintiffs being trustees. Petitioners contend that a trustee cannot be one of the plaintiffs in a suit under s. 92 because the essence of such a suit is relief claimed by the general public against the management and conduct of the body of trustees as a whole, and that, therefore, the whole body of trustees must be defendants. There is nothing in the section to justify such a narrow restriction of its scope. A suit may be instituted to remove only one trustee and to have another appointed in his place. Here the relief sought for is not against the whole body of trustees but against two trustees only. Such a narrow interpretation of the section will lead to the result that a body of trustees cannot by suit under s. 92 get rid of an obstructive or dishonest trustee who is ruining the institution, unless they persuade two public spirited men to undertake the trouble and expense of filing a suit.

The petitioners further point out that in this suit they are making counter-charges against the first plaintiff in his capacity as a trustee and asking for his removal, and urge that, if he remains as a plaintiff, the Court cannot investigate and record findings on these counter-charges or remove the first plaintiff, if the Court finds that it is advisable to do so. But we see no such difficulty, since the section itself gives the Court a very wide discretion as to what it may or may not do in such a suit.

We have been able to discover one direct authority on this point of law in *Subramania Pillai* v. *Krishnaswami Somayajiar* (4), where a Bench of this Court held that a suit by two trustees to remove a third trustee was a suit under s. 92 of the Civil Procedure Code. We agree with this view. The real plaintiff, by whomsoever it may be represented, is the trust, and the representation may be either by the interested public or by a trustee thereof and, so long as the plaintiffs, whether trustees or not, are vindicating a public and not an individual right, the suit is one maintainable under s. 92. In our view, the present plaint shows that the nature of the present suit is the vindication of the public right, and this is also indicated by the fact that one of the plaintiffs is a member of the general public. We hold, therefore, that the suit is maintainable and there is no case for interference in revision. The Civil Revision Petition is, therefore dismissed with costs of respondents Nos. 1 and 2.

As to Civil Miscellaneous Appeal No. 273 of 1922, the same petitioners appeal against the order of the lower Court appointing a Receiver to the temple trust property pending disposal of the suit mentioned above. We need not go into detail in this matter. It is clear from the statement of both parties that there are internecine quarrels between the trustees, each charging the other with mismanagement and suppression of accounts, and the issues in the case will entail an investigation of the charges against each. In these circumstances it is undesirable that either party should be left in exclusive control of the accounts or in exclusive authority over the temple servants. We are not prepared to interfere with the discretion of the lower Court, which considers it just and convenient to appoint a Receiver in such circumstances. We, therefore, dismiss this appeal with two sets of costs one for respondents Nos. 1 and 2 and one for respondents who are members of the Devasthanam Committee.

V. N. V. *Petition dismissed.*

Z. K.

(4) 53 Ind. Cas. 605; (1919) M. W. N. 522; 26 M. L. T. 143; 42 M. 668.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1077 OF 1923.

February 25, 1925.

Present:—Mr. Justice Mukerji.

MUHAMMAD ABDULLAH KHAN—PLAINTIFF—APPELLANT

versus

KUNDAN—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 194—Lambardar, *right of, to sue for arrears of rent—Record of Rights, entry in, effect of.*

In the absence of a clear indication to the contrary, the *lambardar* is the person who is entitled to recover the rent. [p. 197, col. 2.]

Mojiz Fatima v. *Ali Akbar*, 56 Ind. Cas. 112; 18 A. L. J. 435; 42 A. 414, followed.

Where a Record of Rights gives the *lambardar* a right to recover the rent, the *lambardar* must be deemed to be appointed as agent of the co-sharers within the meaning of s. 194 of the Agra Tenancy Act. [*ibid.*]

Where a *lambardar* is not entitled to bring a suit to recover arrears of rent he is not entitled to a decree even with regard to his own share of the rent. [*ibid.*]

Second appeal against a decree of the District Judge, Bulandshahr, dated the 6th of April 1923.

Mr. *M. A. Aziz*, for the Appellant.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for arrears of rent claimed by the *lambardar* in respect of the years *Rabi* 1324 to *Kharif* 1327 *F.* The sole question for determination is whether the *lambardar* is entitled to recover.

The history of the village has been given in detail by the learned Assistant Collector who decreed the suit. The learned District Judge, in his appellate judgment, writes that all the facts found by the learned Assistant Collector in his judgment were accepted before him. Indeed, the question is only one of inference to be drawn from admitted facts.

The admitted facts appear to be these. The *mahal* Abu Bakar Khan was divided by an imperfect partition into two *pattis*, *viz.*, *patti* Khudaija Bibi and *patti* Abdullah Khan. The plaintiff-appellant was recorded as the *lambardar* in the divided *mahal* as he had already been the *lambardar* of the undivided *mahal*. In the *patti* Khudaija Bibi, Khuadija Bibi herself had been making collections on behalf of herself and other co-sharers. Abdullah Khan had no share in *patti* Khudaija Bibi. Khudaija Bibi collected rents up to the year 1324*F. Kharif*. Thereafter, she having sold a large portion of her share to the defendants, ceased to collect rent. Abdullah Khan inherited a portion of the *patti* Khudaija Bibi from a co-sharer. He came upon the scene and began to collect rent from tenants. So far as the present defendants are concerned they were sued by Abdullah Khan in the Settlement Court, for enhancement of rent. The rent was enhanced with effect from 1327*F.* Abdullah Khan having brought the suit, it was contested on the ground that he had no right to recover. The defendants did not say that they would not pay rent to anybody and would appropriate it to themselves. But they said that they were paying rent to Khudaija Bibi and would pay rent to her alone.

The learned Assistant Collector found that, during the Settlement, a Record of Rights was prepared and the right to collect rent was expressly given to the *lambardar* in the *patti* of Khudaija Bibi. The other *patti* it appears belongs to Abdullah Khan in its entirety. The Settlement took place in the course of the years 1324 to 1326*F.* The Assistant Collector also found that the *lambardar* had been collecting rent from the other tenants of the *patti*. It has already been mentioned that the plaintiff-appellant successfully sued the defendants for enhancement of rent. Under these circumstances the question arose, whether the *lambardar* was entitled to recover rent or not.

It has been held in this Court that in the absence of a clear indication to the contrary, the *lambardar* is the person who would be entitled to recover the rent, *vide Mojiz Fatima* v. *Ali Akbar* (1). That is the usual law. In this particular case, the Record of Rights clearly gives the *lambardar* a right to recover the rent and thereby establishes the fact that the *lambardar* is the appointed agent of the co-sharers within the meaning of s. 194 of the Tenancy Act.

The learned Judge has given the appellant a decree for his share only. This decree is entirely untenable. Either all the co-sharers must join in bringing the suit or the *lambardar* alone should be entitled to bring it. If the *lambardar* is not entitled to bring a suit for arrears of rent he certainly cannot recover only his share of it.

I hold that in the circumstances and on the facts admitted the appellant is entitled to recover the rent.

I allow the appeal, set aside the decree

(1) 56 Ind. Cas. 112; 16 A. L. J. 435; 42 A. 414.

of the Court below and restore that of the Court of first instance. The appellant will have his costs in this Court and in the Court below.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1718 OF 1922.

November 13, 1924.

Present :—Mr. Justice Ramesam.

KOZHIPPURATH AMMUNNI AMMA'S DAUGHTER PAPPIAMMA—PLAINTIFF—APPELLANT

versus

KOZHIPPURATH AMMUNNI AMMA'S DAUGHTER KUNHU *alias* KUTTIMALU AMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Law—Maintenance deed—Tavazhi, *whether constituted—Suit to recover maintenance by some members, maintainability of.*

A deed executed by a Malabari in favour of one of his children recited that the properties of the executant were assigned in favour of the children named in the deed and "for those children, boys and girls who are uterine relations below you and your mother for your livelihood". In a suit to recover maintenance on the basis of the deed by some of the children:

Held, (1) that the donees under the deed with their mother constituted a *tavazhi* ;

(2) that, therefore, the *karnavan* of the *tavazhi* was a necessary party to the suit.

Second appeal against a decree of the District Court, South Malabar, in A. S. No. 728 of 1921, preferred against that of the Court of the Additional District Munsif, Calicut, in O. S. No. 356 of 1919.

Messrs. *C. V. Ananthakrishna Aiyar* and *K. P. Ramakrishna Aiyar*, for the Appellant.

Mr. *Kuttikrishna Menon*, for the Respondents.

JUDGMENT.—The plaintiff is the appellant before me. The suit is for maintenance. The defendants contend that the suit is not properly constituted as necessary persons are not parties to the suit.

The suit is based upon Ex. A, a *teer*-deed, executed by plaintiff's father Raman Menon in favour of Narayani Amma. Raman Menon had four daughters and two sons. He executed the document in 1888 in favour of Narayani Amma, but the document recited that Raman Menon's properties were assigned in favour of Narayani Amma and "those children, boys and girls who are uterine relations below you and to your mother for your livelihood." The only difference that I can find between this case and *Chakkara Kannan* v. *Kunhi Pokker* (1) is that in that case the document was executed in favour of all the children, whereas in this case it is executed in favour of one child, but it was mentioned that it was in her favour and in favour of her brothers and sisters. I do not think this fact makes any difference in the construction of the document. It is not for me, in construing it, to say whether that decision is right or wrong. It is a Full Bench decision and purports to follow another Full Bench decision. I am bound to hold that the effect of this document, Ex. A, is to constitute a *tavazhi*. The question whether if the document is in favour of some of the children alone, a *tavazhi* is created as in *Chakkara Kannan* v. *Kunhi Pokker* (1), does not arise and to constitute a *tavazhi* of all the children does not offend against the ordinary ideas of Malabar Law. Holding, therefore, that the donees under Ex. A with their mother constituted a *tavazhi*, I think it follows that the *karnavan* of the *tavazhi* must be a party to the suit. The children of the donees also will be included in the *tavazhi* and the *karnavan* of the *tavazhi* is a necessary party to the suit. Mr. Ramakrishna Iyer contended that the *karnavan* might now be made a party and the case remitted. There is no objection to such a procedure in a proper case; but in this case the point was decided by the Courts below in the way in which I am now holding and it does not appear that any such request was made in the Courts below. After all it will not help the plaintiff in any way if I comply with the plaintiff's request. The pleas of limitation cannot be got rid of and costs cannot be got rid of. I do not see, therefore, the purpose of allowing the plaint to be amended.

The second appeal is dismissed with costs.

V. N V.

Z. K. *Appeal dismissed.*

(1) 30 Ind. Cas. 755; 39 M. 317; 18 M. L. T. 255; 29 M. L. J. 481; (1915) M. W. N. 740.

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL No. 86 OF 1923.

March 10, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, Mr. Justice Kajiji and Mr. Justice Kemp.

VELJI BHIMSEY & CO.—DEFENDANTS —APPELLANTS

versus

BACHOO BHAIDAS—PLAINTIFF—RESPONDENT.

Wrongful arrest—Damages, suit for—Decree passed against legal representative—Arrest in execution of decree—Letters Patent (Bombay), cls. 15, 36—Division Bench, difference of opinion in—Appeal—Appellate Court, powers of.

A decree on a promissory note executed by a deceased member of a joint Hindu family was passed against the surviving member of the family and it was ordered that it was to be executed by seizure and sale of the property of the deceased that would come to the hands of the judgment-debtor as his heir and legal representative. More than a year after the date of the decree a notice for renewal of judgment was issued under O. XXI, r. 22 of the C. P. C. The judgment-debtor did not appear and an order was passed that execution was to issue against him. The decree-holder took out a warrant for arrest of the judgment-debtor, arrested him and brought him before the Court, where he was released on the ground that the decree was not capable of execution against him personally. The judgment-debtor, thereupon, brought a suit against the decree-holder for damages for wrongful arrest:

Held, (1) that the decree-holder must have known that he was not entitled to execute the decree against the person of the judgment-debtor, and that the order of the Court directing that execution should issue against the judgment-debtor was a merely formal order allowing execution to proceed; [p. 203, col. 2.]

(2) that the decree-holder's act in causing the judgment-debtor to be arrested was wrongful and the latter was entitled to recover damages for wrongful arrest. [*ibid.*]

Where an appeal is preferred under cl. 15 of the Letters Patent (Bombay), owing to a difference of opinion among the Judges of the Division Bench, under clause 36 of the Letters Patent, the whole decree lies open before the Appellate Court, and it is not restricted to the consideration of the point on which the Judges constituting the Division Bench have differed. [p. 204, col. 1.]

Letters Patent Appeal against the following judgments of Sir Lallubai Shah, Acting Chief Justice, and Mr. Justice Crump, dated the 22nd October 1923.

JUDGMENT.

Shah, Actg. C. J.—This appeal arises out of an action for damages for false imprisonment. The facts which have given rise to the action are these:—The present defendants, Velji, Bhimsey & Co., filed Suit No. 24340 of 1920 against the present plaintiff Bachoo Bhaidas and his two minor brothers as surviving members of a joint Hindu family of the deceased Bhaidas Vallabhdas on a promissory note said to have been passed by the said Bhaidas Vallabhdas. In that suit decree was passed in the following terms:—

"That the defendants do pay the plaintiffs the sum of Rs. 510-9-6 for debt and Rs. 44-4-0 for costs, making together Rs. 554-13-6 and that the defendants do pay the same to the Registrar of the Court at his office. It is also ordered that in default of payment of the said sum of Rs. 554-13-6 by the defendants the same shall be levied by seizure and sale of the property of Bhaidas Vallabhdas deceased which may have come to their hands as heirs and legal representatives of the said deceased to be administered."

That decree is Ex. 3 in the case. According to the evidence it was passed by consent: and it is clear from the decree that though the claim was against Bachoo Bhaidas personally, in the result the decree was passed on January 17, 1921, against the heirs and legal representatives of the deceased Bhaidas to the extent of his estate in their hands.

On May 11, 1922, a notice for renewal of judgment under O. XXI, r. 22, was issued to the defendants in that suit, because by that time more than a year elapsed since the passing of the decree. The only defendant who was a major and could have appeared was Bachoo Bhaidas, but he did not appear. Tokersey, a partner in the firm of Velji, Bhimsey & Co., appeared, and the Court made an order on June 4, 1922, in the following terms:—"Execution to issue against defendant No. 1." The notes of proceedings and order are Ex. 2 and Ex. C respectively.

On July 4, the plaintiffs in that suit applied for a writ of execution against the person of defendant No. 1 in that suit for Rs. 554-13-6 through their Pleader Mr. I. K. Vakil (Ex. D). A warrant was issued in pursuance of that application on the same day by the Deputy Registrar of the Court of Small Causes. It was a warrant for the personal arrest of defendant No. 1 in that suit, Bachoo Bhaidas. He was arrested at about 9-30 A. M. on the morning of July 12, 1922, and he was produced before the Registrar. At that time the decree-holders were represented by Mr. Dotiwalla, and the arrested debtor was represented by Mr. Thakoredas. The Registrar made the following order on the same day:—

"Decree against the estate of the deceased. No execution by arrest should have been issued against the first defendant's person. Warrant of arrest bad and illegal and not justified by the tenor of the decree. Defendant released." (Ex. F).

The person arrested was released by 12-30. He filed the present suit on October 10, 1922, against the decree-holders in that suit to recover Rs. 2,000 as damages for his wrongful arrest.

Two issues were raised at the hearing:—

"(1) Whether the plaintiff was arrested wrongfully and maliciously as alleged by him?"

(2) Whether the plaintiff has sustained any damage and if so what?"

The learned Judge found on the first issue in the affirmative. But he recorded no finding on the second issue, in the view which he took of the first issue.

It may be mentioned that at the trial no attempt was made to give any evidence of malice, and there was no question of malice on the part of the present defendants. The learned Judge's view is summed up in the following passage in his judgment:—

"In the present case there is a record (Ex. 2) that warranted the writ. It was the direction of the learned Judge that execution do issue against the first defendant. It may be that the learned Judge had no materials before him to justify the order which he passed. But assuming it was so, the case is one of an erroneous order passed by a Court, and not one of absence of jurisdiction. It is well-established that no action will lie against any person for issuing execution or otherwise acting in pursuance of a judgment or order of a Court of Justice, even though it is erroneous. A valid order, however, erroneous in law or in fact, is a sufficient justificatian for any act done in pursuance of it. I, therefore, hold that the plaintiff has no cause of action against the defendants and dismiss the suit."

The plaintiff has appealed from that judgment, and it is urged in support of the appeal that the learned Trial Judge's view is wrong. It is contended that on the facts it is clear that this arrest could not be justified, that the order which the learned Trial Judge has relied upon is really nothing more than an order on the notice for renewal of judgment to execute the decree, and that the real justification for the warrant of personal arrest, if any, must be founded on the terms of the decree, and not upon an order which was in substance an order under O. XXI, r. 22, directing execution to issue. It is further contended that though the order of June 24 taken by itself may be capable of the interpretation that execution might be issued against defendant No. 1 personally, in view of the fact that it was an order endorsed on the decree, the terms of which are explicit, it could not possibly be read as entitling the party to take out a warrant for the personal arrest of the present plaintiff.

On the other hand, it is urged that, however, erroneous the order of June 24 may be, it is an order which is capable of being interpreted as an order allowing personal execution against the present plaintiff, and that, therefore, the arrest of the plaintiff in pursuance of a warrant issued after that order would afford sufficient protection to the defendants. It is urged that it is only if the warrant is issued as the result of any irregularity that the plaintiff may have a cause of action, and that if it is the result of an order made by the Court based upon any error, the party taking out the warrant is not responsible for the wrongful arrest.

Several English cases have been cited in the course of the argument, and I have referred to some other cases also, including the case of *Fisher* v. *Pearse* (1). The law, as I understand it, seems clear, and the difficulty, such as there is in the case, is in applying the principles to the facts of the present case. This action is not based upon any allegation of malice. Though there is an allegation of malice, it forms no essential part of the basis of the action. It is an action for damages for false imprisonment and the defendants have to justify the imprisonment.

In the present case it is not disputed, and it cannot be disputed, that the plaintiff was detained from about 9-30 A. M. to 12-30 P. M. and that during that period he was under imprisonment. It is also undisputed and it is clear that the arrest could not be finally justified. The writ of arrest was set aside as being contrary to the terms of the decree, and it is not argued before us that that order of the Registrar is wrong.

The ground, however, upon which the learned Judge has based his decision, and upon which the respondents seek to justify the arrest, is that there was an order of the

(1) 9 B. 1; 5 Ind. Dec. (N. S.) 1.

Court of June 24, 1922, under which the application for execution against the person of the present plaintiff and the writ of arrest would be justified. I am, however, unable to accept this contention. It is clear on terms of the decree, which would be known to the plaintiffs in that suit, who are defendants now, that the execution was limited to the estate of the deceased Bhaidas Vallabhdas in the hands of the present plaintiff and his two minor brothers. The order on the notice under O. XXI, r. 22, for renewal of judgment as it is called was or must be taken to have been made under r. 23. The Executing Court would have no power to vary the terms of the decree in any sense, and the terms of the order made are not such as to justify the inference that the learned Judge while dealing with the matter in execution on a notice under rule 22 purported to make an order which he had no power to make at the time, directing execution to issue against defendant No. 1 personally. That order is intended only to be read with the decree. It could be interpreted only in the light of the decree and not otherwise by the party concerned. As I have already stated, it is possible to read this order as empowering a personal execution against defendant No. 1, only if it is read without relation to the terms of the decree. I do not feel any doubt that the Judge could never have intended to allow personal execution against defendant No. 1, and in fact when the matter was brought to the notice of the Registrar after the arrest, he at once set aside the warrant for personal arrest, as the decree was limited to the estate of the deceased Bhaidas.

It must be remembered that the Court was dealing with the matter in execution, and subject to the terms of the decree. In that capacity the Court had no jurisdiction to vary the terms of the decree. The learned Trial Judge seems to have relied upon the consideration that it is possible for a decree-holder to obtain execution against the heirs of the deceased personally when facts as indicated in s 52, C. P. C., are proved. The learned Judge has referred to this section; and it is possible that he may have been influenced by the consideration that if under certain conceivable circumstances, such as are indicated in s. 52, C. P. C., it was possible for the decree-holders to take out personal execution against defendant No. 1 in that suit, and if the order of the Court passed on June 24 is capable of being read as allowing execution against him personally it is possible to justify the order in that sense on that particular basis. The notes made by the learned Judge at the hearing of the notice under O. XXI, r. 22, do not disclose any such basis; and Tokersey, who appeared as a partner in the firm of the decree-holders then, and who has been examined in the present suit, does not suggest that any allegation such as would invite the application of s. 52, C.P.C., was ever made by him at the time when that notice was heard. It seems to me, therefore, that on the facts of the present case any reference to s. 52, C. P. C, for the purpose of suggesting a possible basis for the order made on June 24, 1922, is not justified.

Taking the case with reference to the facts which are proved or undisputed, it seems to me that the execution was taken out against defendant No. 1 personally as a result either of ignorance or of negligence on the part of the present defendants or their Pleader. The writ cannot be attributed to an erroneous order on the part of the Court, but to an unjustifiably erroneous interpretation put upon it by the party concerned, who could have and must be deemed to have known, that the order of June 24 only entitled him to treat the decree as renewed for execution, and that he could execute the decree only in the manner allowed by the terms of the decree.

Though our attention has been drawn to several cases, we have not been referred to a single case which is applicable to the state of facts such as we have in the present case. We have to consider the plea of justification in the light of the facts of this case and of the rules of procedure applicable to the decree, in the execution of which the writ for personal arrest was taken out. It is not easy to apply here the observations made in the English cases with reference to the particular rules of procedure applicable to those cases. I may mention, however, that generally speaking I accept the distinguishing line for justification as laid down in *Smith* v. *Sydney* (2) and *Williams* v. *Smith* (3). On the facts of this case I am of opinion that the writ for

(2) (1870) 5 Q. B. 203; 39 L. J. Q. B. 144; 22 L. T. 16; 18 W. R. 628.

(3) (1863) 14 C. B. (N. S.) 596; 2 N. R. 280; 143 E. R. 579; 135 R. R. 830.

arrest was the result of irregularity on the part of the decree-holders and not of any error on the part of the Court in making the order of June 24.

I may also refer to the case of *Codrington* v. *Lloyd* (4). In the words of Lord Denman, C. J., as applied to the facts of this case, I would say that "the plaintiff here was arrested on a writ which was afterwards declared by the Court irregular. It was, therefore, as if there had been none." In the present case the Registrar, who had the same power as a Judge of the Court in dealing with this writ, set aside the writ which was taken out by the decree-holders. It should be hardly necessary to refer to cases of which *Bates* v. *Pilling* (5) and *Clissold* v. *Cratchley* (6) are types. The latter case shows the strictness with which the Courts protect a party against trespass upon his person in property in execution of a writ, for which no foundation can be made out. In the case of *Fisher* v. *Pearse* (1) which I have already mentioned, the party acted upon a certificate issued by an officer of the Court, and that certificate was really held to be the foundation and condition of the writ of arrest in that case. The observations in *Barker* v. *Braham* (7) quoted by the learned Trial Judge in his judgment, appear to me to support the conclusion which I have arrived at in this case.

I can find no foundation for the application for personal arrest either in the terms of the decree or in the terms of the order made by the Court on June 24.

It seems to me that the writ of arrest is referable to irregularity on the part of the party in making an application for personal arrest and not to the order of June 24, which must be read with the decree.

I am, therefore, of opinion that the plaintiff has a cause of action, and that he is entitled to maintain the suit whether it be treated as an action for damages or in trespass.

As regards the amount of damages, it is clear that the plaintiff was detained for a short time; and no malice is proved. Tokersey has been described by the learned Trial Judge in his judgment as "a man who appeared to have seen very little of litigation." This wrongful arrest appears to have been due to carelessness on the part of the legal adviser of the present defendants rather than to any deliberate intention on their part to get the plaintiff wrongfully arrested. The parties have not pressed for any further inquiry on the question of damages. I think that Rs. 100 would be sufficient to meet the justice of the case. I would, therefore, allow the appeal, reverse the decree of the Trial Court, pass a decree in favour of the plaintiff for Rs. 100. The respondents to pay the costs of the appellant. Each party to bear his own costs of the suit, having regard to the provisions of s. 22 of the Presidency Small Cause Courts Act.

In view of the difference of opinion, the decree to be drawn up in accordance with the provisions of cl. 36 of the Letters Patent.

Crump, J.—It is unnecessary for me to recapitulate the facts set out in the judgment just delivered. This is an action for false imprisonment and as the imprisonment is admitted the sole question is whether defendants can justify it. For that purpose reliance is placed on the Court's order of June 24: "Execution to issue against defendant No. 1." The question is how should that order be understood? I agree with the learned Trial Judge that it warrants the writ of execution upon which plaintiff was arrested. Had the intention been to order execution against defendant No. 1 personally the order would have been in precisely these terms, whereas the words used are not apt to express an order for execution against the goods of the deceased Bhaidas in the hands of defendant No. 1. Had that been the intention it is not easy to understand why the order should have been limited to defendant No 1 for part of the goods may have been in the hands of the other defendants. On the other hand, the Court may have been unwilling to permit the arrest of the minor defendants.

The order was, no doubt, a wrong order as is plain if a reference is made to the decree, but I am unable to hold that it was the duty of the defendant to construe the order in the light of the decree. The learned Trial Judge has accepted defendant's account of what took place, *viz.*, that he appeared in person before the Judge and asked for such order as he might be

(4) (1838) 8 A. & E. 449 at p. 452; 3 N. & P. 442; 1 W. W. & H. 358; 7 L. J. Q. B. 196; 112 E. R. 909.
(5) (1826) 6 B. & C. 38; 9 D. & R. 44; 5 L. J. (o. s.) K. B. 40; 108 E. R. 367.
(6) (1910) 2 K. B. 244; 79 L. J. K. B. 635; 102 L. T. 520; 54 S. J. 442; 26 T. L. R. 409.
(7) (1773) 3 Wils. K. B. 368; 2 W. Bl. 866; 95 E. R. 1101.

entitled to, and that on this order being made he acted on it under legal advice. It is not, in my opinion, fair to say to defendant "you ought to have made enquiry as to whether the Court's order was right or wrong. Had you done so you would have discovered that it was wrong. Therefore, you are liable in damages for having acted on it." That seems to me a dangerous doctrine, and none of the cases go to that length.

I have referred to the cases but the principle to be extracted from them is this "was there an order of the Court justifying the writ?" That is a question of fact and on the facts of this case I hold that there was such an order. I would, therefore, dismiss the appeal with costs.

Apart from this question I agree as to the proposed measure of damages.

Messrs. *Campbell* and *Kania*, for the Appellants.

Mr. *M. V. Desai*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff brought this action to recover damages for wrongful arrest and imprisonment.

The suit was dismissed by Mr. Justice Mulla and on an appeal from that decision, the Judges of the Appeal Court differed. The Acting Chief Justice was of opinion that there should be a decree for the plaintiff for Rs. 100 as damages. Mr. Justice Crump was of opinion that the appeal should be dismissed. Under cl. 36 of the Letters Patent, the opinion of the Senior Judge prevailed. Accordingly there was a decree for the plaintiff for Rs. 100. But under s. 22 of the Presidency Small Cause Courts Act as the plaintiff had recovered less than Rs. 300, no order was made with regard to his costs in the Trial Court. The plaintiff has now appealed under cl. 15 of the Letters Patent.

The facts of the case as set out in the judgment of the Acting Chief Justice are that the firm of Velji Bhimsey & Co., filed a suit against the present plaintiff and his two minor brothers as surviving members of a joint Hindu family, on a promissory-note passed by Bhaidas Vallabhdas deceased a late member of the family. A decree was passed in favour of the plaintiffs for Rs 510-9-6 and costs and it was ordered that in default of payment of the decretal amount by the defendants, the same was to be levied by seizure and sale of the property of Bhaidas Vallabhdas deceased that would come to their hands as his heirs and legal representatives.

The money was not paid and no execution was levied for a year after the date of the decree. On May 11, 1922, a notice for renewal of judgment under O. XXI, r. 22, was issued. The defendant did not appear and an order was made on June 24, 1922, in these terms: "Execution to issue against defendant No. 1." On July 4, the plaintiffs Velji, Bhimsey & Co applied for a writ of execution against the person of defendant No. 1 and a warrant was issued by the Deputy Registrar for the arrest of the first defendant who was arrested at 9-30 A. M. on the morning of July 12, 1922, and was produced before the Registrar. The Registrar made the following order: "Decree against the estate of the deceased. No execution by arrest should have been issued against the first defendant's person. Warrant of arrest bad and illegal and not justified by the tenour of the decree." Accordingly the defendant was released.

The present defendants seem to base their defence on the order made on June 24, 1922, and contend that under that order, they were entitled to apply for the arrest of the first defendant. But that order was merely a formal order allowing execution to proceed and it cannot possibly be said that it entitled the plaintiffs in the suit to apply for a warrant for the arrest of the first defendant.

The plaintiffs in the Small Cause Court suit knew perfectly well that they were not entitled under that decree to apply for the arrest of the defendants. They must have known or ought to have known that the order of June 24, 1922, merely enabled them to proceed with the execution of the decree, and as the decree only entitled them to execute it against the property of Bhaidas in the hands of the defendants, they must be taken to have been aware when they applied for the arrest of the first defendant that such conduct was not justified. The plaintiff, therefore, is entitled to damages for wrongful arrest.

The respondents have filed cross-objections and ask to have the damages increased. There was no excuse whatever for the action of the defendants. To arrest a man without any justification is a very serious

matter and may have very serious consequences. The consequence of limiting the decree to a hundred rupees was that the plaintiff under s. 22 of the Presidency Small Cause Courts Act could not be given the costs of the suit. It has been argued that in a Letters Patent Appeal, we are only entitled to consider the point on which the Judges in the Court of Appeal have differed. There is no warrant for that argument. Under cl. 36 of the Letters Patent, the opinion of the Senior Judge prevails. Under cl. 15 an appeal lies from that decree, without any limitation imposed upon the powers of the Appeal Court. The whole decree lies open before us, and on the question of damages, we do not think that Rs. 100 awarded, in the circumstances of the case, are sufficient. We increase the damages on the cross-objections of the respondent to Rs. 300, so that the plaintiff will get his costs throughout.

Kajiji, J.—I concur.

Kemp, J.—I also concur.

Z. K. *Decree varied.*

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION No. 35 OF 1924.

May 30, 1924.

Present:—Mr. Kendall, A. J. C.

RAM LAL AND OTHERS—PLAINTIFFS—APPLICANTS

versus

RAM DHANI AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XLVII, rr. 1, 4, 7—Review—Appeal, grounds for—Revision.

An order granting an application for review may be objected to in appeal under O. XLVII, r. 7 of the C. P. C. only on the grounds that the application was (*a*) in contravention of the provisions of r. 2 of the Order; (*b*) in contravention of the provisions of r. 4 of the Order; and (*c*) was made after the expiration of the period of limitation. [p. 205, col. 1.]

Where there is a mistake apparent on the face of the record and an application for review is granted on the ground of such mistake and an appeal against the order granting review is dismissed, the order of the lower Appellate Court is not open to revision by the High Court. [*ibid.*]

Application against an order of the District Judge, Fyzabad, dated the 7th November 1923, upholding that of the Subordinate Judge, Fyzabad, dated the 10th May 1923.

Mr. *M. Wasim*, for the Applicants.

Mr. *H. Husain*, for the Opposite Party.

ORDER.—The facts relating to this application for revision are somewhat curious and may be briefly stated. Six co-parceners in a Hindu joint family filed a suit for partition against certain other co-parceners. They obtained a preliminary decree in September 1920, and this was confirmed by this Court in 1921. One of the plaintiffs, Dwarka, had given a perpetual lease of his share to another plaintiff named Sheo Raj. When an application was made for a final decree, one of the defendants, Ram Dhani, made an objection on the ground that the plaintiff Dwarka had died before the execution of the perpetual lease in favour of Sheo Raj. In the course of his enquiry into this objection, the Subordinate Judge found that there was already a finding that Dwarka had died on 4th June 1920, after the execution of the perpetual lease, but before the sale of the proprietary rights in favour of the same transferee Sheo Raj had actually been completed by Dwarka's agent. The result of this finding was that Sheo Raj was held to be not a full representative of Dwarka's proprietary interest. As Dwarka had died before the date of the preliminary decree, the Subordinate Judge held that the decree was not valid. He dismissed the application for a final decree and set aside the order granting a preliminary decree inspite of the fact that it had been confirmed on appeal.

There was an appeal to the District Judge against this order, but the District Judge refused to interfere holding that the preliminary decree was a nullity. He referred to a ruling of the Bombay High Court reported as *Vishvanath Dnyanaba* v. *Lallu Kabla* (1) in support of this view.

Against this order of the District Judge the present application is filed, though all the grounds of the application, except the last one, hark back to the order of the Subordinate Judge. The only ground given for setting aside the order of the District Judge in revision is that: "On a proper consideration of the circumstances of the case the learned District Judge

(1) 4 Ind. Cas. 137; 11 Bom. L. R. 1070.

ought to have set aside the order of the learned Subordinate Judge granting the review and the order passed on review." This in itself is no valid ground for an application under s. 115, C. P. C., but I have been in arguments asked to regard the order of the Subordinate Judge as the subject of the application. Even if this procedure could be followed, there are technical objections in the applicant's way. The Subordinate Judge granted the application for a review on the ground that there was a mistake on the face of the record. An order granting an application for review may be objected to in appeal under O. XLVII, r. 7 on one of three grounds, namely, that the application was; (*a*) in contravention of the provisions of r. 2 of the Order; (*b*) in contravention of the provisions of r. 4; and (*c*) after the expiration of the period of limitation. It is not suggested that (*b*) or (*c*) will apply to the present case, but it is suggested that (*a*) will apply, *i. e.*, it is argued that there was no mistake on the face of the record. On this point I am in agreement with the Subordinate Judge. There clearly was a mistake on the face of the record. It had been found as a fact that Dwarka had died before the preliminary decree was given, nevertheless a decree had been given in his name in common with those of the other plaintiffs. The learned Judge has found, and the opposite party in arguments have contended, that the decree was a nullity, and they have authority for this conclusion. The learned Pleader for the applicants has referred to the facts of the case, and it is claimed that under s. 208 of the Indian Contract Act, the agent who was acting for Dwarka was in a position to complete the contract, because the death of Dwarka was not known to him and consequently that Sheo Raj the transferee was in a position to represent Dwarka. What I have to consider now is whether the District Judge acted without jurisdiction, or illegally, or with material irregularity in upholding the order of the Subordinate Judge granting the review. The Subordinate Judge found that there was a mistake on the face of the record, namely, that a decree had been given to Dwarka as if he had been alive, when, as a matter of fact, he was known to be dead. Even if there was a valid contract between Dwarka and Sheo Raj for the transfer of the former's proprietary rights to the latter, that would not be sufficient, because the interests of Ram Dhani, the defendant who is admitted to be the legal heir of Dwarka are adverse to those of Sheo Raj, and the right of the latter to represent Dwarka's proprietary interests can, therefore, not be assumed.

Sheo Raj will apparently be able to enforce his rights under the lease, but that point does not affect the present proceedings. In short I see no grounds for interfering with the orders of the Courts below, and I reject the application with costs.

Z. K. *Application rejected.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 1132 OF 1924.

February 2, 1925.

Present:—Mr. Justice Walsh.

GANGA JEE—DECREE-HOLDER—APPELLANT

versus

SAT NARAIN LAL AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—Execution of decree—Stay order—Execution suspended by order of Court—Application for revival—Limitation.

Where the execution of a decree is stayed pending the decision of a suit the Court making the stay order must make it clear as to when the order is to come to an end. An order staying execution until the decision of a suit is not satisfactory. In one sense a suit is not decided until it is no longer appealable. Where a right of appeal is given a suit is often finally decided in the Appellate Court, and the Court ought to make its order clear by saying whether the stay is to operate until the decision of the suit in the Trial Court or the decision of the appeal, if any. [p. 206, col. 1.]

Where the execution of a decree has been suspended through no act or fault of the decree-holder, the latter has a right to ask the Court to revive and carry through the execution proceedings which have been thus suspended, and no question of limitation arises with regard to an application made under these circumstances to revive and carry through the proceedings. [p. 207, col. 2.]

Qamar-ud-Din Ahmed v. *Jawahir Lal*, 27 A. 334; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.), *Madho Prasad* v. *Draupadi Bibi*, 61 Ind. Cas. 417; 19 A. L. J. 174; 43 A. 383 and *Madhabmani Dasi* v. *Lambert*, 6 Ind. Cas. 537; 37 C. 796; 15 C. W. N. 337; 12 C. L. J. 328, followed.

Second appeal from a decree of the Subordinate Judge, Jaunpur, dated the 30th April 1924.

Mr. *Mushtaq Ahmad*, for the Appellant.

Mr. *Gadadhar Prasad*, for the Respondents.

JUDGMENT.—This to my mind is a very clear case, and I find myself unable to agree with the decision of the Court below. Nobody can doubt that to affirm the decision of the Court below would result in grave misjustice and injury to the decree-holder, which would be entirely due, as it seems to me, to the acts of the Court itself. Except so far as they afford a guide for the principles which ought to govern cases of this kind, the authorities referred to in the Courts below and in the arguments do not really assist one, because these cases must depend in the main upon the facts peculiar to them. In this case there are two appeals and there are two decrees, both of which were obtained by the appellant-decree-holder in Bombay in 1917, one on the 12th of May 1917, and one on the 11th of June 1917. They were transferred to the Court of the Munsif of Jaunpur for execution, presumably upon the application of the decree-holder. On the 20th of February 1918 an order was made by the Munsif of Jaunpur. The reason for that was this. The judgment-debtor had begun a suit or suits in Jaunpur seeking to set aside the decrees which had been obtained against him in Bombay, on the ground of fraud. Nobody I imagine would expect that the decree would be executed while the suit to set it aside was being litigated, and the Munsif made an order; "execution proceedings shall be stayed until decision of the regular suit." Unfortunately this form of order is what may be described as slipshed or *katcha*. A Judge ought to make it clear when he means the order to come to an end. In one sense a suit is not decided until it is no longer appealable. Where a right of appeal is given, a suit is often finally decided in the Appellate Court, and Courts ought to make their own orders clear by saying whether the stay is to operate until the decision of the suit in the Trial Court, or the decision of the appeal, if any. The decree-holder was required to communicate to the Court the result of the suit, but the Court seems to have been in a great hurry, and apparently to have yielded to the temptation to get rid of a pending application, and on the 29th of June 1918 the Court passed the following order:—"As the regular suit is not decided, the case be struck off". Two things are perfectly clear upon that order. First the execution application has never been disposed of at all, either on the merits or by a judicial proceeding. The Judge did say "strike it off," which is not a good way of removing from the list, or indefinitely postponing. The reason given, however, shows clearly that it was only intended to be suspended. Secondly the act was the act of the Court, and in no sense the act of the decree-holder. The suits were decided in the Trial Court on the 9th of December 1919 against the judgment-debtor, but the judgment-debtor, of course, appealed—everybody seems to appeal—and the presumption is that if a suit is decided against anybody, he will appeal, and that a suspension of execution in a case like this means suspension until the final disposal of the suit. Technically the decree-holder might, when the Trial Court had disposed of the suit on the 9th of December 1919, have applied to the Court which had suspended his execution proceedings, to have it revived, at any rate without committing any act of disobedience of the previous order. But everybody in his senses must have appreciated that if an appeal were pending, the same reason would have operated on the mind of the Court pending the appeal, as operated on its mind pending the trial of the original hearing, so that it would have been a perfectly idle application. Meanwhile some rule operating behind the back of the decree-holder in the record-room must have come into operation, and the record was sent back to Bombay on the 29th of May 1920. That did not prevent its being sent for again, but it was the act of the Court, and it further indefinitely postponed the decision of the execution application. That is made perfectly clear by the endorsement of the *munsarim* on the back of the application, which the decree-holder eventually filed in this case on the 23rd of April 1923, saying: "This is a decree of the Court of Small Causes of Bombay. The decree-holder should first produce a certificate of transfer." The appeals were decided on the 30th of March 1922 after a successful delay of four years, which the judgment-debtor and his advisers no doubt hoped to achieve by alleging fraud, and delaying the decree-holder so that he could not get execution by making a further application within three years of

his application of 1918. It is not improbable that the whole scheme of the suit and appeals was a scheme to prevent execution and to put the decree-holder in this difficulty. The decree-holder himself was guilty of his usual contribution towards the general delay and did not apply until the 23rd of April 1923. Owing to the *munisarim's* note, to which I have already referred, it was necessary to get the record from Bombay, and a further substantial contribution to the general fund of delay was made by all the Courts concerned. Between them it took the Munsif's Court at Jaunpur, the District Court at Bombay, and the High Court at Bombay, eight months to get the record back from Bombay where it had gone in 1920, and it eventually returned to Jaunpur on the 8th of December 1923. The only question in this appeal—indeed in this application throughout has been whether this application for execution is a new application, in which case it is undoubtedly barred by time, or whether it is only a revival of the application which was suspended and eventually struck off the list in February and June 1918 respectively. The decree-holder's representative in the Court below did his best to ruin any chance which the decree-holder had. In dealing with the previous application, he foolishly alleged that it was "struck off for want of prosecution". But that is not the case, and a misdescription of the order five years afterwards cannot affect the legal result of the order. But in the column reserved for stating the mode in which he requires the assistance of the Court, he does say that his prayer "to issue notice to the Judgment-debtor is" in aid of the previous execution, clearly intimating that it is—as I have no doubt it is—in fact an attempt to revive a previous application which had been indefinitely postponed. The view which I am taking may perhaps be said to involve holding that the order of June 1918 and the sending of the record to Bombay, in 1920, was an indefinite postponement so that the decree-holder would be entitled to come back even after 20, 30 or 40 years and ask for it to be revived on the same ground that I am deciding he is entitled to have it revived now. I think that is the logical result, but it is due to the orders of the Court and not the fault of the decree-holder. The principles governing this matter seem to me to be quite simple and clearly established by the ruling of the Privy Council in 1905 in the case of *Qamar-ud-Dil Ahmed* v. *Jawahir Lal* (1). The effect of that decision is accurately set out by Mr. Justice Piggott on page 176 in the case of *Madho Prasad* v. *Darupadi Bibi* (2), where he says that that case is a good authority for the proposition that where the execution of a decree has been suspended through no act or fault of the decree-holder, the latter has a right to ask the Court to revive and carry through the execution proceedings which have thus been suspended. In the case of *Madhabani Dasi* v. *Lambert* (3) it was held, "that an application for execution of a decree may be treated as one in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless," and quite recently Mr. Justice Lindsay in Execution Second Appeal No. 264 of 1922 took the same view, and held that an application to revive and carry through a pending execution proceeding will not be time-barred even if presented more than three years after the order of suspension was passed. I am prepared to go even further than Mr. Justice Lindsay and to hold that such an application would be within time even if presented more than 103 years after the order of suspension was passed. This seems to me the just and business result, and clearly does justice in this case, and I think in accordance with well-settled principles. The authorities mainly discussed by the Judge in the Court below seem to me to deal with cases where an injunction with a definite date for determination has been granted. I am inclined, further to think that this case could be treated within s. 15 of the Limitation Act, to which I was quite properly refered by Mr. Mushtaq Ahmad in the arguments, by reason of the fact that the execution of the decree has been in effect stayed by the orders of February and June 1918, and that it was stayed indefinitely. I do not think it

(1) 27 A. 334; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 38 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.).
(2) 61 Ind. Cas. 417; 19 A. L. J. 174; 43 A. 383.
(3) 6 Ind. Cas. 537; 37 C. 796; 15 C. W. N. 337; 12 C. L. J. 328.

necessary to determine that question as I am satisfied that the appeal ought to succeed on the ground which I have already stated.

The appeal must be allowed with costs here and below including in this Court fees on the higher scale, and the case must be remitted to the lower Court for execution according to law.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 355 AND 356 OF 1923.

November 3, 1924.

Present:—Mr. Dalal, J. C.

Thakurain ANPURNA KUAR—PLAINTIFF—APPELLANT

versus

JAGESHAR MISRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Person other than karta, *whether can sue and be sued in representative capacity—Adverse possession—Equity of redemption—Appeal, second—Finding of fact, interference with—Counsel in Subordinate Courts, duty of.*

Even where a person is not the *karta* of a joint Hindu family there may be circumstances which would entitle a Court to hold that such person sued or was sued as representing the entire joint family. The question, however, whether the entire family was or was not represented by the person suing or the person who was sued is one of fact to be determined on the particular circumstances of each case. [p. 209, cols. 1 & 2.]

A right of redemption can be acquired by adverse possession but whether it has been so acquired would depend upon the amount of evidence produced by the parties. [p. 210, col. 1.]

Even where the evidence in support of a finding of fact is doubtful the High Court will not in second appeal interfere with the finding until strong reasons either of injustice or of misapprehension of evidence by the lower Court are indicated. [*ibid.*]

In subordinate Courts the easy method of gripping a principle of law without much understanding is adopted by Counsel while the difficult method of collecting and carefully producing all the available evidence on facts is abandoned. It is enough in the Subordinate Courts to ruin any case on facts only if some principle of law is dangled before the eyes of the learned Counsel. Every principle of law has to be applied to facts and there is no easy method of avoiding facts and deciding cases on easily available rulings. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Fyzabad, dated the 7th September 1923, reversing that of the Probationary Munsif, Sultanpur, dated the 27th March 1923.

Messrs. *A. P. Sen* and *H. K. Ghose*, for the Appellant.

Messrs. *Haider Husain* and *M. A. Khan*, for the Respondents.

JUDGMENT.—The Court had the advantage of listening to very able arguments by rival Counsel. The suit in the Trial Court was one of redemption by a superior proprietor. Her allegation was that the under-proprietary right which was mortgaged to the defendant had been purchased by her predecessor-in-interest in execution of a decree. The question at issue, therefore, is whether under this decree the right of redemption was transferred to the plaintiff's predecessor or not. Both the Subordinate Courts held that the right had not been transferred. The Trial Court, however, was of opinion that the equity of redemption had been acquired by the plaintiff by adverse possession and granted to the plaintiff a decree for redemption. On appeal the learned Subordinate Judge came to a contrary finding and the plaintiff's suit was dismissed.

We have, therefore, to consider (1) whether the plaintiff is owner of the equity of redemption of the under-proprietary right and (2) if not, whether she has acquired such right by adverse possession.

One Subhao Singh had five sons and at the first regular Settlement in 1864 a decree of under-proprietary right of 10 *biswas* property in village Bangar Khurd was passed in favour of the descendants of Subhao Singh. The persons in whose favour the decree was passed were three sons Sanoman Singh, Sheo Prasad Singh and Bhairon Prasad Singh representing their branches and two grandsons Nidhi and Jagat representing the branches of two deceased sons of Subhao Singh, Sitla Prasad and Sarabjit Singh. For some reason unknown, the names of Nidhi and Jagat alone were entered in the village record. In 1865 the other owners of under-proprietary right made a half-hearted attempt to get their names entered by putting in an application before a Revenue Court. They, however, did not prosecute it and the application was in due course dismissed. It is admitted now, whatever may have been the contention in the lower Courts, that all the descendants of Subhao Singh were interested in the under-proprietary tenure in 10 *biswas* of the village.

The mortgages in suit are dated 13th June 1861 and 13th May 1870, correspond

ing dates of *Hindi* dates mentioned in the mortgages. The dates have been furnished by the respondents' learned Counsel. On the first mortgage the rent reserved was Rs. 32 out of which the mortgagee was to pay himself Rs. 24 towards interest and pay Rs. 8-8 to *hakiman* meaning presumably superior proprietors. The rent reserved under the second mortgage was Rs. 14-12 and this sum was divided between interest Rs. 9 odd and payment to *hakimans* Rs. 4 and odd.

The sale proceedings in favour of the superior proprietor took place in 1873. Udresh Singh and Chandresh Singh the plaintiff's predecessors-in-title, obtained a decree for arrears of under-proprietary rent of the 10 *biswas* property against Nidhi and Jagat alone. The amount was not paid and in execution of the decree the 10 *biswas* under-proprietary right was put up to sale and purchased by the superior proprietors on 15th November 1873. Subsequent to the purchase the names of the under-proprietors Nidhi and Jagat were removed from the village records.

As usually happens, the plaintiff first went to the Revenue Court to eject the defendants. In that Court the defendants put forward the mortgage in their favour executed by Bhairon Prasad and pleaded that they were not the tenants of the plaintiff. On this ground the defendants' suit for cancellation of a notice of ejectment issued by the plaintiff was decreed.

There is one other fact which may be mentioned before we consider the legal aspect of the case. On 21st March 1883, that is subsequent to the sale in favour of Udresh Singh and Chandresh Singh, Bhairon Prasad made a further mortgage of his under-proprietary right in favour of the defendants.

I quite agree with the learned Counsel of the plaintiff-appellant that it would be taking too narrow a view of representation to fix the plaintiff down to a representation by Nidhi and Jagat as *karta* of joint family property. Even where a person is not a *karta* of a Hindu joint family there may be circumstances which would entitle a Court to hold that the person sued was sued as representing the entire family. The question is whether Nidhi and Jagat were so sued in 1873. First of all there is the finding of two Subordinate Courts against the plaintiffs and this Court would require very strong reasons to differ from a finding of fact. In the present case I find no such reasons. On the face of it Nidhi and Jagat can not be presumed to have represented the family as they were one degree below Bhairon Prasad in the status of the family. It was pointed out that the defendants paid a portion of the reserved rent to the plaintiff and her predecessors thereby acknowledging them to be representatives-in-interest of Bhairon Prasad. This argument is not supported by facts. The payment was to be made to *Hakiman* and not to the mortgagor and naturally the superior proprietors were to receive the payment whether they purchased the under-proprietary title or not. Such payment, therefore, does not establish any acknowledgment by the defendants that Nidhi and Jagat were sued in their representative capacity and that by the sale the share of Bhairon also was transferred. One witness Kamta Singh son of Jagat Singh was examined on behalf of the plaintiff but his statement was very confused. It is not clear whether any direct descendants of Bhairon Prasad are existing at the moment or not. The successors-in-interest of Bhairon Prasad, even if there are no direct descendants existing, are other persons besides Kamta Singh, so the statement of Kamta Prasad that he has no interest in the equity of redemption cannot be accepted as final on the subject of Bhairon Prasad's title passing to the plaintiff. If on behalf of the plaintiff all the possible successors-in-interest of Bhairon Prasad had come forward to depose that they had no longer any title in the under-proprietary tenure there would have been considerable force in the plaintiff's allegation that Nidhi and Jagat were sued in their representative capacity. No such evidence exists on the record. On the other hand, even after this sale, Bhairon Prasad transferred his rights in the under-proprietary holding. The learned Counsel for the plaintiff stated that the charge under the deed of 21st March 1883 being a small one he had advised his client to accept it and not to appeal on that point. However that may be, the document is proof of Bhairon Prasad claiming the equity of redemption subsequent to 1873 when the case for the plaintiff is that that equity of redemption had through representation of Nidhi and Jagat passed to him. No copy of the sale proclamation is filed. If there had been any mention

in the sale proclamation of the mortgages by Bhairon Prasad there might have been some reason to presume that Bhairon Prasad's share was also being sold in execution of a decree against Nidhi and Jagat. Evidence that could have been produced by the plaintiff does not exist on the record. It is most unfortunate, as I have declared in this Court from time to time, that in Subordinate Courts the easy method of gripping a principle of law without much understanding is adopted by Counsel while the more difficult method of collecting and carefully producing all the available evidence on facts is abandoned. It is enough in the Subordinate Courts to ruin any case on facts only if some principle of law is dangled before the eyes of learned Counsel. After all, every principle of law has to be applied to facts and there is no easy method of avoiding facts and deciding cases on easily available rulings. I agree with the two Subordinate Courts that the plaintiff has not established her title to the under-proprietary rights of Bhairon Prasad on the basis of the decree of 1873.

Now we come to adverse possession. There also the decision must depend on the amount of evidence produced by the parties and, therefore, the finding of the lower Appellate Court must be taken to be one of fact when it is decided that the plaintiff has not acquired title in the right of redemption by adverse possession. The learned Counsel for the respondents rightly admitted that such right can be acquired by adverse possession in the equity of redemption. What he insisted equally rightly was that such acquisition will depend on the amount of evidence produced by the parties. In the present case I have been referred to no assertion of title by the superior proprietors to the under-proprietary rights of Bhairon Prasad beyond the removal of the names of Nidhi and Jagat from the village records. It so happens that Bhairon Prasad's name was never entered in the record and, therefore, the removal of the names of Nidhi and Jagat does not raise any presumption that the superior proprietors declared that they had acquired the under-proprietary title of Bhairon Prasad. As already noticed, the document of 1883 also indicates that subsequent to 1873 Bhairon Prasad claimed to be in touch with the right of redemption. Even where the evidence is doubtful this Court will not interfere with the decision of fact until strong reasons either of injustice or of misapprehension of evidence by the lower Court are indicated. This plea of adverse possession also fails.

In the result I dismiss both appeals with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1093 OF 1922.

October 24, 1924.

Present:—Mr. Justice Ramesam.

MALLIPEDDI LAKSHMAMMA—PLAINTIFF—APPELLANT

versus

MALLIPEDDI VENKATASUBBIAH AND OTHERS—DEFENDANTS NOS. 1 TO 4—RESPONDENTS.

Hindu Law—Widow—Maintenance, arrears of, right to recover—Abandonment—Burden of proof—Rate of maintenance—Discretion of Court—Appeal, second—Interference by High Court.

In a suit for arrears of maintenance by a Hindu widow, if the defendants want to plead that the plaintiff is disentitled from claiming maintenance, they must plead and prove circumstances amounting to an abandonment. [p. 211, col. 1.]

Raja Yarlagadda Mallikarjuna Prasada Nayadu v. *Raja Yarlagadda Durga Prasada Nayadu*, 24 M. 147; 27 I. A. 151; 5 C. W. N. 74; 10 M. L. J. 294; 2 Bom. L. R. 945; 7 Sar. P. C. J. 761 (P. C.), referred to.

Where a Hindu widow whose husband died 27 years ago made a demand for maintenance only three years prior to suit:

Held, that the Court had a discretion, while not disallowing totally the arrears claimed by the plaintiff, to cut down the period for which arrears may be granted, and that if the plaintiff was anxious to get the whole of the amount, it was for her to adduce evidence that she was in need of those arrears. [*ibid.*]

A. S. No. 75 of 1922, relied on.

Karbasappa v. *Kallava*, 47 Ind. Cas. 623; 43 B. 66; 20 Bom. L. R. 823, followed.

The rate of maintenance is entirely in the discretion of the lower Courts, and the High Court will not interfere in second appeal with the rate allowed by the lower Courts until it appears that the discretion has been perversely exercised by them. [p. 211, col. 2.]

Second appeal against a decree of the Court of the Subordinate Judge, Baptala, in A. S. No. 200 of 1921, preferred against that of the Court of the Principal District Munsif, Ongole, in O. S. No. 275 of 1920.

Mr. *B. Somayya*, for the Appellant.

Mr. *T. V. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for maintenance and for arrears. The plaintiff is the appellant before me in second appeal. In the plaint she claimed at the rate of Rs. 15 a month and arrears for six years. Her husband died 26 years before suit. The defendants pleaded that there was an arrangement by which her claim for maintenance was satisfied and also contended that the plaintiff was not entitled to ask for arrears. This arrangement was supposed to be 12 years before suit. Both the lower Courts found against the arrangement pleaded by the defendants. The District Munsif ought to have framed an issue as to whether the plaintiff was entitled to arrears of past maintenance and how much, if any. It is true that if the defendants want to plead that the plaintiff is disentitled to recover any arrears of maintenance, they must plead and prove circumstances amounting to an abandonment. *Raja Yarlagadda Mallikarjuna Prasada Nayadu* v. *Raja Yarlagadda Durga Prasada Nayadu* (1). But it does not follow that because they have not pleaded such facts the plaintiff is entitled to all the arrears she claims especially in a case where her husband died twenty-six years before suit and when it does not appear according to the findings of the lower Appellate Court, that any demand was made prior to three years before suit. Mr. Somayya contends that the evidence of the first defendant as the first witness contains an admission that there was a demand 12 years before suit and it was followed by an arrangement. But I do not think much can be made of this admission as the arrangement was disbelieved by the Courts below; and I am inclined to think that the whole of the evidence of the first defendant must be found to be false.

The result is we have got in this case a widow whose husband died 27 years ago and a demand is made only three years prior to suit. In these circumstances I think a discretion remains with the Courts, while not disallowing totally the arrears claimed by the plaintiff, to cut down the period for which arrears may be granted. *Vide* judgment in A. S. No. 75 of 1922. In such a case, if the plaintiff is anxious to get the whole of the amount, I think it is for her to adduce evidence that she was in need of those arrears. See *Karbasappa* v. *Kallava* (2). I do not think that the plaintiff has been prejudiced in this particular case owing to the absence of an issue as to the arrears of maintenance. Having regard to all the facts of this case, I am not inclined to vary the order of the Courts below wherein arrears have been allowed only for three years.

The next question argued by Mr. Somayya is the rate of maintenance. I think this is entirely in the discretion of the Courts below and this Court in second appeal should not interfere unless it appears that the discretion has been very perversely exercised which does not seem to be the case here. There is no reason to interfere with the rate of Rs. 12 per mensem.

The third point argued by Mr. Somayya is that his client ought not to be made to pay the proportionate costs of the defendants in the Courts below. This point is conceded by the Vakil for the respondents and has to be allowed.

The result is the second appeal will be allowed by declaring that the plaintiff will not be liable to pay the proportionate costs of the defendants in the Courts below. She will be entitled to recover only the proportionate costs incurred by her.

In second appeal the parties will give and take proportionate costs, but the plaintiff will not get the printing charges for printing the documents.

V. N. V.

Z. K. ... *Decree modified.*

(1) 24 M. 147; 27 I. A. 151; 5 C. W. N. 74; 10 M. L. J. 294; 2 Bom. L. R. 945; 7 Sar. P. C. J. 761 (P. C.).

(2) 47 Ind. Cas. 623; 43 B. 66; 20 Bom. L. R. 823.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 424 OF 1923.

February 20, 1925.

Present:—Mr. Justice Mukerji and Mr. Justice Boys.

BABU RAM—DECREE-HOLDER—APPELLANT

versus

BANKE BEHARI LAL—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 105, O. XXII, r. 9—"Affecting the decision of the case," meaning of—Order setting aside abatement, whether can be challenged in appeal from final decree.

The expression "affecting the decision of the case", in s. 105 of the C. P. C., means affecting the merits of the case.

Puran Mal v. *Tarif*, 30 Ind. Cas. 2; 13 A. L. J. 1089, followed.

Section 105 of the C. P. C. allows a party who is not entitled to appeal against an interlocutory order, to challenge that order when he is appealing against the decree in the case. But unless such interlocutory order affects the merits of the case it cannot be so challenged. An order setting aside an abatement is not an order which affects the merits of the case and cannot, therefore, be challenged in an appeal from the final decree passed in the suit.

Second appeal from a decree of the District Judge, Mainpuri, dated the 18th November 1922.

Mr. *Shambhu Nath Chaube*, for the Appellant.

Dr. *N. C. Vaish*, for the Respondent.

JUDGMENT.—The following facts may be stated in order to make the judgment intelligible.

The appellant obtained a decree for sale which was affirmed on appeal on the 29th of November 1917. When he made an application for a final decree about three years after the passing of the appellate decree, it was discovered that two of the defendants in the suit had died more than 90 days before the making of the application. The Court of first instance declared that the suit had abated. The appellant, thereupon, filed an application to have the abatement set aside. The respondents were heard and an order was made setting aside the abatement. Then followed, in due course, a final decree for sale. Against that final decree for sale, the respondents appealed and the sole ground that they took for challenging the decree was that the Court of first instance was not justified in setting aside the abatement.

The learned District Judge was of opinion that the Court of first instance should not have set aside the abatement and, decreeing the appeal, set aside the order making the decree final.

In this Court two grounds have been urged:—

The first is that it was not open to the respondents to appeal against the final decree on the sole ground that the order setting aside the abatement was unjustifiable.

The second ground is that the order setting aside the abatement did not touch "the decision of the case", and the lower Court was, therefore, not justified in setting aside the final decree passed in the case.

We have considered both the points. We think that we can satisfactorily dispose of this appeal on the second ground and in this view we need not decide the first point urged.

It appears that s. 105 of the C. P. C. allows a party, who is not entitled to appeal against an interlocutory order, to challenge that order, when he is appealing against the decree in the case. But the interlocutory order, unless it affects the merits of the case, will not be allowed to affect the decree. In other words, unless the interlocutory order affects the merits of the case, it cannot be challenged. In the case of *Puran Mal* v. *Tarif* (1) an *ex parte* decree had been passed. It was later on set aside and when an appeal was filed against the decree in the suit, the order setting aside the *ex parte* decree was challenged. On the question whether it was open to the party appealing to attack the order setting aside the *ex parte* decree the following remarks were made:—

"In our opinion the question of propriety of setting aside the *ex parte* decree was a matter which could not be considered by the learned District Judge in appeal. No appeal is given by the Code from an order setting aside an *ex parte* decree. It cannot be taken exception to later on in a regular appeal *because it did not affect the merits of the case.*"

We are also of opinion that the order setting aside the abatement did not affect the merits of the case. As we read s. 105 of the C. P. C., the words "affecting the decision of the case" are equivalent to "affecting the merits of the case".

The orders setting aside the abatement brought on the record the proper parties. The merits of the case had nothing to do with the array of the parties. The merits of the case related to the correctness or otherwise of the contentions of the parties placed before the Court. If this view be correct, the final decree could not be challenged on the sole ground that the order setting aside the abatement and trying the suit on its merits was a wrong order.

We allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance. The respondents will pay the appellant's costs in this Court and in the Court below. The Counsel's fee in this Court will be calculated on the higher scale.

Z. K. *Appeal allowed.*

(1) 30 Ind. Cas. 2; 13 A. L. J. 1089.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1463 AND 1754 OF 1922.

November 5, 1924.

Present:—Mr. Justice Venkatasubba Rao.

PERIAMURUGAPPA ASARI AND ANOTHER —DEFENDANTS NOS. 1 AND 3—APPELLANTS IN BOTH

versus

MANICKA CHETTY—PLAINTIFF— RESPONDENT IN S. A. No. 1463 of 1922.

THINNAPPA CHETTY AND ANOTHER— PLAINTIFF AND DEFENDANT No. 4— RESPONDENTS IN S. A. No. 1754 OF 1922.

Transfer of Property Act (IV of 1882), s. 52—Lis pendens, *doctrine of, applicability of—Decree based on compromise—Collusion.*

The fact that a decree is made in pursuance of a compromise does not exclude the application of the doctrine of *lis pendens* provided, however, that such compromise is not tainted by fraud or collusion. A suit may be collusive at its very inception or a decree may be obtained by collusion in a suit which was honestly begun. [p. 214, col. 2.]

Where during the progress of a suit honestly instituted, the parties enter into a collusive agreement of compromise with the express object of defeating the rights of an auction-purchaser at the Court sale pending the suit, the doctrine of *lis pendens* is inapplicable. [p. 215, col. 1.]

Annamalai Chettiar v. *Malayandi Ayyaya Naik*, 29 M. 426; 1 M. L. T. 145; 16 M. L. J. 372 (F. B.), *Krishnappa* v. *Shivappa*, 31 B. 393 at p. 393; 9 Bom. L. R. 533, *Hukum Chand* v. *Raja Ram Bahadur Singh*, 53 Ind. Cas. 833; 4 P. L. J. 580; (1919) Pat. 335, and *Tanjor Majhi* v. *Jaladhar Deari*, 5 Ind. Cas. 691; 14 C. W. N. 322 at p. 324, relied on.

Second appeal against a decree of the Court of the Subordinate Judge, Cuddalore, in A. S. No. 80 of 1921, preferred against that of the Court of the District Munsif, Panruti, in O. S. No. 557 of 1918.

Messrs. *C. Padmanabha Ayyangar* and *T. D. Srinivasachariar*, for the Appellants.

Mr. *K. Bashyam Iyangar*, for the Respondents.

JUDGMENT.—Original Suit No. 557 of 1918 and O. S. No. 27 of 1919 were instituted by Thinnappa Chetty and Manicka Chetty respectively. The two suits were heard together by the District Munsif of Panruti who decided them in favour of the plaintiffs. The learned Subordinate Judge confirmed the decision of the District Munsif. In Second Appeal No. 1754 of 1922 the judgment of the Subordinate Judge in the first case is attacked; in Second Appeal No. 1463 of 1922 his decision in the second case is likewise attacked.

The defendants in the two suits are practically identical. The question to be decided is, to whom does the property in dispute belong, to the plaintiff in each suit or the defendants? The point was very fully considered both by the District Munsif and the Subordinate Judge and they have come to the conclusion that the defendants have no title. I agree with that finding.

The defendants are carpenters. Their ancestors owned two sets of properties:—(1) Thacha Manyan or carpenter's *Inam Paimash* Nos. 67 and 68 and (2) *Sircar* or *ryotwari* lands. *Paimash* Nos. 68 and 70.

The defendants' father Nainapillai Asari conveyed *Sircar* lands Nos. 68 and 70 by the original of Ex. F on 12th November 1873 to Chinnathambi Goundan. The latter sold the property which he purchased in four different parcels. It is sufficient to say that as the result of various transactions to which I need not refer, Thinnappa Chetty became the owner of two out of four plots and I shall designate them plots Nos. 1 and 2. Similarly Manicka Chetty became the owner of a third plot which I shall designate plot No. 3. We are not concerned with plot No. 4.

The defendants contended that the properties claimed by Thinnappa and Manicka were carpenter's *inam* corresponding to *Paimash* Nos. 67 and 69 and that, therefore, they had no right to them. The land in question bears Field No. 32 and in Diglott Register Ex. 6, S. No. 32 is said to be carpenter's *inam* corresponding to *Paimash* Nos. 67 and 69. The District Munsif has found that this description in the register is wrong and that the suit land, that is in S. No. 32 is not carpenter's *inam*. The learned Subordinate Judge has also held that the suit land is not carpenter's *inam*. There is no doubt as regards the identity of the subject-matter in dispute. The District Munsif and the Subordinate Judge were both dealing with it. The Subordinate Judge, however, states his conclusion in a slightly different way. He says in effect that if the various plots were rightly shown on the Survey Map, carpenter's *inam* would not have been shown in the place where S. No. 32 is now marked on the map but it would have been shown in a different place. This idea he conveys in language which has been made the subject of much debate in the arguments at the Bar. But I have care-

fully considered the Subordinate Judge's judgment and the clear effect of his words is that the suit land is not carpenter's *inam* and it does not correspond to *Paimash* Nos. 67 and 69 and that it is on the contrary *Sircar* land sold in 1873 by Nainapilli Asari. Owing to the facts being complicated, it may become necessary to very closely follow the Subordinate Judge's arguments, in order to understand what he means. But, when once his reasoning is understood, there can be no doubt as to the effect of his judgment. He agrees with the District Munsif but looks at the question from a different stand point. The learned Subordinate Judge has written a well-considered judgment on this point and I entirely agree with his conclusion. The defendants taking advantage of the mistake in Diglott Register put forward a false case. On this finding Second Appeal No. 1473 of 1922 fails and is accordingly dismissed with costs.

There is a further question that arises in the other second appeal. Original Suit No. 480 of 1913 had previously been filed by the carpenters, that is, the present defendants. In that suit, they claimed S. No. 32 on the ground that it was carpenter's *inam* and asked that the defendants in that suit should be directed to give up possession of it. There were four defendants and the first defendant Arunachallam Chetty was interested in plots Nos. 1 and 2. That suit was filed on 27th August 1913. In execution of a decree against Arunachallam Chetty, these plots were sold and Thinnappa Chetty purchased them in Court-auction on the 10th September 1914. Although the interest of Arunachallam Chetty passed to Thinnappa Chetty the latter was not brought on the record of that suit and a decree was passed against the original defendants including Arunachellam Chetty on 16th November 1915.

The contention of the appellants is that the alienation in favour of Thinnappa Chetty was made *pendente lite* and his purchase is, therefore, affected under *s. 52 of the Transfer of Property Act* by *lis pendens*. Both the District Munsif and the Subordinate Judge have overruled this contention but on different grounds. The District Munsif has held that the doctrine of *lis pendens* has no application, because the decision in the previous suit was a result of a collusive agreement entered into between the parties to that suit. I cannot agree with the view which the Subordinate Judge has taken, to which I shall presently refer. He has not given any finding on the point whether there was collusion. I have, therefore, examined the evidence myself under s. 103 and O. XLI r. 24, C. P. C., and I have come to the conclusion that the District Munsif's finding is correct. If it is proved that the carpenters and Arunachellam Chetty the plaintiff and the first defendant respectively in that suit, entered into an agreement for the purpose of defeating the rights of the auction-purchaser Thinnappa Chetty and that in pursuance of that agreement a decree was allowed to be passed in favour of the carpenters, these facts would be sufficient to establish collusion which would render the rule of *lis pendens* inapplicable. The fact that the decree was made in pursuance of a compromise does not exclude the application of s. 52, provided, however, that such compromise is not tainted by fraud or collusion. *Annamalai Chettiar* v. *Malayandi Appaya Naik* (1). A suit may be collusive even at its very inception or a decree may be obtained by collusion in a suit which was honestly begun. *Krishnappa* v, *Shivappa* (2), *Hukum Chand* v. *Raja Ram Bahadur Singh* (3) and *Tangor Majhi* v. *Jaladhar Deari* (4). In this case I am satisfied that during the progress of the suit which was honestly instituted, the parties entered into a collusive agreement with the express object of defeating the rights of the auction-purchaser at the Court sale. In paras. 26 and 30 of the Munsif's judgment, he deals with his point fully and I entirely agree with the reasons which he gives for his conclusion. The evidence of P. W. No. 2 fully supports the view of the District Munsif and he was right in acting upon it. The circumstances and probabilities also show that the decree was the result of a collusion. It is unnecessary to go into this matter more fully.

I have said that the Subordinate Judge also has held on the question of *lis pendens* against the defendants but for different reasons In his opinion the subject-matter of the previous suit and the pre-

(1) 29 M. 426; 1 M. L. T. 145; 16 M. L. J. 372 (F. B.).
(2) 31 B. 393 at p. 398; 9 Bom. L. R. 530.
(3) 53 Ind. Cas 833; 4 P. L. J. 580 at pp. 596 and 598; (1919) Pat. 305.
(4) 5 Ind. Cas. 691; 14 C. W. N. 322 at p. 324.

sent suit is not identical and he has on that ground held that s. 52 has no application. I do not think that this view can be supported. The contest in both the suits related to the same land. It was described as S. No. 32. The carpenters attempted in the previous suit to get possession of what is known as S. No. 32—of its identity there can be no doubt that it was corpenter's *inam*. In the present suit again the dispute was about this very plot and the question had to be determined whether it was or was not carpenter's *inam*. It is doubtless true that in the previous case no plan was filed and no boundaries were given. But it is reasonably certain that the claim was put forward in regard to the plot now in dispute. The *terwa* was given annas 13 and the extent was given annas 2 and pies 6. This description applies to the suit land. I do not think that there was in the previous suit such misdescription as to render the doctrine of *lis pendens* inapplicable. *Loke Nath Sahu* v. *Achutnand Dass* (5).

As, however, I have held that Thinnappa Chetty is not bound by *lis pendens* for the reasons given by the plaintiff. Second Appeal No. 1754 of 1922 fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

(5) 2 Ind. Cas. 85; 15 C. L. J. 391.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 61 OF 1924.

September 9, 1924.

Present:—Mr. Dalal, J. C.

FIRM BHAGAI RAM-BAHADUR RAM —PLAINTIFF—APPLICANT

versus

B. N. W. RAILWAY—DEFENDANT—OPPOSITE PARTY.

Railway Company—Carriage of goods—Risk Note Form "B"—Wilful neglect—Waggon sealed and not locked.

In a suit to recover damages for the loss of goods consigned to the defendant Railway Company for carriage under Risk Note Form "B" it was found that the Company had sealed the waggon which contained the goods on one side and that the seal was broken and it was not known how the goods disappeared;

Held, that the putting of a seal instead of a lock on the waggon did not amount to wilful neglect on the part of the Railway Company and that the plaintiff's suit was liable to be dismissed.

Revision against an order of the Additional Judge, Small Cause Court, Lucknow, dated the 13th February 1924, in Original Suit No. 1873 of 1923.

Mr. *Ramapat Ram*, for the Applicant.

Mr. *G. N. Mukerji*, for the Opposite Party.

JUDGMENT.—In the lower Court of Small Causes the suit was of the usual type of damages for loss of goods conveyed by a Railwary under Risk Note B. The learned Counsel for the plaintiff-applicant put forward an ingenious argument that this Note B was not justified at all and that the plaintiff had paid full weight and not at the reduced rate. This issue was not put forward in this Form in the Trial Court. Further, there is evidence on the record of two witnesses Hira Lal and Baswas to the effect that the goods were booked at reduced rates. The learned Counsel desired the Court to give another opportunity to disprove those statements and prove as a fact that the rate charged was not a reduced one. I do not think that he is entitled to any such privilege. He himself produced Risk Note B and he ought to have produced definite evidence that a wrong Risk Note was given to him by the Railway Company; there was no necessity for the framing of an issue on such an obvious point.

The plea as to wilful neglect cannot succeed. The Company in the way usual with all Railways sealed the waggon on one side. The seal was broken and it is not known how the plaintiff's property disappeared. The putting of a seal and not of a lock does not amount to wilful neglect on the part of the Railway Company. The learned Judge of the lower Court has discussed the rulings put forward in support of the plaintiff's case and I consider his observations to be correct. I dismiss this application with costs.

Z. K. *Application dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 548 OF 1923.

October 23, 1924.

Present:—Mr. Justice Srinivasa Iyengar.

T. C. XAVIER—COUNTER-PETITIONER—PETITIONER

versus

E. C. JOSEPH—PETITIONER—RESPONDENT.

Madras District Municipalities Act (V of 1920), election held under—Voting paper—Name of candidate struck out—Marks or writing on voting paper—Cross-marks bisected by line between names of two candidates—Validity of votes.

In an election held under the Madras District Municipalities Act, a vote recorded in favour of a candidate will not be invalidated by the fact that the name of the candidate for whom the vote was not cast was struck out on the voting paper. Nor will mere unintelligible tracings, or other mark or writing, on the voting paper invalidate a vote unless the Court finds that the tracing, mark, or writing is such by which a voter may afterwards be identified. [p 217, col. 1.]

Where the intersecting point of the cross mark on a voting paper is bisected by the line between the names of two candidates the vote cannot be counted in favour of any of those candidates and must be excluded altogether. [*ibid.*]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Subordinate Judge, Cochin, dated the 31st March 1923, in O. P. No. 4 of 1922.

Messrs. *T. M. Krishnaswami Iyer* and *D. A. Krishna Variar*, for the Petitioner.

Messrs. *T. R. Ramachandra Iyer* and *V. Subramania Iyer*, for the Respondent.

JUDGMENT.—The respondent in Election Petition O. P. No. 4 of 1922 before the Subordinate Judge's Court at Cochin was declared by the Returning Officer as the candidate duly elected for the B Ward in an election held for that Ward in Cochin Municipality. The petitioner Mr. Joseph filed a petition for having it declared that the respondent's election was not valid and that it should be declared that he was the person properly elected by the constituency at the election held. A civil revision petition has been filed in this Court on behalf of the respondent to revise the order of the Subordinate Judge by which he declared that the petitioner was the person who was duly elected and that the declaration that the respondent was the duly elected candidate was wrong.

To begin with, I am far from satisfied that on the facts of this case a revision petition under s. 115, C. P. C., is competent. There is no question which can be said to be a question of jurisdiction or of any material irregularity in the exercise of jurisdiction by the Subordinate Judge. There may be cases where the mistakes committed by the lower Court are so varied and so numerous as almost to amount to material irregularity in the exercise of jurisdiction but this is not such a case and I am not called upon, to express any opinion with regard to the possibility of a civil revision petition in such cases. I have been referred to the decision of Krishnan and Venkatasubba Rao, JJ., in the case of *Ramaswami Gounder* v. *Muthu Velappa Gounder* (1). So far as that case was concerned, it would appear that the lower Court declared the petitioner duly elected without giving any one an opportunity to show that his election was valid or invalid. The other observations in the course of the judgment regarding jurisdiction assumed by misconstruing a rule were apparently not necessary for the decision of that case as apart therefrom the Court was found to have jurisdiction. However, I am informed that this very question of the right of this Court to interfere in revision is now pending before the Full Bench of this Court. Anyhow, in the view I have taken of the merits in this case, it has become unnecessary for me to express any decided view with regard to the extent of the jurisdiction of this Court to interefere in revision in such election cases.

The petitioner in this Court was by the Returning Officer declared to have received 100 votes and the respondent 98 votes. The Subordinate Judge allowed the respondent five more votes out of the votes found by the Returning Officer to be invalid and refused to be counted by him for the respondent. This made the total number of votes in favour of the respondent 103. To the 100 votes obtained by the petitioner, one vote was added, namely, that of a person alleged to have been a minor but whose name was found included in the list of voters for the constituency. From the total so made up, namely 101, two votes were deducted by the Subordinate Judge on the ground that one of those was a case of voting by false personation and another was a vote granted by a person who according to the list was no voter at all but whose official description

(1) 71 Ind. Cas. 1039: 44 M. L. J. 1: 16 L. W. 848: (1923) M. W. N. 133; (1923) A. I. R. (M.) 192; 46 M. 536.

happened to correspond with that given in the list. We, therefore, have as a result of these additions and subtractions made by the Subordinate Judge 103 votes in favour of the respondent and 99 in favour of the petitioner. Mr. T. M. Krishnaswami Iyer, the learned Vakil for the petitioner, has addressed considerable argument with regard to every one of the five votes and contended that all those five votes were wrongly included in the votes for the respondent and should have been rejected by the Subordinate Judge.

I shall now deal with these five votes. With regard to one of these five votes, the objection to its being counted is that the name of the candidate for whom the vote was not cast seems struck out on the voting paper. This has been held not to invalidate the vote. Another vote shows that under the cross-mark made on the voting paper against the name of the respondent, there appears a tracing of some letters which we cannot make out. From the voting paper it is clear for whom the voting was intended and I cannot say that the other marks on the voting paper are marks from which the voter may be identified. The third voting paper to which objection has been raised is the paper on which the cross-mark seems to be placed just midway between the names of the two candidates. It has been argued by Mr. T. R. Ramachandra Iyer that the intersecting angle is placed above the dividing line and that, therefore, the vote must be counted in favour of his client, the respondent. I have no doubt whatever that if the intersecting point was undoubtedly above the line and visibly so there could be no doubt that it ought to be counted for the respondent. But though it does appear to be slightly above the line substantially, the cross-mark is really bisected by the line between the names of the candidates and I am unable to gather from the mark any clear intention of the vote having been cast in favour of one candidate or the other. That vote would have to be excluded from the votes counted by the Subordinate Judge in favour of the respondent. The remaining two voting papers have been objected to by the learned Vakil for the petitioner on the ground that in the one there is some Tamil writing and in the other there is the English letter C written on the voting paper in addition to the cross-mark. Such writing would invalidate the vote only if it should be found that the writing is a mark by which the voter may be afterwards identified. For all these positions indicated by me, the leading case of *Woodward* v. *Sarsons* (2) is the leading authority. So far as any writing on the voting paper is concerned, which is attacked on the ground that it is a mark by which the voter may be identified, it seems to me that it must be either a mark which on the face of it shows or may show the person who has voted or with regard to which there is evidence on the record which shows that the mark was put in there by some prearrangement or conspiracy by reason whereof by looking at the mark, one will be in a position to say that it is the vote of such and such a person. No doubt there may also be other cases where from the very nature of the mark we may be able to infer the intention on the part of the person who put the mark there that the voter should or may be identified. In the case of such marks also the Courts would have no hesitation in declaring against the vote if such intention could be gathered from the mere appearance of the writing. In the case of the two votes I am now considering, it is clear that the writing alone is not sufficient to identify the voter, because in the one case though it appears to be a Tamil writing one cannot even be sure that it is any particular letter. In the other case, no doubt, there is the English letter C, but I consider that being only a single and such a simple letter it is not sufficient to form the ground of the identification of the writing of any person. I am unable to say that there is anything in the appearance of these marks from which I can reasonably infer that there was the intention on the part of the person making them that the voter or writer should be identified. In the result, therefore, one out of the five votes added by the Subordinate Judge to the votes obtained or declared to have been obtained by the respondent would have to be excluded from the Court. Thus the total number of votes obtained by him would be 102. Mr. Krishnaswami Iyer further argued that one of the votes recorded for the respondent has been proved in the Court below to have been recorded by a person whose name was not in the list. The learned Subordinate Judge has found that there has been no false personation

(2) (1875) 10 C. P. 733; 44 L. J. C. P. 293; 32 L. T. 867.

with regard to that vote and I have not felt persuaded that the person who cast the vote was any other than the person who was entitled to vote. Remembering that in the evidence this particular person calls himself Parameswara Ayyar and that in the list he is called Eswara Ayyar, I am not prepared to say that the difference in the names was not due only to some mistake with regard to the name of the same individual. There is no reason to suppose that any case of false personation has been established. Seeing, therefore, that the votes according to my findings which are recorded in favour of the respondent total up 102, it seems to me unnecessary to consider the question of the votes with regard to the petitioner, because taking them at the highest the total is 101. It is, therefore, unnecessary for me to discuss the question of the two cases of false personation which were found against him by the Subordinate Judge with regard to which Mr. Krishnaswami Iyer has addressed arguments to me to show that the findings of the lower Court are wrong. Having, therefore, come to the conclusion that even on a careful scrutiny of the votes by me the finding of the Subordinate Judge is correct, there is no reason for me to interfere.

The civil revision petition is accordingly dismissed with costs.

V. N. V. *Revision petition dismissed.*
Z. K.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT No. 2122 OF 1922.
March 28, 1924.
Present:—Mr. Justice Page.

MCLEOD & COMPANY—PLAINTIFFS
versus
IVAN JONES & COMPANY—
DEFENDANTS.

Principal and agent—Commission agent and principal, relationship of, after contract has been carried into effect—Sale of goods—Acceptance of bill against documents—Suit on bill—Consideration, want of—Burden of proof—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint at late stage—New cause of action, whether can be allowed to be introduced.

An amendment of a plaint should not be permitted at a late stage of a suit which would have the effect of introducing a new cause of action which has become time barred. [p. 218, col. 2.]

The agreement between a commission agent and the party for whom he is acting may, at the outset, be that as between a principal and his agent, and so long as the contract remains executory the relationship of principal and agent may subsist between the parties. But after the contract of purchase has been effected the relationship of the parties *quoad* the contract of sale ceases to be that of principal and agent and ripens into that of vendor and purchaser, though it may be necessary to refer to some other prior agreement in order to ascertain the terms and conditions of the contract of sale. [p. 219, col. 1.]

A purchaser of goods who has accepted a bill against documents is under an obligation, as the acceptor of the negotiable instrument, to pay for the value of the instrument according to its tenor, notwithstanding that at the time when the bill is duly presented for payment the goods may not have arrived at the place where they are to be delivered and, therefore, the purchaser may not have had an opportunity before payment of examining the goods. The position in law of such a purchaser is this that although he is bound to honour the bill according to its tenor the payment of the bill will not in any way prejudice his right subsequently to reject the goods if he is entitled to do so under the contract after examination. But in a suit to recover the amount of the bill the onus is upon the defendant to prove that no consideration passed to him which would sanction the obligation under which he accepted the bill. [p. 220, col. 2.]

Case-law referred to.

Mr. *Pugh*, for the Plaintiffs.

Mr. *Langford James*, for the Defendants.

JUDGMENT.—This is a suit brought to recover damages for the breach of a contract to take delivery of and to pay for 4 Westcott Cars, 12 Lexington Cars and 70 Nash Cars sold by the plaintiffs to the defendants. In his opening address Counsel for the plaintiffs stated that the plaintiffs' relationship to the defendants in respect of the sale of these cars was partly that of agent to the principal and partly that of vendor to vendee. At the trial he applied for leave to amend the plaint by adding a claim in the alternative for an indemnity as agents, but I refused the application because in my opinion there was no reasonable ground for permitting an amendment of the claim at so late a stage in the proceedings, and also because, if the amendment were to be allowed a new cause of action would be admitted which is now time-barred. I do not wish it to be understood, however, that, in my opinion the proposition which was propounded on behalf of the plaintiffs is one to which I should give my assent. No doubt circumstances may arise in which a person who enters into a contract of sale as agent, for example, as agent for an undisclosed principal, may be deemed to

be either a principal or an agent *vis a vis* the other party to the contract of sale; but in the eye of the law, in my opinion, he cannot be regarded as filling at the same time both capacities. In effecting the contract of sale, he must needs have acted either as a principal, or as an agent. Now the legal position of a commission agent who sells or purchases goods for a foreign principal is well-known, and has been frequently defined. It may be that the agreement between a commission agent and the party for whom he is acting may, at the outset, be that between a principal and his agent, and so long as the contract remains executory the relationship of principal and agent may subsist between the parties. It has also been held that such a broker may possess a right in certain circumstances to stop the goods in transit. But in my opinion after the contract of purchase has been effected the relationship of the parties *quoad* the contract of sale ceases to be that of the principal and agent, and ripens into that of vendor and purchaser; though it may be necessary to refer to some other agreement, for example the prior agreement of agency, in order to ascertain the terms and conditions of the contract of sale. If the law were to be otherwise, the result would be that in so far as the agent was acting as vendor he would be under no obligation to account to the other party to the contract in respect of any profit which he might have made through buying or selling the goods in question to that other party. On the other hand, in so far as he was acting as the agent of the principal he would be liable to account to his principal in respect of any profit in excess of the agreement commission which he might have made out of the transaction. Where goods are sold through *A*, *A* must either sell on his own account as principal or, as an agent for *B* must create privity of contract between *B*, and a third party [see *Feise* v. *Wray* (1), *Ireland* v. *Livingstone* (2), *Robinson* v. *Mollett* (3), *Cassaboglon* v. *Gibbs* (4), *Ex parte Miles*, *In re Isaacs* (5) and *Paul Beier* v. *Chotalal Javerdas* (6). It is not uninteresting to observe that Lord Blackburn in his Book on Contracts of Sale (3rd Edition page 352) states the position of a commission agent acting for a foreign principal to be as follows :—

"It seems that in cases where a factor acting for a foreign correspondent purchases goods in his own name and on his own credit, it is rather too qualified a phrase to say merely that he stands in the position of a seller quoad the consignee : if he is not a seller it is difficult to say who is, as there would be much difficulty in establishing any privity of contract between the foreign correspondent, and the original seller. But there is very gradual progression through these cases in which the original seller has a right to elect between the liability of a factor and the consignee as principals up to those cases in which the factor if liable, at all, is liable merely as a surety, and there may be consequently difficulty at times, in determining whether an agent can be said to be in the position of seller so as to give him the right to stop the goods in transit on his own account or not." See further on this subject *Siffken* v. *Wray* (7).

As I have stated it may be difficult to ascertain whether in any particular case the relationship between the parties is that of principal and agent or of vendor and vendee, but inevitably, in my opinion, it must be either the one or the other. I was referred certain passages in the judgment of Mr. Justice Blackburn, as he then was, in *Ireland* v. *Livingston* (2) but, in my opinion, these passages when submitted to analysis do not support the proposition that an agent can enter into a contract of sale or purchase for or with a foreign principal without creating the relationship of vendor and purchaser between the parties to the contract. In *Robinson* v. *Mollett* (3) Mr. Justice Blackburn in impressig an opinion contrary to that of Mr. Justice Brett, a great Master of Commercial Law, and other learned Judges appeared to think that an agent might purchase goods for his principal without himself being the vendor or creating privity of contract between his principal and a third person, but the opinion which that very learned Judge then expressed was dissented from and, if I may venture to say so, rightly

(1) (1802) 3 East. 93; 6 R. R. 551; 102 E. R. 532.
(2) (1872) 5 H. L. 395; 41 L. J. Q. B. 201; 27 L. T. 79.
(3) (1875) 7 H. L. 802; 44 L. J. C. P. 362; 33 L. T. 544.
(4) (1883) 11 Q. B. D. 797; 52 L. J. Q. B. 538; 48 L. T. 850; 32 W. R. 138.
(5) (1885) 15 Q. B. D. 39; 54 L. J. Q. B. 566.
(6) 30 B. 1; 6 Bom. L. R. 918.
(7) (1805) 6 East, 371; 2 Smith 480.

deprecated by other learned Judges and was treated as erroneous by the House of Lords. In this case, however, I will not yield to the temptation to discuss this question further because in my opinion it is clear that in relation to the sale of the motor cars in question in this case the allegation of the plaintiffs, as set out in the plaint, that they were acting as principals is the correct inference to be drawn from the facts. It will be enough to say in respect of the cars which were sold by Nash to the plaintiffs and re-sold by them to the defendants that McLeod & Co., had contracted with Nash to take consignments of these cars before they had come into any contractual relationship whatever with the defendants, and I have no doubt that in effecting the contract of sale of these cars to the defendants the plaintiffs acted as principals, and not as agents.

As regards the 4 Westcott Cars and the Lexington Cars it was not contended that the contract of sale was entered into by Ivan Jones with the plaintiffs otherwise than as principals. With respect to the 4 Westcott Cars in the course of the case, in my opinion acting on sound advice, the plaintiffs abandoned their claim. As regards the 12 Lexington Cars the controversy between the parties arose in this way.

[After discussing the evidence adduced in the case, his Lordship held:]

In my opinion having regard to the form of the contract and the surrounding circumstances the failure to ship in September was a breach of the contract which entitled the defendants to reject the goods when tendered to them on arrival.

I now pass on to the 70 Nash Cars, 25 of which were despatched from the factory on the 24th June.

[After discussing of the position between parties in respect of these 25 cars, His Lordship held:].

Having regard to the contract, and to what passed between the parties, in my opinion, the tender of these 25 cars was not a good tender of cars under the contract between the parties the plaintiffs and the defendants. Because firstly, they were not to form the subject-matter of that contract and even if they were, they were cars which did not fulfil the conditions of the contract because they were fitted with battery and not magnet ignition, I have carefully considered the evidence, and I am unable to come to the conclusion that the provision of battery ignition instead of magnet ignition was merely a trifling matter which would not justify Ivan Jones in rejecting the goods. Therefore, as far as these 25 cars are concerned, I come to the conclusion on both grounds that the defendants were entitled to refuse to accept them under the contract.

[His Lordship, upon a consideration of the evidence relating to the delivery of the remaining 46 cars held:]

In so far as this is a claim for goods sold and delivered the onus is upon the plaintiffs to satisfy me that the goods tendered were goods which correspond with the description provided in the contract, and they have not done so. On the other hand, although, in my opinion, the plaint is not aptly drawn to raise this issue, I propose to consider one further matter, and it is a very important one, namely, that in respect of these 46 cars two drafts were accepted by the defendants, and having regard to the principles of law applicable to this matter and the observations of Baron Parke in *Stephens* v. *Wilkinson* (8) and the case of *Biddell Brothers* v. *Clemens Horst Co.* (9) the purchaser of goods who has accepted a bill against documents is, in my opinion, under an obligation as the acceptor of a negotiable instrument to pay for the value of the instrument according to its tenor, notwithstanding that at the time when the bill is duly presented for payment, the goods may not have arrived at the place where they are to be delivered, and therefore, the purchaser had had no opportunity before payment, of examining the goods. In my opinion, the position in law of such a purchaser is this, that although he is bound to honour the bill according to its tenor, the payment of the bill will not in any way prejudice his right subsequently to reject the goods if he is entitled to do so under the contract after examination. But in a suit to recover the amount of the bill the onus is upon the defendant to prove that no consideration passed to him which would sanction the obligation under which he came through accepting the bill. Therefore, on the assumption that the plaintiffs are entitled in this suit as framed to sue

(8) (1831) 2 B. & Ad. 320; 9 L J. K B. (o. s.) 231; 109 E. R. 1162.

(9) (1911) 1 K. B. 214 on appeal (1911) 1 K. B. 934; 16 Com. Cas. 197.

upon the bills, (though in my opinion, they are not so entitled) the onus is upon the defendants to satisfy me that there was a total failure of consideration for their acceptance and payment of the bill, or in other words, they have to satisfy me that the goods as tendered were not in accordance with the contract. In order to satisfy me of that the defendants make this case, Mr. Jones states, and it is not in dispute that he had never seen the export specification of the models in question before the contract was entered into, but that in June, before the contract was entered into a Nash Car arrived for McLeod & Co., from Bombay. It is reasonably clear to my mind that a Nash Car did come into McLeod's possession sometime in June, because on the 4th June they insured it. The car which had come into their possession on the 4th June was a car which was bought by Ivan Jones. Ivan Jones stated in his evidence that when the question of the Nash Agency was first mooted he had gone to McLeod's office, and that there had seen a Nash Car; and that he may or may not have gone for a short spin in that car. But he stated that he asked that he might have the car for demonstration purposes and that the car was delivered to him by McLeod as a demonstration car. Now, it is admitted that this car was insured by McLeod on the 4th June and that it was ultimately bought by Ivan Jones and that this car as well as Mr. Watson's car were fitted with clincher rims and tyres. Mr. Ivan Jones stated that he was most anxious to see the car, and to test the car, before he entered into the contract, that he had this car that he ran about in the car and that he was satisfied that the car had clincher rims, and tyres. He further stated that he had this car before he entered into the contract, and that Mr. Dwyer told him that this was the demonstration model of the Nash Cars which was the subject-matter of the contract, Mr. Jones further asserted that it was on the faith of that representation that he entered into the contract. Now, the plaintiffs do not accept Jones' version of what took place. They agree that he went for a spin in Mr. Watson's car. They admit that they bought a car like Watson's car, which was insured on the 4th June, and which was ultimately bought by Jones, but it was suggested on behalf of the plaintiffs that probably this car had nothing to do with the contract which was entered into, but was a car which Mr. Jones bought for his own purposes after the contract was entered into, that it was in no sense a demonstration car, and that the plaintiffs had not represented it as being fitted with the type of tyre with which the cars under the contract would be fitted. I have to satisfy myself as to the probability of the evidence given on the one side and on the other. In my opinion, the version given by Mr. Jones is the correct one, and I am supported in that view by a letter written on the 7th September by the plaintiffs. On the 7th September the plaintiffs wrote to the defendants:—

Nash Demonstrator

DEAR SIRS,

We beg to return herewith our Bill No. 1013, dated 5th August for the above car.

We note that your Mr. Jones has called our attention to the fact that he is buying Nash Cars at Rs. 5,250, this price we know to be *f. o. b.* Bombay, you will realise that we ourselves purchased this car in Bombay from your Messrs. Hill Sawyer & Co., re railed it to Calcutta by passenger train and had it equipped with spare tyres, side lamps, horns and also cushion covers. At the time Mr. Jones took delivery of this car he enquired the price and was told that it would be approximately Rs. 5,500 the actual cost to us here.

With regard to the extra charge for insurance premium, as advised to Mr. Jones, this car was insured by our office here and this is the actual cost of the premium to us.

In view of the fact that this was a verbal arrangement whereby Mr. Jones took over this car at our cost we feel sure that upon going into this matter you will realise that with the extra fitting the car cost us just exactly what we are charging you.

We will appreciate receiving your cheque by return.

Yours faithfully,
Pro. McLeod & Co.
(*Sd.*) J. H. DULTON.

The fact that the defendants themselves described the car as a Demonstration car, in my opinion, throws a considerable light upon the probability of the two stories. If Mr. Jones entered into this contract upon the faith of a representation by Mr. Dwyer, on behalf of the plaintiffs, that the

export specifications of the models under the contract would be equipped among other things with the clincher tyres with which his Demonstration car was fitted, that in my opinion, if Mr. Jones was induced to enter into this contract by reason of that representation, and accepted the bills for the cost on the faith of the representation, it would not be open to the plaintiffs now to assert that the export specifications of the models in question did not provide for the clincher tyres. The law of estoppel is only a branch of the law of evidence. I have come to the conclusion that in the absence of any specification which had been given to Mr. Jones, and having regard to the fact that a Demonstration car with clincher tyres was given to him, as I find was a fact, before he entered into the contract, that the plaintiffs are now precluded from asserting that the export specifications did not provide for clincher tyres. Under the circumstances I come to the conclusion and for the purpose of this case it must be taken, that these 46 cars which were tendered in partial fulfilment of the contract did not conform to the description provided in the contract, and, therefore, even if the suit may be regarded as a suit on the bills of that the defendants have satisfied me that there was a total failure of consideration. That disposes of the case in respect of all the cars which were in question and, in my opinion, the plaintiffs have failed to make out their claim, and the suit must be dismissed with costs on Scale No. 2.

Z. K. *Suit dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 360 OF 1923.

November 7, 1924.

Present:—Mr. Dalal, J. C.

Syed MAZHAR HUSAIN AN ANOTHER—DEFENDANTS—APPELLANTS

versus

Sheikh RAFIQ HUSSAIN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 96, O. IX, rr. 7, 13—Ex parte *proceedings—Remedy—Appeal from final decree—Objection to* ex parte *proceedings, whether can be taken.*

A party against whom proceedings are taken *ex parte* and who has failed to avail himself of the remedy given by r. 7 or r. 13 of O. IX of the C. P. C. is not entitled, on an appeal from the decree passed against him under s. 96 of the C. P. C., to urge that the Trial Court was wrong in proceeding to hear the suit *ex parte* against him. The remedy provided by rr. 7 and 13 of O. IX and that provided by s. 96 of the C. P. C. are not cumulative. [p. 222, col. 2.]

Where an application to set aside an *ex parte* trial is dismissed under r. 7 of O. IX of the C. P. C., the aggrieved party is not bound to take proceedings under r. 13 of O. IX inasmuch as such a course would be futile. The order refusing to set aside the *ex parte* proceedings, however, may, in such a case, be challenged in an appeal filed against the decree under s. 96 of the C. P. C. [p. 223, col. 2.]

Case-law referred to.

Second appeal from a decree of the District Judge, Fyzabad, dated the 7th November 1923, preferred against that of the Subordinate Judge, Sultanpur, dated the 30th April 1923.

Mr. *Zahur Ahmad*, for the Appellants.

Messrs. *Hyder Husain* and *Jagat Narayan Varma*, for the Respondents.

JUDGMENT.—This appeal was not argued on the merits though it was filed from an *ex parte* decree under s. 96 (2) of the C. P. C. The question at issue here is whether the Trial Court was justified in passing an *ex parte* order during the hearing on 15th January 1923. The appellants are two defendants: defendant No. 3 and defendant No. 5 and different considerations arise in their cases. Defendant No. 3 applied on 30th January 1923 for the cancellation of the *ex parte* order. This application was lodged under O. IX, r. 7 and dismissed on 28th February 1923. The defendant No. 5 took no steps under r. 7 nor any steps under r. 13 when finally a decree *ex parte* was passed against him. Under the circumstances there was no interlocutory order passed against the defendant No. 5 which he could only attack on appeal and in no other manner. He had an opportunity of applying to the Court under r. 7 and did not avail himself of that opportunity. Further he never made any attempt to produce any witnesses or to argue his case prior to the final decision of the Trial Court dated 30th April 1923. In his case the question, therefore, will be whether a party who has failed to avail himself of the remedy given to him by r. 7 and r. 13 is entitled on appeal under s. 96 to urge that the Court was wrong in proceeding to hear the suit *ex parte* against him. On the basis of the Full Bench ruling of *Sadhu Krishna Ayyar* v.

Kuppan Ayyangar (1) a learned Judge of this Court decided in *Farzand Ali* v. *Ekadashi* (2) that the remedies were cumulative. If a party failed to take advantage of r. 13 he can raise the same point of the injustice of the *ex parte* order on an appeal under s. 96. The learned Judge's attention does not appear to have been drawn to a decision of a Judge of great learning of this Court now Mr. Justice Piggott in *Jadu Nath Basak* v. *Ram Narayan* (3). There the learned Judge specifically dissented from the Full Bench ruling of the Madras High Court. Even in the Madras High Court it has been recently held in *Badvel Chinna Asethu* v. *Vattipalli Kasavayya* (4) that when once an application has been filed under r. 13 the same matter as to the justice of the *ex parte* order cannot be agitated on appeal. If that is the reasoning of the Mardras High Court the reasoning in *Farzand Ali* v. *Ekadashi* (2) cannot be sustained that the two remedies are cumulative. If they had been cumulative even when one has failed in one of the two remedies he can take advantage of the other remedy. The Madras High Court, however, held that he could not. A similar view has been taken by the Allahabad High Court in *Hummi* v. *Aziz-ud-din* (5). A Bench of that Court held that once a party sought his remedy under r. 13 he could not raise the same ground of impropriety of the *ex parte* character of the decree in regular appeal. It is clear, therefore, that according to the Allahabad and Madras High Courts the two remedies are not cumulative. With great respect I am unable to follow the reasoning of *Sadhu Krishnh Ayyar* v. *Kuppan Ayyangar* (1). When a specific remedy with a particular limited period of limitation is granted, a party must avail himself of it and cannot make it a ground of appeal under the general provision granting him a right of appeal from an *ex parte* decree. If the view of the Madras High Court in the Full Bench decision is accepted the intention of the Code would be frustrated. It appears to be the intention of the Code that the Court which passed the *ex parte* decree should first decide and give its reasons why such an order was passed. If the point is not raised under r. 13 but is raised in general appeal the burden of discovering reasons for an *ex parte* order will be thrown on the Appellate Court which would not be possessed of the knowledge of the Trial Court. The appeal of the defendant No. 5 must, therefore, fail because no argument is advanced on the merits. The question as to costs of the lower Courts shall be considered later.

Coming next to the appeal by the defendant No. 3 the circumstances will be found to be different. As already pointed out he applied under r. 7 and his application was dismissed. There is no appeal allowed from the dismissal of such an application and the order can only be attacked in appeal. It was argued on behalf of the respondents that the defendant No. 3 ought again to have applied r. 13 when the *ex parte* decree was passed and that as he failed to do so his case was similar to that of defendant No. 5. A ruling of the Madras High Court in *Sankaralinga Mudali* v. *Ratnasabhapati Mudali* (6) was quoted. It was passed prior to enactment of the present C. P. C. but substituting the corresponding sections, what a Bench of the Madras High Court held was that the dismissal of an application under r. 7 did not take away from that party his right to apply under r. 13. This, however, is not an authority for the proposition that where an application is dismissed under r. 7 the party was bound to take proceedings under r. 13 which would in the nature of things be futile as the Trial Court had already considered the question and come to the conclusion that its *ex parte* order was correct. In my opinion the case will be governed by the observations of the learned Judge who decided the case of *Jadu Nath Basak* v. *Ram Narayan* (3). There an application for adjournment was refused by the Trial Court whereupon the Pleader of that party absented himself and an *ex parte* decree was passed. The learned Judge was prepared to consider whether this order was on the face of it one which the Trial Court ought not to have passed. The present case is similar. The refusel to set aside an *ex parte* order during the trial was an interlocutory order which can be brought to the test as to its justification in appeal. If this Court does not agree with the Trial Court as to the rejection of the application of r. 7 the *ex parte* decree will

(1) 30 M. 54, 1 M. L. T. 268; 16 M. L. J. 479.
(2) 73 Ind. Cas. 591, 23 O. C. 10; 9 O. & A. L. R. 332; 10 O. L. J. 36; (1923) A. I. R. (O.) 177.
(3) 1 Ind. Cas. 329; 12 O. C. 25.
(4) 60 Ind. Cas. 215; 39 M. L. J. 697; 12 L. W. 507; (1920) M. W. N. 780; 29 M. L. T. 63.
(5) 33 Ind. Cas. 277; 39 A. 143; 14 A. L. J. 1225.
(6) 21 M. 324; 8 M. L. J. 58; 7 Ind. Dec. (N. S.) 585.

fail in consequence and the suit will have to be re-tried. The reasoning would not apply here that the defendant has failed to avail himself of another remedy granted to him under the law because there is no appeal from an order under r. 7. My opinion, therefore, is that defendant No. 3 can be permitted to argue in this appeal that the order of the 28th of February 1923 refusing his prayer for an order *ex parte* to be set aside was unjustified.

His learned Counsel argued that the mere application was sufficient to entitle him to have the order set aside. In support of this argument he quoted *Mannu* v. *Tulshi* (7) and *Bhagwat Prasad Tewari* v. *Muhammad Shibli* (8). I do not think that the rulings go so far. What was held there was that the Trial Court in each case ought to have exercised its discretion in favour of the person who applied for the *ex parte* order to be set aside. Every case will, therefore, depend upon its own circumstances and the Appellate Court must decide on the evidence in this case whether the order of 28th February 1923 passed by the Trial Court was justified or not. I have examined the circumstances of the case and I am satisfied that the order was just. It may be mentioned that in a few days will arrive the 3rd birth day of this suit. Obviously it has been pending long enough. The suit was instituted on the 18th November 1921 and the defendant No. 3 failed to turn up at a hearing on 15th January 1923. On the previous date of 19th December 1922 he had obtained an adjournment on the ground that a compromise between him and the plaintiff was probable. On the 15th January he did not appear to advise the Court as to what had been done. It was argued that 15th January was a date fixed for a particular purpose and, therefore, no *ex parte* order should have been recorded on that date. This is entirely a misapprehension of the proceedings of the Trial Court. The reasoning of *Debi Sahai* v. *Saraswati* (9) has no application here. The Court in case of a compromise failing was prepared to go on with the trial on 15th January and every party was under an obligation to be present on that date. The date was fixed for proceedings and the Court could take no action as to fixing of future dates if parties were permitted to absent themselves on such a date with impunity. The progress of the suit depended on orders to be passed on 15th January 1923. So it cannot be said that a date was fixed merely to record a proceeding whether there had been a compromise or not. The defendant No. 3 himself did not plead that he absented himself for the reason that the date was fixed for a particular purpose and his presence was not necessary. He made a false excuse that he was looking after the case of a friend. His obvious desire was to lengthen out the proceedings and maintain possession of the property as long as he possibly could. It will be contrary to reasons to believe that the defendant if he had a real desire to prosecute his decree would have gone away elsewhere to look after the case of his friend in which he was in no way interested. When a party is guilty of such negligent conduct 14 months after the institution of the suit he deserves no indulgence. I hold that the order of the 28th February 1923 was rightly passed. The appeal of defendant No. 3 also must fail except as regards costs which I now proceed to consider.

The Trial Court did not see its decree being properly prepared. Defendant No. 2 who owned the main portion of the property compromised with the plaintiff and yet the entire cost of the suit was thrown on the other defendants. The value of the property was Rs. 4,150 while the defendants Nos. 3 and 5 were together interested in property of the value of Rs. 200. There is also the fee of the Commissioner Rs. 30 made payable by the defendant when nothing came out of the appointment of the Commissioner to oblige the plaintiff. It is not known what the value of the property in possession of defendants Nos. 2 and 4 is. The decree shall, therefore, be amended as regards defendants Nos. 3 and 5 only as to costs. The Commissioner's fee Rs. 30 shall be cut out and the Pleader's fee Rs. 200 reduced to Rs. 2-8-0. The plaintiff had to produce witnesses even in an *ex parte* trial so the costs of the diet, etc., of the witnesses shall be maintained. The Court fee shall be reduced to Rs. 15. The other costs shall be maintained. So far as to the amendment of the First Court's decree which shall affect only defendants Nos. 3 and 5.

As regards the cost of the lower Appellate Court the objection made as to full fee of the respondent's Counsel is not sound. The *vakalatnama* was filed on 21st September

(7) 64 Ind. Cas. 958; 20 A. L. J. 39; (1922) A. I. R. (A.) 33.
(8) 66 Ind. Cas. 892; 20 A. L. J. 270; (1922) A. I. R. (A.) 110.
(9) 10 Ind. Cas. 313; 33 A. 560; 8 A. L. J. 612.

while the case was ready for actual hearing on 22nd October. On 22nd October prior to the hearing of arguments the certificate was filed by Counsel. There is no force in the contention that only half fee should have been allowed.

The decree of the Trial Court shall be amended as directed above; otherwise the appeal is dismissed. The appellants shall pay the costs of the plaintiffs-respondents because the decree could have been amended by an application to the Trial Court and there was no need to come up here for such a purpose.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 355 OF 1923.

February 13, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

JODHA SINGH—PLAINTIFF—APPLICANT

versus

PANDEY GOKARAN DAS—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. XXXIV, r. 5—Mortgage suit—Preliminary decree—Application for final decree, dismissal of, for default, legality of—Inherent power of Court to rectify mistake.

A preliminary decree for sale on foot of a mortgage was passed in favour of the appellant and as the judgment-debtor failed to make the payment directed by the decree the appellant made an application to the Court to pass a final decree. Notice was issued to the judgment-debtor and when the case was ripe the appellant happened to be absent, and the Court passed an order dismissing the suit in default. The appellant thereupon made an application pointing out that as nothing further remained to be done by him, the Court should not have dismissed the suit in default but should have proceeded to pass a final decree. The judgment-debtor objected that this last application made by the appellant must be treated as a fresh application for the passing of a final decree and that as it was barred by time it should be dismissed:

Held, that the order passed by the Court dismissing the suit for default of the decree-holder owing to his absence was erroneous, and that the Court had inherent power to rectify its own mistake by setting aside that order and by proceeding to pass a final decree on the original application of the decree-holder which must be regarded as still pending.

Debi Bakhsh Singh v. *Habib Shah*, 19 Ind. Cas. 526; 11 A. L. J. 625; 35 A. 331; 17 C. W. N. 829; 18 C. L. J. 9; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 16 O. C. 194; 40 I. A. 151 (P. C.), referred to.

Second appeal from a decree of the District Judge, Agra, dated the 28th November 1922.

Mr. *Baleshwari Prasad*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—This appeal raises a question of some importance and is accordingly laid before a Bench of two Judges.

Briefly the facts are these. A preliminary decree for sale was passed in favour of the appellant and one Dina Nath on the 31st of January 1911. The appellant purchased the share of Dina Nath in the decree and on the 2nd of January 1914, well within three years of the passing of the preliminary decree, applied to the Court to pass a final decree. Notices were issued to the judgment-debtors and to Dina Nath who had been made an opposite party to the application and the case was adjourned from time to time. On the 17th of July 1915 when the case was ripe, the appellant happened to be absent. The defendants never appeared. In the absence of the parties, the learned Subordinate Judge passed an order which, though ambiguous, has been treated as amounting to an order dismissing the suit for default. On the 28th of September 1916 the appellant put in an application before the learned Subordinate Judge reciting all the previous history of the case and asking that his application dated the 2nd of January 1914 might be revived and a final decree might be passed. He mentioned pointedly that the order of the 17th of July 1915 was one which should not have been passed. The learned Subordinate Judge accepted the petition and passed by an *ex parte* order a final decree for sale.

At the instance of some of the defendants the *ex parte* final decree was set aside and the previous application dated the 28th of September 1916 was restored.

When the application dated the 28th of September 1916 came to be heard it was urged on behalf of the defendants that it was a fresh application and that it was barred by time.

The learned Subordinate Judge held that the order dated the 17th of July 1915 was an order which the Court ought not to have passed. He pointed out that under the law, namely, the provisions of O. XXXIV, r. 5 of the C. P. C., nothing further was needed to be done by the plaintiff, the appellant before us. The decretal amount had not been paid into Court and

the plaintiff had done all that could be done by him, namely, that he had put in an application before the Court asking it to pass a final decree. The learned Judge, under the circumstances, thought that he was justified, nay it was his duty, to rectify his own mistake (possibly his predecessor's mistake) and he dismissed the objection of the judgment-debtors and passed a final decree for sale.

An appeal was taken to the learned District Judge who accepted it and dismissed the application of the appellant for the preparation of the final decree.

Hence this second appeal.

It has been urged for the respondent that the Court of first instance was not right in saying that on the 17th of July 1915 the appellant had nothing further to do in the case. It was stated that he had to prove the assignment. Assuming that this argument is correct all that was wanting was the proof as to the assignment; but that did not give the Court any right to dismiss the application *in toto*. It could have only said that it would pass a final decree for sale in favour of both the appellant and Dina Nath. This argument, therefore, does not find favour with us.

Now the question is whether the judgment of the Court of first instance was right. It is clear that if we treat the application of the 28th of September 1916 as a fresh application it would be time-barred. If we treat it as an application for review of judgment it would still be time-barred unless we apply s. 5 of the Limitation Act to the case. On the other hand, there is no bar to the Court exercising its inherent authority under s. 151 of the C. P. C. and rectifying its own mistake. This is exactly what the Court of first instance purported to do.

The Privy Council in the case of *Debi Bakhsh Singh* v. *Habib Shah* (1) laid down, under the following circumstances, that even apart from s. 151 of the C. P. C. the Court possessed an inherent power to rectify the mistake which had been inadvertently committed by itself. In the case before the Privy Council the plaintiff had died and the suit was dismissed for default, in ignorance of the fact of the death. The legal representatives of the deceased plaintiff made an application to be brought on the record. It is clear that no suit was pending and an application for substitution of names could not be made where there was no suit pending. An application for restoration of the suit would have been time barred. Yet, the Privy Council had no hesitation in saying that, in the circumstances of the case, the Court was bound to correct its own error.

The case before us is different in facts, but the same principle, as has been laid down by the Privy Council, is applicable. As already pointed out, the case was ripe on the 17th of July 1915. Rule 5 of O. XXXIV of the C. P. C. requires only this much of the plaintiff that he shall tell the Court that a final decree for sale has to be prepared. In the case of the defendant paying up the decretal amount it is not even necessary for him to say to the Court that a final decree, discharging the mortgage, has to be passed in his favour. The plaintiff, however, is required to make an application and that application he did make. If, therefore, nothing remained to be done by the plaintiff the Court's duty it was to pass a final decree for sale. The Court has rectified its own mistake and we do not think that there is any real grievance to the defendants.

We allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance. The appellant will have his costs in this Court and in the Court below, which will include Counsel's fees in this Court on the higher scale.

Z. K. *Appeal allowed.*

(1) 19 Ind. Cas. 526; 11 A. L. J 625; 35. A. 331; 17 C. W. N. 829; 18 C. L. J. 19; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 16 O. C. 154; 40 I. A. 151 (P. C.).

BOMBAY HIGH COURT.

SMALL CAUSE COURT SUIT No. 145/2139 OF 1920.

April 4, 1923.

Present:—Mr. Justice Mulla.

THORAPPA DEVANAPPA—PLAINTIFF

versus

UMEDMALJI AND OTHERS—DEFENDANTS.

Negotiable Instruments Act (XXVI of 1881), ss. 58, 85—Hundi—*Forged endorsement—Holder, whether acquires title—Payment by drawee to holder, effect of —Wrongful conversion—Suit to recover amount, maintainability of—Property in* hundi, *when passes—Post Office, whether agent of payee.*

If a party primarily liable on a negotiable instrument pays the amount thereof to a wrong person, who holds it under a forged indorsement, he remains liable to the true owner. The only exception to this is where the payee's indorsement on a cheque payable to order is forged. [p. 227, col. 2; p. 228, col. 1.]

No holder of a negotiable instrument, though he may be a holder in due course, can acquire a title to the instrument through a forged indorsement. [p. 228, col. 1.]

Section 58 of the Negotiable Instruments Act, which protects a holder in due course where a negotiable instrument has been obtained by means of an offence, does not apply to a case of forgery. [*ibid.*]

Hunsraj Purmanand v. *Ruttonji Walji*, 24 B. 65; 1 Bom. L. R. 734; 12 Ind. Dec. (N. S.) 581, *Jai Narain* v. *Mahbub Bakhsh*, 28 A. 428; 3 A. L. J. 203; A. W. N. (1903) 77, and *Banku Behari Sikdar* v. *Secretary of State for India*, 1 Ind. Cas. 929; 36 C. 239, relied on.

If a person wrongfully convert a bill and receive the amount, the owner of the bill may either sue in tort or may waive the tort and recover the money as received to his use. [*ibid.*]

Arnold v. *Cheque Bank*, (1876) 1 C. P. D. 578; 45 L. J. C. P. 562; 34 L. T. 729; 24 W. R. 759, and *Heilbut* v. *Nevill*, (1870) 5 C. P. 478 at p. 482; 39 L. J. C. P. 245; 22 L. T. 662; 18 W. R. 898, referred to

In order to make the property in a bill pass it is not sufficient to indorse it; it must be delivered to the indorsee. [p. 228, cols. 1 & 2.]

The Post Office is the agent of the person to whom the bill or note is posted if there be express or implied authority to send by post, but if there be no such authority the Post Office is the agent of the sender. [p. 228, col. 1.]

Ex parte Cote, (1874) 9 Ch. App 27; 43 L. J. Ch. 19; 29 L. T. 598; 22 W. R. 39, *Norman* v. *Ricketts*, (1886) 3 T. L. R. 182 and *Thairlwall* v. *Great Northern Railway*, (1910) 2 K. B. 509; 79 L. J. K. B. 924; 103 L. T. 186; 17 Manson 247; 54 S. J. 652; 26 T. L. R. 555, followed.

FACTS.—On January 6, 1920, the N. Mills at Sholapur drew a *hundi* for Rs. 1,500 upon one *U.* at Bombay in favour of one *T. D. T. D.* endorsed the *hundi* to one *S.* at Hyderabad and posted it to him. The *hundi*, however, got into the hands of a stranger and then to one *N.* who presented it for payment to *U*, and received the money. The *hundi* was found to have the following three endorsements on it:

(1) "*Hundi* sold (by) Devanappa Jivanappa Mahajan to Sardarmal Suganmal by the hand of Tatya Mahajan."

(2) "*Hundi* sold (by) Sardarmal Suganmal to Lachhiram Ganeshlal."

(3) "*Hundi* sold (to) Nathmal Chunilal by Lachhiram Ganeshlal."

It appeared that the first endorsement was by *T. D.* but the other two were forged.

After posting the *hundi T. D.* advised *S.* about it and on January 8, 1920, *S.* sent a telegram stating that he had not received it. The plaintiff then sent a duplicate to *S.* who forwarded it to *U.* but *U.* refused payment alleging that he had already paid the amount. *S.* informed *T. D.* about it and demanded payment from him. Thereupon *T. D.* brought the present suit against *U.* and *N.* Subsequently he applied to join *S.* also as a defendant and was allowed to do so. The main point in issue was whether the plaintiff was entitled to maintain the suit against the defendants.

Mr. *Mehta*, for the Plaintiff.

Messrs. *Setalvad* and *Lalji*, for the Defendants.

JUDGMENT.—[After stating the facts of the case His Lordship proceeded as follows:—]

The suit came on for hearing before me on March 28, 1923, and again on April 3, 1923, for a few hours on each day. On March 28, Counsel for the plaintiffs read out the evidence recorded in the case. Counsel for the 2nd defendant then addressed the Court. Counsel for the 1st defendant followed him. Though the 2nd defendant filed a long written statement, he did not give any evidence in the case. Such being the case, it is difficult to say under what circumstances the *hundi* passed into his hands and whether he played any part in this nefarious affair. Nor was any evidence led on behalf of the 1st defendant. On April 3, at the close of the address of Counsel for the 1st defendant, Mr. Lalji, who had already addressed the Court on behalf of the 2nd defendant applied that the plaintiff may be re-called to give him an opportunity to cross-examine him as to whether the 3rd defendant had given any authority to the plaintiff, express or implied, to remit the money due by the plaintiff to the 3rd defendant by a *hundi*. The plaintiff, who resides and carries on business at Hyderabad, was in Bombay on March 29, but he left Bombay after that date, and he was not in Bombay on April 3. I refused the application. The 1st and 2nd defendants had every opportunity of cross-examining the plaintiff when he gave his evidence before Kanga, J., on November 18, 1921. On that day the plaintiff was cross-examined by Counsel for the 1st defendant but he was not cross-examined at all by Counsel for the second defendant.

Upon these facts the question arises whether the 1st and 2nd defendants or either of them is liable to the plaintiff. It is well-established that if a party primarily liable on a negotiable instrument pays the amount thereof to a wrong person, who holds it

under a forged indorsement, he remains liable to the true owner. The only exception to this is where the payee's indorsement on a cheque payable to order is forged. In such a case it is provided by s. 85 of the Negotiable Instruments Act, 1881, that the drawee is discharged if he pays the amount in due course. No holder of a negotiable instrument, though he may be a holder in due course, can acquire a title to the instrument through a forged indorsement. Section 58 of the Negotiable Instruments Act, which protects a holder in due course where a negotiable instrument has been obtained by means of an offence, does not apply to a case of forgery. *Hunsraj Purmanand* v. *Ruttonji Walji* (1), *Jai Narain* v. *Mahbub Bakhsh* (2) and *Banku Behari Sikdar* v. *Secretary of State for India* (3). Such being the case the 1st defendant is clearly iallbe to the true owner for the amount of the *hundi*.

The 2nd defendant is also liable to pay the amount of the *hundi* to the true owner. In the case of goods, if a man takes and sells them when he has no right the owner may waive the tort and recover the proceeds in an action for money had and received. And equally if a person wrongfully convert a bill and receive the amount the owner of the bill may either sue in tort or may waive the tort and recover the money as received to his use. The 2nd defendant who came into possession of the *hundi* through forged indorsements took no property in the *hundi*. What was done by him amounted to a conversion of the *hundi*, and the proceeds of the *hundi* received by him are the moneys of the true owner: *Arnold* v. *Cheque Bank* (4) and *Hilbut* v. *Nevill* (5).

The next question is, who was the true owner of the *hundi* at the date of suit? It is contended on behalf of the 1st and 2nd defendants that the true owner of the *hundi* at the date of suit was the third defendant, and not the plaintiff, and that the plaintiff, therefore, is not entitled to maintain this suit. Now it is elementary law that in order to make the property in a bill pass it is not sufficient to indorse it, it must be delivered to the indorsee. Such delivery, as enacted in s. 46 of the Negotiable Instruments Act, may be actual or constructive. Counsel for the defendants contended that by the Regulations of the Indian Post Office a letter once posted cannot be reclaimed, and since the plaintiff had not only indorsed the *hundi* to the 3rd defendant, but posted the letter enclosing the *hundi* to him, the property in the *hundi* passed to the 3rd defendant, and he alone, therefore, was entitled to sue. Reliance was placed in support of this contention on *Ex parte Cote* (6).

The authorities go to show that the post office is the agent of the person to whom the bill or note is posted if there be express or implied authority to send by post, but if there be no such authority the post office is the agent of the sender?—See Chalmers Bills of Exchange, 8th Edn., p. 61; Halsbury's Laws of England, Vol. II, p. 481. In *Ex parte Cote* (6) Mellish, L. J., said:—

"In this country, where the sender of a letter cannot get it returned after it has been posted, if the indorsee of a bill authorises the indorser to send the bill through the post office, the bill as soon as it is posted becomes the property of the indorsee."

In that case the authority to send the bills by post was implied from the course of dealings between the parties, but as by the rules of the French Post Office a letter though posted, could be reclaimed before it was despatched from the office where it was posted, it was held that the property in the bills which were posted from Lyons and claimed back by the indorsor did not pass to the indorsee. In *Norman* v. *Ricketts* (7) the plaintiffs wrote from London to the defendant in Suffolk asking her to send a cheque for money due by her. The defendants sent by post a cheque for the amount due. The cheque was stolen in transit, and the thief got it cashed. It was held that the posting was a good delivery to the payee, and the cheque operated as payment. This is a case of express authority to send by post. This case was followed in *Thairlwall* v. *Great Northern Railway* (8) which was a case of a dividend warrant sent by the defendant Company to the plaintiff.

(1) 24 B. 65; 1 Bom. L. R. 734; 12 Ind. Dec. (N. s.) 581.
(2) 28 A. 428; 3 A. L. J. 203; A. W. N. (1906) 77.
(3) 1 Ind. Cas. 929; 36 C. 239.
(4) (1876) 1 C. P. D. 578; 45 L. J. C. P. 532; 34 L. T. 729; 24 W. R. 759.
(5) (1870) 5 C. P. 478 at p. 482; 39 L. J. C. P. 245; 22 L. T. 662; 18 W. R. 898.
(6) (1874) 9 Ch. App. 27; 43 L. J. Ch. 19; 29 L. T. 598; 22 W. R. 39.
(7) (1886) 3 T. L. R. 182.
(8) (1910) 2 K. B. 509; 79 L. J. K. B. 924; 103 L. T. 186; 17 Manson 247; 54 S. J. 652; 26 T. L. R. 555.

The warrant was lost in the post. In a suit to recover the dividend it was held that the posting of the warrant operated as payment. In the course of his judgment Lord Coleridge, J., said :—

"The real question is whether the posting of the warrant was payment of the amount of the dividend. To establish that it was, the defendants must prove a request by the plaintiff or an agreement between the plaintiff and defendants that payment should be made by means of the warrant posted to the plaintiff."

In the present case the 1st and 2nd defendants contend that the property in the *hundi* passed to the 3rd defendant immediately it was endorsed and posted. The 1st and 2nd defendants must therefore, show that there was an authority, express or implied, from the 3rd defendant to the plaintiff to send the *hundi* by post. It is not suggested that there was any express authority. Nor is there any evidence on record of implied authority. There was, therefore, no delivery to the 3rd defendant, and the negotiation of the *hundi* to him was not completed. The property in the *hundi* never in fact passed out of the plaintiff, and it remained his property when it reached the hands of the 1st and 2nd defendants. Moreover, the 3rd defendant never claimed any property in the *hundi*. On the contrary, he enforced his claim by a suit against the plaintiff in the Residency Court.

I, therefore, hold that the property in the *hundi* was in the plaintiff at the date of suit, and pass judgment against the 1st and 2nd defendants for Rs. 1,500, costs including costs of commission and costs reserved, and interest on judgment at six per cent. per annum.

Plaintiff's attorneys to be at liberty to withdraw Rs. 800 being the amount deposited by the plaintiff as security for the costs of the 1st defendant after the expiration of the period of appeal.

K. S. D. *Suit decreed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1247 OF 1922.

November 28, 1924.

Present :—Mr. Justice Suhrawardy and Mr. Justice Cuming.

NAYAN MANJURI DASI—DEFENDANT No. 1—APPELLANT

versus

CHAIRMAN, HOWRAH MUNICIPALITY AND ANOTHER—RESPONDENTS.

Calcutta Municipality Act (III of 1899), s. 228, construction of—Rate assessed on building and land, whether charge on holding—Interpretation of Statutes.

In the interpretation of a Statute it is sometimes necessary to read the conjunctions "or" and "and", one for the other. [p. 230, col. 1.]

The policy of s. 228 of the Calcutta Municipal Act is to make the holding primarily responsible for the rates assessed on it. When the Act speaks of the rates on any building or land it includes a tax which has been assessed on the land and the house taken together. The expression "building or land" in the section includes the case of a rate assessed on a building and land and arrears of such rate become a charge on the land and the house. [*ibid.*]

Appeal against the decree of the Subordinate Judge, First Court, Howrah, dated the 27th of February 1922, confirming that of the Munsif, Second Court, Howrah, dated the 29th of July 1920.

Babus *Narendra Chandra Bose* and *Dwijendra Nath Mukherjee*, for the Appellant.

Babus *Ram Chandra Mazumdar*, *Manmotha Nath Roy* and *Indu Prokas Chakravarty*, for the Respondents.

JUDGMENT.

Cuming, J.—In the suit out of which this appeal has arisen the Chairman of the Municipality of Howrah sued the appellant for the recovery of Rs. 100-6-6 being the Municipal Tax of a certain holding No. 25-1, Courys Road, defendants Nos. 2, 3 and 4 were made defendants on the ground that they had acquired a right on the property and that they were in possession. The defendants raised various defences that it is not necessary now to set out in detail. The learned Munsif decreed the suit in the following terms :—

"Ordered that a decree be made for the full amount claimed and the costs, declaring that the sum be a first charge on the holding and the building and the moveable property to be found on the land subject to the prior payment of the land revenue if any due, on the land directing the defendants to pay the decretal amount and costs within a month from this date, in default of which the land and the building

and the moveables to be found on the land will be sold for the arrears so decreed with costs."

The defendants appealed to the District Court. That Court dismissed the appeal with costs. Defendant No. 1 has appealed to this Court. He contends that s. 228 has no application to the present case and that, therefore, no decree can be made against the property.

His argument is as follows :—

The rate has been assessed on the holding *and* house under s. 104 of the Bengal Municipal Act at a consolidated rate. Section 228 of the Calcutta Municipal Act which has been made applicable to the Municipality of Howrah provides that the consolidated rate due in respect of any building *or* land shall subject to the prior payment of the land revenue due, if any, be a first charge on the land or building etc.

The rate in the present case has been assessed on the house and land. Section 228 speaks of any building or house. Therefore, it does not contemplate a consolidated rate assessed on the house and the land. You cannot read "and" for "or" in the section.

We are not prepared to put on the section the limited meaning that the appellant will ask us to do.

Maxwell in Interpretation of Statutes has pointed out that it is sometimes necessary to read the conjunctions 'or' and 'and' one for the other.

The policy of the Act would seem to be to make the holding primarily responsible for the rates assessed on it. When the Act speaks of the rates on any building or land it seems to us that it would be straining the words of the section to say that it did not refer to the tax which had been assessed on the land and the house taken together.

The expression building or land in s. 228, we think, includes the case of a rate assessed on a building and land and that such an arrear of rate becomes a charge on the land and house.

The decision of the lower Courts is, therefore, right and the appeal must be dismissed with costs.

Suhrawardy, J.—I agree

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 1034 OF 1923.

April 13, 1923.

Present:—Mr. Justice Mulla.

PAULO DAVID DESOUZA AND OTHERS—PLAINTIFFS

versus

K. R. DAPHTARY—DEFENDANT No. 1.

Trusts Act (II of 1882), s. 34—Trust property—Court, whether can sanction sale—Bombay High Court—Extraordinary Civil jurisdiction—Order sanctioning sale, when can be challenged—Marketable title—Vendor, duty of—Vendee, when can repudiate contract.

Section 34 of the Trusts Act does not enable the Court to sanction a sale of the trust property by trustees when no power of sale is given by the trust deed. [p 232, col. 2.]

The High Court of Bombay has Extraordinary Civil Jurisdiction to sanction a sale by trustees of property vested in them. [*ibid.*]

In re Manilal Hargovan, 25 B. 353; 3 Bom. L. R. 411, and *In re, Shirinbai*, 49 Ind. Cas. 882; 43 B. 519; 21 Bom. L. R. 41, followed.

But this jurisdiction is of an extremely delicate character and has to be exercised with the greatest caution. [*ibid.*]

In re, New, (1901) 2 Ch. 534 at p. 543; 70 L. J. Ch. 710; 50 W. R. 17; 85 L. T. 174, referred to.

The Court will not in the exercise of its Extraordinary Jurisdiction sanction an unauthorised change of investment proposed on the mere ground that it will be to the advantage of the beneficiaries. [*ibid.*]

In re Tollemache, (1903) 1 Ch. 955; 72 L. J. Ch. 539; 88 L. T. 670; 51 W. R. 597 affirming (1903) 1 Ch. 457; 72 L. J. Ch. 225; 51 W. R. 568; 88 L. T. 13, relied on.

When an order sanctioning a sale of property by trustees has been made, it cannot be challenged except on the ground of "fraud or underhand dealing." [p. 233, col. 1.]

Gangapershad Sahu v. *Maharani Bibi*, 12 I. A. 47 at p. 50; 11 C. 379; 4 Sar. P. C. J. 621; 9 Ind. Jur. 158; 5 Ind. Dec (N. S.) 1012 (P. C.), followed.

The title which the vendor must show must be a title in himself, or in those whom he has a legal or equitable right to require to join in the conveyance: he has no right to say that some other person is willing to enter into a contract, and to force the title of that other person on the purchaser. [p. 234, col. 1.]

In re Bryant and Barninghan, (1880) 44 Ch. D. 218; 59 L. J. Ch. 636; 63 L. T. 20; 38 W. R. 469 and *In re Head's Trustees and Macdonald*, (1890) 45 Ch. D. 310 at p. 311; 59 L. J. Ch. 604; 63 L. T. 22; 38 W. R. 657, referred to.

When a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may repudiate the contract. [p. 234, cols. 1 & 2.]

Forrer v. *Nash*, (1865) 35 Beav. 167; 6 N. R. 361; 11 Jur. (N. S.) 789; 14 W. R. 8; 55 E. R. 858; 147 R. R. 92, relied on.

This right of repudiation must be distinguished from the common law right of rescission, and arises out of that want of mutuality which, unless waived, is generally fatal to relief by way of specific performance. But the right must be exercised, if it is to

be exercised at all, as soon as the defect is ascertained. If, after ascertaining the defect, the purchaser still treats the contract as subsisting, he does not retain the right to repudiate at any subsequent moment he may choose. [p. 234, col. 2.]

Halkett v. *Dudley (Earl)*, (1907) 1 Ch. 590; 76 L. J. Ch. 330; 93 L. T. 539, referred to.

FACTS.—The property in suit belonged to two brothers, A. F. and L. P. De Souza as tenants-in-common with equal shares. A. F. died in 1904 leaving a Will, Probate whereof was granted to his son, plaintiff No. 1, as sole executor. On obtaining Probate the son conveyed a moiety of the property for himself and his brother, plaintiff No. 3, in accordance with the terms of the Will. L. P. died on December 24, 1899, leaving a widow, a grandson by a predeceased daughter and a grand-daughter by a predeceased son. He also left a Will, Probate whereof was granted to the second defendant and one *D*. As a result of the administration of the estate of *L*. the second defendant ceased to hold a moiety of the said property as executor but continued to hold it as trustee.

On March 27, 1922, the plaintiff agreed to sell the property to the first defendant and received Rs. 10,000 as earnest money. It was agreed to complete the purchase on 31st May 1922. The plaintiffs were to deduce a marketable title free from all reasonable doubts and were to get in all outstanding estates and clear all encumbrances at their own costs. On the date of the agreement of sale, half the property was vested in plaintiffs Nos. 1 and 3, and the other half in defendant No. 2 as trustees of the Will of L. P. Plaintiffs Nos. 5 and 6 had no power to sell the moiety which belonged to L. P. which was vested in defendant No. 2 subject to the trustees of the Will, but he too had no power to sell it and he was not a party to the agreement.

On these facts coming to the notice of the plaintiffs, a long correspondence ensued between the parties and eventually the first defendant wrote to the plaintiffs on the 31st August 1922, purporting to put an end to the agreement. Thereupon the plaintiffs informed the first defendant that they were applying for an order of the Court and in reply the first defendant informed the plaintiffs on the 14th September that he was prepared to give them time up to the 15th October and that time was of the essence of contract. On October 13, defendant No. 2 put in a petition praying for leave to sell the half share of L. P. in the property vested in him under the Will, and the learned Judge made an order to that effect the same day. After the order the plaintiff's Attorneys wrote to defendant No. 1 asking for a draft conveyance but the defendant questioned the sufficiency of the order and the Court's jurisdiction to make it, and after some correspondence on the point between the parties, the plaintiffs filed a suit for the determination of the question whether they had made out a marketable title to the property free from all reasonable doubts and took out an originating summons for that purpose.

Mr. *Thomas Strangman*, for the Plaintiffs.

Mr. *Inverarity*, for Defendant No. 1.

Mr. *Taraporevala*, for Defendant No. 2.

JUDGMENT.—[After stating the facts of the case his Lordship went on:—] The question arises whether the plaintiffs have made out a marketable title to the property. The first defendant contends that they have not, and on his behalf the following points have been raised, namely,—

(1) that the order does not in fact empower the second defendant to sell the moiety vested in him;

(2) that even if it does, it was obtained by underhand dealing on the part of the second defendant;

(3) that the learned Judge had no jurisdiction to make the order; and

(4) that the first defendant contracted with the plaintiffs on the footing that they were absolute owners, and the plaintiffs could not force on him a title different to that which he agreed to take.

I shall deal with these points in order.

The first point is that the order does not authorise the second defendant to sell the moiety vested in him. I think it does. The agreement was for the sale of the whole property, not merely of the interests of the first and third plaintiffs and the fifth and sixth plaintiffs. What was sanctioned was the sale of the whole property. One moiety was vested in the first and the third plaintiffs and the other in the second defendant. That being so, the order empowered the second defendant execute or join in the conveyance of the property. It was argued that "to execute" means "to sign." I think that what the second defendant was empowered to do was to sell the moiety vested in him and to convey it by the deed of conveyance. This is put beyond all doubt by the second part of the order by which it is provided that the

second defendant should hand over the nett sale proceeds of the half share of Lawrence DeSouza to the Accountant General of Bombay. It appears from the plaintiffs' letter of October 23 that this direction did not appear in the order originally submitted to the learned Judge, but that he ordered that direction to be added in the order. If the order did not empower the second defendant to sell the moiety vested in him, the direction for handing over "the nett sale proceeds of the half share of the said Lawrence De Souza" would be meaningless. The order is not artistically drawn, but its meaning is plain.

The next point taken on behalf of the first defendant was that the order was obtained by underhand dealing on the part of the second defendant, in that the petition did not even refer to the agreement for sale or mention the fact that there were minor beneficiaries. It was also said that the agreement could not have been before the learned Judge as it was not put in evidence. Now it is not correct to say that the petition does not state that there were minor beneficiaries. Paragraph 10 of the petition expressly mentions this fact. Immediately this fact was brought to the notice of Counsel for the second defendant, he withdrew the charge of underhand dealing to that extent. As regards the other charge it is true that the petition does not refer specifically to the agreement, but the agreement is thrice referred to in the order, and it is impossible to believe that the order was made without the learned Judge having the agreement before him. It is true also that the agreement was not put in evidence, but it is not the practice to do so on applications of this nature. Before the order was obtained the Attorneys for the plaintiffs sent a copy of the petition to the Attorneys for the first defendant with their letter of October 11, 1922, and gave them notice that they would apply for the order. The first defendant did not appear before the Chamber Judge when the order was made. Such being the facts, the charge of underhand dealing ought never to have been made.

The third point is one of jurisdiction. The petition was presented to the Court in the exercise of its Extraordinary Original Civil Jurisdiction. It was headed: "In the matter of the Indian Trusts Act II of 1882, and in the matter of the trusts created by the Will of Lawrence De Souza." I do not think that the order was made under the Indian Trusts Act, nor was it seriously contended that it was. The only section of that Act that could possibly be referred to in this connection would be s. 34. That section provides that a trustee may apply by petition to a principal Civil Court of Original Jurisdiction for its opinion, advice or direction on any present questions respecting the administration of the trust property. I do not think that this section enables the Court to sanction a sale of the trust property by trustees where no power of sale is given by the trust deed. I think that the order was made under the Extraordinary Civil Jurisdiction of the Court.

That the High Court of Bombay has this jurisdiction is beyond all doubt. This jurisdiction was recognised in *In re Manilal Hargovan* (1), where Sir Lawrence Jenkins sanctioned the sale of a minor's interest in Hindu joint family property. It was also recognised in *In re Shirinbai* (2), where Marten, J., sanctioned a sale by trustees of immoveable property vested in them. But this jurisdiction is of an extremely delicate character and has to be exercised with the greatest caution. "The principle," as observed by Romer, L. J., in *In re New* (3), "seems to be this—that the Court may, on an emergency, do something not authorised by the trust. It has no general power to interfere with or disregard the trust; but there are cases where the Court has gone beyond the express provisions of the trust instrument—cases of emergency, cases not foreseen or provided for by the author of the trust, where the circumstances require that something should be done." But the Court will not in the exercise of its Extraordinary Jurisdiction sanction an unauthorised change of investment proposed on the mere ground that it will be to the advantage of the beneficiaries. *In re, Tollemache* (4).

These cases, it must be observed, are cases of change of investment, the principle being that the Court will not sanction an unauthorised change of investment except in cases of emergency. Kemp, J., treated the case as one of emergency, and he passed

(1) 25 B. 353; 3 Bom. L. R. 411.
(2) 49 Ind. Cas. 882; 43 B. 519; 21 Bom. L. R. 41.
(3) (1901) 2 Ch. 534 at p. 543; 70 L. J. Ch. 710; 50 W. R. 17; 85 L. T. 174.
(4) (1903) 1 Ch. 955; 72 L. J. Ch. 539; 88 L. T. 670; 51 W. R. 597 affirming (1903) 1 Ch. 457; 72 L. J. Ch. 225; 51 W. R. 568; 88 L. T. 13.

the order. He had the jurisdiction to make the order, and he made it. That being so, it seems to me that the order cannot be challenged except on the ground of "fraud or underhand dealing." *Gangapershad Sahu* v. *Maharani Bibi* (5). Neither of these two elements is present in this case.

But it was urged for the first defendant that the originating summons in the present case could not be distinguished from a suit for specific performance, and that a Court trying such a suit was entitled, in cases of title, to determine for itself whether the title was marketable, though the question of title might have been adjudicated upon in a previous suit. On the analogy of this principle it was urged that it was competent to me to go behind the order of Kemp, J., and determine whether the order was a right order to make on the facts of the case. Counsel for the first defendant also argued that the facts of the case were not such as gave jurisdiction to the Court to make the order. I proceed to examine these facts.

The said property was purchased by the two brothers in 1886. Part thereof was used by them for the business which they carried on as coach-builders and the rest was let out to tenants. Clause 2 of the Will of Lawrence is as follows:—

"I have my partnership business of coach-builders wherein my brother A. F. De Souza is my partner. The immoveable property in which the business is carried on is also partnership property. The said business has large debts which must be paid as soon as possible. *If considered necessary by the executors, the business or property or both might be sold.*"

The first part of para. 12 of the petition is as follows :

"The said coach factory business has ceased to be paying owing to increase in product and use of motor cars in India."

Clause (*b*) of para. 12 of the petition is as follows :

"The said two sons of A. F. De Souza (first and third plaintiffs) are now getting old and want to close the coach building business and return to Goa in their native place. They are anxious to get their shares forthwith and if no steps are taken by the petitioners to help in such realization by applying to the Honorable Court for the necessary sanction for the sale, the petitioners apprehend that the two sons of A. F. De Souza will file a suit for partition and there might be a litigation and even the present price may not be realized at a forced sale in such partition suit."

It was not suggested at the argument of the summons before me that the facts stated in para. 12 of the petition were not correct.

These then were the facts before Kemp, J., when he made the order. It was not as if the testator never contemplated a sale of his half share, for by cl. 2 of his Will he gave an express power to his executors to sell it if they thought it necessary. Moreover, if a suit for partition were instituted by the first and third plaintiffs, it is almost certain that if all the parties had applied for an order for sale, the Court would have made the order. A sale, therefore, was inevitable, and a change of investment was bound to take place. The question before Kemp, J., was whether it should be left to take place under a decree in a partition suit or whether it could be effected by an order of the Court in the exercise of its Extraordinary Jurisdiction. There would have been obvious injury to the beneficiaries if a sale was to take place under a decree of the Court, for at a Court sale the property would hardly have realised the price offered by the first defendant. Having regard to the special facts of the case, I am not prepared to say that Kemp, J., acted beyond his jurisdiction in making the order which he did, or that the order is otherwise invalid. I am not sure whether, when an express power of sale is given to an executor to be exercised by him when he thought it necessary, it ceases to operate when the executor on a complete administration of the estate ceases to be an executor. It was assumed throughout the argument that it does, and I have proceeded on that assumption.

The last point urged on behalf of the first defendant was that he contracted with the plaintiffs on the footing that they were absolute owners, and that the plaintiffs could not force upon him a title different to that he agreed to take. When the summons was first argued before me, Counsel for the first defendant stated that his client was quite prepared to complete the sale if only the title was marketable. The above objection to title was taken for the first time when I invited further argument on the summons on April 6.

(5) 12 I. A. 47 at p. 50; 11 C. 379; 4 Sar. P. C. J. 621; 9 Ind. Jur. 158; 5 Ind. Dec. (N. S.) 1012 (P. C.).

The objection raised is inconsistent with the readiness and willingness of the first defendant to complete the transaction. The first defendant, however, is entitled to take the point, and I proceed to consider it.

The first defendant, it may be observed, is an Attorney of this Court. There is no evidence to show whether the agreement was drafted by him or by his partner who has attested it. Clause 5 of the agreement for sale provides for the execution of the conveyance by "the vendors and all other necessary parties." Clause 6 of the agreement provides that "if any documents or orders of the Court are required to be obtained by the vendors for the clearance of the title or for the completion of their title to sell the costs thereof shall be paid by the vendors alone." It may be observed that the words "orders of the Court" do not occur in all agreements for sale of land. They are added only when there are minors or other persons under disability. I think those words were deliberately inserted in the agreement for sale to provide for the costs of the order empowering the second defendant to sell the moiety vested in him. It so appears also from the correspondence annexed to the plaint and put in evidence by Counsel for the first defendant. If that be so, it cannot be said that the plaintiffs are forcing a new contract on the first defendant or are substituting a new vendor. But even if they are, the conduct of the first defendant as disclosed by the correspondence is a complete answer to that contention.

It seems to be settled law that the title which the vendor must show must be a title in himself, or in those whom he has a legal or equitable right to require to join in the conveyance; he has no right to say that some other person is willing to enter into a contract, and to force the title of that other person on the purchaser: *In re Bryant and Barningham* (6), *In re Head's Trustees and Macdonald* (7). When a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, "I will have nothing to do with it," and he may repudiate the contract: *Forrer* v. *Nash* (8). This right of repudiation must be distinguished from the common law right of rescission, and arises out of that want of mutuality which, unless waived, is generally fatal to relief by way of specific performance. But the right must be exercised, if it is to be exercised at all, as soon as the defect is ascertained. If, after ascertaining the defect, the purchaser still treats the contract as subsisting, he does not retain the right to repudiate at any subsequent moment he may choose: *Halkett* v. *Dudley (Earl)* (9). Now assuming that the first defendant was entitled, immediately he came to know of the defect, to repudiate the contract, was such right exercised, or did he still continue to treat the contract as in operation? The answer is furnished by the correspondence. The correspondence leaves no doubt that at the date of said order the first defendant still continued to treat the contract as subsisting. For though by his Attorneys' letter of August 31, 1922, he purported to put an end to the agreement, he gave further time to the plaintiffs by his Attorneys' letter of Septemher 14, after the plaintiffs wrote to him stating that the petition was ready and that they would apply for an order immediately after they received the petition duly declared by the second defendant who was then at Karachi. The following is the material portion of the letter of September 14:—

"We do not agree with you that our client has no right to put an end to the contract as he has done. Without prejudice to the aforesaid contention and our client's right to terminate the contract as he has done, we are instructed, in order to leave no ground for complaint to your clients, to give them time up to the 15th proximo to make out a complete and marketable title to the property on the distinct understanding that the said date would be of the essence of the proposal, and if by that date the title is not made out, our client will not be bound to wait any longer and will be deemed to have terminated the contract."

The order was made on October 13, and the plaintiffs informed the first defendant about it, and asked for a draft conveyance.

(6) (1890) 44 Ch. D. 218; 59 L. J. Ch. 636; 63 L. T. 20; 38 W. R. 469.

(7) (1893) 45 Ch. D. 310 at p. 311; 59 L. J. Ch. 604; 63 L. T. 21; 38 W. R. 657.

(8) (1865) 35 Beav. 167; 6 N. R. 361; 11 Jur. (N. S.) 789; 14 W. R. 8; 55 E. R. 858; 147 R. R. 92.

(9) (1907) 1 Ch. 590; 76 L. J. Ch. 330; 96 L. T. 539.

On October 17, the first defendant's Attorneys wrote to the plaintiffs' Attorneys requesting information on certain points, namely, under what section of the Indian Trusts Act the order was made, and whether certain letters of theirs were brought to the notice of the Court. The plaintiffs' Attorneys replied stating that the order was made in the exercise of the Extraordinary Jurisdiction of the Court. The first defendant's Attorneys then enquired whether any cases in support of the application were brought to the notice of the learned Judge who made the order. The plaintiffs replied stating that the order having been made, the first defendant was bound to complete and there the correspondence ended. It is clear that the enquiry which the first defendant made from time to time would have been useless if the contract had been effectually repudiated: *Halkett* v. *Dudley (Earl)* (9). I, therefore, hold that the first defendant is now precluded from setting up the original want of mutuality in the contract.

All objections to title raised by the first defendant fail. The title, I hold, is marketable and it is free from reasonable doubt.

The first question is answered in the affirmative. Defendant No. 1 to pay plaintiffs' costs.

K. S. D. *Suit decreed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 303 OF 1923.

February 19, 1925.

Present:—Mr. Justice Mukerji and Mr. Justice Boys.

BANSIDHAR—PLAINTIFF—APPELLANT

versus

Musammat DULHATIA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expl. VI—Hindu Law—Alienation by widow—Suit by reversioner—Subseqnent suit by another reversioner, whether maintainable—Res judicata.

The reason of allowing a reversioner to challenge an alienation by a Hindu widow in the lifetime of the widow is that the reversioner sues not on his own behalf but on behalf of the entire body of reversioners, or the persons who would be the actual reversioners on the death of the widow. In other words, such a suit by a reversioner comes within the purview of Expl. VI to s. 11 of the C. P. C., and the decision in such a suit is binding on the entire body of reversioners. [p. 236, col. 1.]

Kesho Prasad Singh v. *Sheo Pargash Ojha*, 64 Ind. Cas. 248; 19 A. L. J. 749; 3 U. P. L. R. (A.) 117; 44 A. 19; (1922) A. I. R. (A.) 301, followed.

A reversioner of a deceased Hindu brought a suit to challenge an alienation effected by the widow of the deceased. It was held that a portion of the property alienated had become the absolute property of the widow by adverse possession and the suit was decreed with regard to the rest of the property. Subsequently another reversioner brought another suit to challenge the same alienation on the same grounds on which it was challenged in the previous suit:

Held, that the suit was barred by *res judicata* and the mere fact that the widow was holding a portion of the property in dispute not as a representative of her husband but in her own right was immaterial. [p. 237, col. 1.]

Second appeal from a decree of the Subordinate Judge, Banda, dated the 16th December 1922.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *Ram Nama Prasad*, for the Respondents.

JUDGMENT.—The question in this appeal is whether a former decision given against Sheo Mangal, a brother of the plaintiff, operates as *res judicata* or not.

The Courts below have held that it does operate as *res judicata* as regards a portion of the property in suit.

Briefly the facts are these:—

Ganesh Din was the owner of the property in suit. On his death a part of the property was recorded as held by his widow although his son Ram Partab survived him. After the death of Ram Partab the property which recorded in his name, being a portion of his father's property, was recorded in the names of his mother and a pre-deceased brother's widow. The mother of Ram Partab executed a deed of gift in favour of her daughter-in-law and this gave rise to the suit which was brought by Sheo Mangal.

Sheo Mangal sued as a possible reversioner to the estate and his case was that *Musammat* Dulhatia, the wife of Ganesh Din, was in possession of the property as a Hindu widow and had no right to execute a gift.

The defence, *inter alia*, was that the widow held adversely to the estate of Ganesh Din and had matured in herself an absolute title and was, therefore, competent to execute the deed of gift. This defence succeeded in respect of that portion of the property which had been recorded in *Musammat* Dulhatia's name

on the death of Ganesh Din. The suit succeeded in respect of that portion of the property which came to be recorded in the name of *Musammat* Dulhatia on the death of her son.

After the failure of Sheo Mangal, his brother Bansidhar started a fresh campaign of litigation on practically the same allegations as had been made by Sheo Mangal.

As stated above the question is whether the decree in Sheo Mangal's suit should or should not be treated as concluding Bansidhar's suit.

It has been conceded that this High Court in the case of *Kesho Prasad Singh* v. *Sheo Pragash Ojha* (1) held that the justification of allowing a reversioner to sue in the life-time of the widow was this that he was suing not on his own behalf but on behalf of the entire body of reversioners or the person who would be the actual reversioner on the death of the widow. In other words it was held that a suit by a reversioner came within the Expl. VI of s. 11 of the C. P. C. This judgment, which was of a Full Bench, was upheld by the Privy Council. The judgment is reported as *Kesho Prasad Singh* v. *Sheo Pragash Ojha* (2). On the face of it, the principle of these two rulings should apply.

The learned Counsel for the appellant has sought to distinguish the case on two grounds :—

First, he said that there are observations in the judgment of the Privy Council which show that where the reversioner's suit fails, a second suit by a different reversioner would not be barred as *res judicata*. As to this arugument we are of opinion that there is nothing in the judgment of the Privy Council which can support it. Their Lordships make the following remarks: "Their Lordships, of course, recognise that the principle is less obviously just where it operates to bind the ultimate reversioners by the result of a suit in which a plaintiff had failed whose interest, then merely presumptive, never ultimately matured. The danger of a feigned issue in such a suit is not to be overlooked".

In our opinion their Lordships gave the reason for holding why in the case of a failure of a reversioner's suit, the question whether or not the decree would bind the ultimate reversioner was not always capable of the same answer. To our mind their Lordships had in their view the case of a reversioner colluding with a transferee, for the simple reason that he was not certain whether the property was going to vest in him or not ultimately. Their Lordships expressly mention cases of fraud and collusion in continuation of the remarks already quoted. Looking to the principle of the decision we are of opinion that the case before us is entirely governed by the observations of the Privy Council and the decision of this Court. No question of collusion or fraud on the part of Sheo Mangal has been raised before us.

Sheo Mangal's suit was either a representative suit or it was not. If it is not a representative suit Bansidhar's suit is not equally representative one. Because there is no difference between the two suits in any respect at all. If Bansidhar's suit is not a representative suit there is no reason why he should be allowed to maintain one on his own account. If the suit of Bansidhar is not a representative suit the result of the suit will not bind the ultimate reversioner. If that be the case there is no ground for allowing Bansidhar to maintain this suit.

Again, if Bansidar's suit be a representative suit, the suit of Sheomangal must be treated as having been a representative suit. If Sheo Mangal's suit was a representative one the decree must bind Bansidhar also.

There is another aspect of the case. Supposing that Bansidhar's suit succeeds on the merits, the result would be that, say ten years hence, when the actual reversion opens out, there will be two conflicting judgments for the actual reversioner and the transferee to meet. The question would arise which of the two judgments should operate as *res judicata*. The learned Counsel for the appellant argued that the latter judgment should operate as *res judicata* ; but it is always necessary to avoid conflicting judgments and this Court cannot allow

(1) 64 Ind. Cas. 248; 19 A. L. J. 749; 3 U. P. L. R. (A.) 117; 44 A. 19; (1922) A. I. R. (A.) 301.

(2) 82 Ind. Cas. 962; 46 A. 831; (1924) A. I. R. (P. C.) 247; 10 O. & A. L. R. 1105; 40 C. L. J. 461; 47 M. L. J. 824; 51 I. A. 881; 23 A. L. J. 168; 27 Bom. L. R. 130; 21 L. W. 295; 1 O. W. N. 640; L. R. 6 A. (P. C.) 1; 29 C. W. N. 606 (P. C.).

two contradictory judgments to come into existence.

In our opinion, therefore, the judgment previously obtained against Sheo Mangal should operate as *res judicata*.

The second ground urged by the learned Counsel for the appellant was that the transferee and the transferor both urged that *Musammat* Dulhatia was not holding as a representatative of Ganesh Din but was holding in her own right. This consideration, argued the learned Counsel, took the case entirely out of the purview of the cases quoted above. In our opinion the nature of the defence cannot alter the nature of the suit.

The appeal fails and it is hereby dismissed with costs which will include in this Court. Counsel's fee on the higher scale.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1046 OF 1924.

November 15, 1924.

Present:—Mr. Justice Martineau.

RELU MAL—PLAINTIFF—APPELLANT

versus

MASITI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expl. IV—Mortgages, simple and usufructuary—Suit to redeem usufructuary mortgage—Failure of mortgagee to set up simple mortgage in defence—Res judicata.

Plaintiff held two mortgages in respect of a house, the earlier mortgage being a simple one and the later a usufructuary one. Defendant, who was the purchaser of the equity of redemption of the house, sued plaintiff for possession of the house by redemption of the later mortgage, which was a usufructuary mortgage, and obtained a decree. Subsequently plaintiff brought a suit to recover the amount of the simple mortgage from the defendant and the latter pleaded that as the plaintiff had not set up the simple mortgage in his defence to the prior suit he was barred by the 4th Explanation to s. 11 of the C. P. C., from suing on it:

Held, that as the earlier mortgage which was the subject-matter of the present suit was a simple mortgage and defendant could not in that suit have been compelled to pay the amount due thereon before he could obtain possession of the house, the failure of the plaintiff to set up the mortgage in defence to the earlier suit did not operate as *res judicata* so as to debar him from suing to recover the amount due under that mortgage.

Phula Singh v. *Bur Chand*, 39 Ind. Cas. 250; 60 P. W. R. 1917, relied on.

First appeal against the decree of the District Judge, Karnal, dated the 19th January 1924, reversing that of the First Class Munsif, Karnal, dated the 22nd December 1922.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Ghulam Mohyuddin*, for the Respondent.

JUDGMENT.—In this case Relu Mal sued Masiti for Rs. 1,000 due on a simple mortgage-deed executed in favour of Relu Mal's father Mithan Lal in 1910. The deed was executed by Karam Ali, and his mother Ajjo sold the equity of redemption of the mortgaged house to Masiti in 1919.

The Trial Court gave the plaintiff a decree but the District Judge has dismissed the suit holding it to be barred by the rule of *res judicata* and the only question in this second appeal is whether the suit is so barred.

In 1919 Masiti, after purchasing the equity of redemption, sued Relu Mal for redemption of a mortgage which had been effected by Karam Ali and Ajjo in favour ot Mithan Lal in 1911 in respect of the same house which had been the subject of the mortgage of 1910 and obtained a decree, and the learned District Judge holds that as Relu Mal did not plead the mortgage of 1910 in his defence to that suit he is barred by the 4th Explanation to s. 11 of the C P. C. from setting up the mortgage in the present suit. This view is not correct as the mortgage of 1911 was a usufructuary mortgage and Masiti's suit was for possession of the house by redemption of that mortgage whereas the mortgage of 1910 was a simple mortgage and Masiti could not have been compelled to pay the amount due thereon before he could obtain possession of the mortgaged property. *Phula Singh* v. *Bur Chand* (1) is applicable to the case. Another point to be observed is that Karam Ali had in 1903 sold the house to his mother so that Masiti's claim on the mortgage effected by Karam Ali in 1910 involved the question whether Karam Ali was then the owner of the house and competent to mortgage it, a question which did not arise in respect of the mortgage of 1911 to which both Karam Ali and Ajjo were parties. I hold, therefore, that s. 11 of the C. P. C. does not bar the suit.

It has been found that the mortgage of

(1) 39 Ind. Cas. 250; 60 P. W. R. 1917.

1910 was for consideration, and that the sale by Karam Ali to his mother in 1903 was fictitious and those findings are not in dispute.

I accept the appeal reverse the decree of the lower Appellate Court, and restore that of the Court of first instance. The respondents will pay the appellant's costs in all the Courts.

Z. K. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 8 OF 1923.

September 5, 1924.

Present:—Mr. Wazir Hasan, A. J. C., and Mr. Neave, A. J. C.

RAMESHWAR BAKHSH SINGH—PLAINTIFF—APPELLANT

versus

Musammat RIDH KUER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 31, 48—Civil Procedure Code (Act V of 1908), O. XXXII, r. 4—Guardian, certificated, whether can alienate minor's property without sanction of Court—Benefit of minor—Natural guardian—Sanction of Court—Procedure, defective, effect of—Guardian ad litem, *appointment of—Presumption—Consent of guardian, whether necessary—Negligence of guardian—Minor, whether bound by decree.*

Once a person, whether he is a natural guardian or a stranger, is appointed guardian of a minor by order of the Court passed in accordance with the provisions of the Guardians and Wards Act, he is clothed with all the obligations imposed by that Act in dealing with the ward's property. It is not in his power to throw off those obligations by the exercise of his own volition and to pose as a natural guardian and act in that status. [p. 241, col. 2.]

An alienation of the minor's property by his guardian without the sanction of the Court cannot be upheld on the ground that the guardian happened to be the father of the minor and that the alienation was for the benefit of the latter. [p. 242, col. 1.]

An order passed by a Court in violation of such rules of procedure, however mandatory, as relate merely to the form of the order cannot be treated as a nullity. The omission to follow such rules of procedure can amount to no more than a mere irregularity or material irregularity in the circumstances of a particular case. On the other hand, an order passed by a Court in violation of such rules of procedure, the observance of which alone invests the Court with jurisdiction to pass the order, is a nullity. [p. 242, col. 2.]

The violation of the procedure prescribed by sub-s. (2) of s. 31 of the Guardians and Wards Act for recording an order granting permission to a guardian to alienate the minor's property, cannot be made the ground for brushing aside the finality of the order sanctioning the alienation which is provided for by s. 48 of the Act. The only condition by which the finality prescribed by s. 48 can be avoided is to establish that the order granting the permission was a nullity. [*ibid.*]

A transferee of a minor's property from the guardian of the minor cannot be made to suffer for defects in the procedure relating to the sanction of the alienation by the Court. The order of the Court granting the sanction is sufficient for his protection. [*ibid.*]

The presumption that judicial acts have been regularly performed applies to the acts of the Court alone. Where, therefore, it appears from the record of a suit that a minor defendant was represented by a guardian *ad litem* it might be presumed that the necessary notices were issued and that a formal order appointing the guardian *ad litem* was drawn up, but there can be no presumption that the person who was named as the guardian *ad litem* of the minor defendant was a fit person to be appointed guardian. [p. 243, col. 1.]

Where a question arises whether a minor is bound by the result of a previous suit or not, it is open to the Court which is investigating the point to enquire as to whether the person who was named as the guardian *ad litem* of the minor in the previous litigation was or was not a fit person to be appointed guardian. [*ibid.*]

Sub-rule (3) of r. 4 of O. XXXII of the C. P. C. lays down that no person shall, without his consent, be appointed guardian *ad litem* for a minor defendant. A person who is named as guardian *ad litem* of a minor defendant but does not appear in the suit cannot be said to have consented to be appointed guardian. [*ibid.*]

A minor is as much bound by a judgment in his own action as if he were a person of full age unless he can establish gross *laches* or fraud and collusion on the part of his guardian. [p. 244, col. 1.]

The omission of a guardian *ad litem* to raise a defence on behalf of his ward which he might and ought to have raised does not preclude the ward from raising that defence in a subsequent suit. [p. 245, col. 2.]

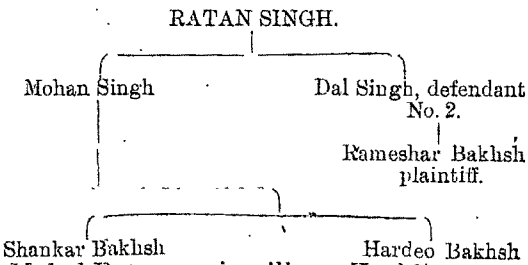
Case-law referred to.

Appeal against the decree of the First Subordinate Judge, Sitapur, dated the 16th September 1922.

Mr. *Muhammad Siddique*, for the Appellant.

Messrs. *Haider Husain* and *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal. It will be convenient to give a short pedigree at the outset.



Mahal Ratanpur in village Kachkapur in the District of Sitapur was the property of

the descendants of Ratan Singh and comprised 380 *bighas* 2 *biswas* land. Early in 1894 the *mahal* was divided into two shares between Dal Singh and the descendants of Mohan Singh. This partition was founded on an award (Ex. 40), which was followed by a decree of Court (Ex. 41). By this decree separate allotments were made in equal shares to Dal Singh on the one hand and Shankar Bakhsh and Hardeo Bakhsh on the other (Exs. 42, 43, 45 and 46). Shankar Bakhsh and Hardeo Bakhsh also obtained 15 *bighas* 16 *biswas* of land in excess of their half share by way of *jethansi* rights. The whole *mahal* was denoted by the unit of 20 *biswas* and each moiety consequently represents 10 *biswas*. In 1884 Dal Singh, Shankar Bakhsh and Hardeo Bakhsh together had mortgaged with possession 10 *biswas* of the entire *mahal* and also 7½ *bighas* of the *jethansi* lands to one Jawahir Singh. It follows that after the mortgage in favour of Jawahir Singh each branch of Ratan Singh's family was left with a 5 *biswas* share in the *mahal* and Mohan Singh's branch with half of the *jethansi* lands in addition thereto. Jawahir Singh subsequently made a gift of his rights under the mortgage to his daughter, *Musammat* Jeo Kuar. On the death of *Musammat* Jeo Kuar in 1912 her daughter, *Musammat* Ridh Kuar, succeeded to those rights and she is the chief defendant in the suit. It may be mentioned that prior to 1894 other alienations by way of mortgages were made by Dal Singh but as those alienations have no bearing on the decision of the case before us it is not necessary to state them with detail in this judgment, except the possessory mortgage of the 12th May 1893 in favour of Udenath and Sita Ram, which will be noticed again at its proper place. According to the finding of the lower Court, which was accepted by both the parties before us, the plaintiff was born on the 4th or 5th November 1899. On the 20th July 1900 Dal Singh sold his remaining 5 *biswas* share under the sale-deed of that date (Ex. A-2) to Kewal Singh and others and on the 28th February 1901 Shankar Bakhsh and Hardeo Bakhsh sold their remaining share of the *mahal*, that is 5 *biswas* and also 7 *bighas* 10 *biswas* of the *jethansi* lands, to the same Kewal Singh, who was one of the purchasers under the sale-deed of the 20th July 1900 executed by Dal Singh. On the 24th June 1901 *Musammat* Umrai Kuer, mother of the plaintiff, acting as his next friend, filed a suit on behalf of her minor son, the plaintiff to pre-empt the sale of the 20th July 1900 effected by Dal Singh and a similar suit was filed on the 27th February 1902 by the same lady, acting in the same capacity, to pre-empt the second sale of the 28th February 1901 (Exs. A-4 and A-6). Both these suits were decreed, the former by the judgment dated the 24th February 1902 (Ex. A-5) and the latter by the judgment dated the 4th November 1902 (Ex. A-7). There were appeals against these judgments but without any success. It will be seen that by virtue of the pre-emption decrees the plaintiff reacquired the 5 *biswas* share of his branch of the family and a similar share belonging to the other branch together with 7½ *bighas* of the *jethansi* lands appertaining to the latter share.

Dal Singh was appointed by the Court of the District Judge of Sitapur guardian of the person and property of his minor son, Rameshar Bakhsh, plaintiff. Acting in that capacity and after having obtained the sanction of the District Judge, Dal Singh executed a deed of a mortgage on the 1st April 1905 in favour of *Musammat* Jeo Kuar for a sum of Rs. 10,000 (Ex. A-10). This loan was raised to satisfy the pre-emption decree of the 4th November 1902 and the previous mortgage of the 12th May 1893 and was to carry interest at the rate of 6 per cent. per annum which the mortgagor undertook to pay six monthly and in the event of default compound interest at the same rate. There was a further covenant that if interest for two consecutive instalments remained unpaid the mortgagee would be entitled to enter into the possession of the mortgaged property and to continue in that possession for a period of 15 years and if no redemption took place at the end of 15 years the mortgage shall be foreclosed. The larger pre-emption decree was satisfied on the 3rd April 1905 with the aid of the money borrowed under the deed of mortgage just now mentioned and the smaller one with the money furnished by the plaintiff's mother, who died soon after. On the 5th August 1909 the defendant No. 1 redeemed the mortgage of the 12th May 1893 by payment of the sum of Rs. 3,000 to the mortgagee (Ex. A-11). Default was made in payment of interest with the result that the mortgagee entered into possession of the property at the end of August 1910,

This finishes the narrative of facts in respect of one of the causes of action on which the present suit is founded. The plaintiff's case is that the mortgage of the 1st April 1905 was executed by Dal Singh without a valid sanction having been obtained in respect of the transfer from the Court of the District Judge of Sitapur and further that the mortgage in question does not embrace any *jethansi* lands and consequently the defendant No. 1 is in possession thereof without any title whatsoever.

It appears that *Musammat* Jeo Kuar was also a *lambardar* of the village, and as we have seen before, she was in possession as a mortgagee of half of the *Mahal* Ratanpur under the mortgage of 1884 and, as we have further seen, she entered into possession of the other half as well under the mortgage of the 1st April 1905. She was, however, not in possession of the latter share till August 1910. Between the date of the satisfaction of the pre-emption decree *Musammat* Jeo Kuar and the date of the possession of the defendant No. 1, nominally the plaintiff but actually his father, Dal Singh, was in possession of the 5 *biswas* share and half of the *jethansi* lands appertaining thereto. On the date of those decrees the plaintiff was an infant 3 years old. It appears that the mortgagee *Musammat* Jeo Kuar, either in the capacity of a *lambardar* or in consequence of the mortgages in her favour had to pay to the Government a sum of Rs. 68-9-0 on account of arrears of revenue for the period preceding her possession as a mortgagee under the deed of the 1st April 1905. To recover this amount she filed a suit in the Rent Court against the plaintiff and obtained a decree therein on the 15th December 1911. The record of that suit has been weeded in its entirety. A copy of the decree seems to have been filed by the defendant No. 1 in a suit which she had brought in 1918 against Dal Singh and others in the Court of the Subordinate Judge of Kheri. That copy is still on the file of that case and was looked into by the Court below. The decree purports to have been passed *ex parte* against the plaintiff under the guardianship of Dal Singh. The plaintiff's case is that he was not properly and in accordance with law represented in the suit which culminated in the decree of the 15th December 1911 and has consequently suffered great injury.

The decree of the Rent Court dated the 15th December 1911 though trifling in amount was not satisfied by Dal Singh. The defendant No. 1 then proceeded to execute it with the result that she brought the entire 10 *biswas* share and also 7½ *bighas* of *jethansi* lands, according to her allegations, to sale and purchased them herself in an auction on the 21st June 1915 in lieu of the amount of the decree. The sale certificate dated the 27th July 1915, which she obtained is exhibited in suit as A-29. It will be seen from what has been stated before that the defendant No. 1 had already had possession of the property which she purchased on the 21st June 1915 for over three years and what she purchased on that date was the equity of redemption which had been left to the plaintiff after the mortgage of the 1st April 1905. The plaintiff's case is that he is not bound by the sale as it was the result of gross negligence on the part of his guardian, Dal Singh.

The appeal, therefore, involves the following four points for determination:—

1. Does the mortgage of the 1st April 1905 cover 7½ *bighas* of *jethansi* lands?
2. Was the sanction accorded by the District Judge of Sitapur for that mortgage a valid sanction, if not, is the mortgage otherwise binding on the plaintiff?
3. Was the plaintiff properly represented in the rent suit?
4. Was Dal Singh, the plaintiff's guardian, guilty of gross negligence in connection with the rent suit and in allowing the sale of the plaintiff's title in the property in suit in execution of the decree of the 15th December 1911?

It may be mentioned that besides the defences involved in the questions set out above the defendant No. 1 also pleaded that the suit was barred by the rule of *res judicata*. This plea has been decided by the Court below against the defendant but it was again pressed on her behalf upon us at the hearing of the appeal. We are, therefore, called upon to give our opinion on that plea as well.

Point No. 1.—In agreement with the Court below we have come to the conclusion that the deed of mortgage of the 1st April 1905 must be interpreted in accordance with the defendant's contention. The sale-deed executed by Shankar Bakhsh and Hardeo Bakhsh on the 28th February 1901 (Ex. A-3) expressly includes 7 *bighas* 10 *biswas*

of *jethansi* lands. The plaintiff in the pre-emption suit relating to that sale also in express terms claimed relief for possession of the 7 *bighas* 10 *biswas* of the *jethansi* lands besides the 5 *biswas* share of the *mahal* (Ex. A-6) and the judgment in that suit expressly embraces the relief for possession of the 7 *bighas* 10 *biswas* of *jethansi* lands. This judgment, as we have said before, is of the 4th November 1902. The mortgage of the 1st April 1905 (Ex. A-10) refers in its preamble to the pre-emption judgment by its date and describes it as being in respect of 5 *biswas* of *Mahal* Ratanpur. It is not disputed that the 5 *biswas* of *Mahal* Ratanpur, which originally belonged to Shankar Bakhsh and Hardeo Bakhsh, were transferred by the mortgage under consideration and it is quite clear on the facts of the case that the *jethansi* lands appertained to that share. It is clear, therefore, that the moiety of the *jethansi* lands was intended to be mortgaged and did pass with the mortgage of the share to which it appertained.

Point No. 2.—The evidence on this part of the case is as follows:—On the 21th March 1905 Dal Singh presented a petition (Ex. A-8) to the District Judge of Sitapur under the provisions of the Guardians and Wards Act (VIII of 1890) asking for permission to make the mortgage in question. In this petition he recited the pre-emption decree of the 4th November 1902 and the minor's liability to pay thereunder the sum of Rs. 5,575, the fact that under the decree of the Court of Appeal the amount was payable up to the 3rd April 1905 and the further fact of the existence of the previous mortgage in favour of Udai Nath and Sita Ram in lieu of Rs. 3,000 (that is the mortgage of the 12th May 1893). On the 31st March 1905 the District Judge passed the following order:—"Approved." (Ex. A-9). This is all the evidence bearing on the point. The Trial Judge has held "the order of sanction was not a legal order which can be pleaded as a sufficient sanction for the transfer by the guardian." To this finding we will address ourselves later because it has been challenged at the hearing of the appeal by the learned Counsel for the respondents. Having given that finding the learned First Subordinate Judge proceeded to discuss the question as to whether the transfer was or was not for the benefit of the minor. Having found that it was he upheld it. With this view we are unable to agree. If the sanction accorded by the District Judge is held to be not legal the transaction must fall through otherwise the whole object of the enactment contained in ss. 28 to 31 of the Guardians and Wards Act will be stultified. Once a person, natural guardian or a stranger, is appointed guardian of a minor by order of the Court passed in accordance with the provisions of the Act mentioned above he is clothed with all the obligations imposed by that Act in dealing with the ward's property. It is not in his power to throw off those obligations by the exercise of his own volition and pose as a natural guardian and act in that status. The view adopted by the Court below seems to be supported by a decision of the High Court at Allahabad in the case of *Tejpal* v. *Ganga* (1) but is opposed to the opinion expressed in the case of *Shib Lal* v. *Sham Das* (2) decided by the former Chief Court of the Punjab. Our opinion is supported also by the decision of the Allahabad High Court in a later case of *Ram Chandra* v. *Chheda Lal* (3). We think, however, that the point is concluded by a recent decision of their Lordships of the Privy Council in the case of *Ganesha Row* v. *Tulja Ram Raw* (4). In the case just now mentioned the guardian *ad litem* of a minor defendant entered into a compromise without the previous sanction of the Court as required by the provisions of s. 462 of the old C. P. C. The guardian was the father of the minor and was a defendant in the suit in his own right as well. It was contended that the compromise was not *ultra vires* of the power of a Hindu father. The view taken in the Courts in India was that the guardian "in entering into the compromise acted in his personal capacity which he was competent to do as his appointment as guardian *ad litem* would not deprive him of his capacity to act on his own behalf and that as the money was made payable to him only as the representative of the family of which he is the head, the compromise he entered into

(1) 25 A. 59; A. W. N. (1902) 192.
(2) 47 Ind. Cas. 253; 61 P. R. 1918; 162 P. W. R. 1918; 110 P. L. R. 1918.
(3) 2 A. L. J. 460; A. W. N. (1905) 122.
(4) 19 Ind. Cas. 515; 40 I. A. 132; 17 C. W. N. 765, 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 36 M. 295 (P. C.).

will be binding on the other members, including the plaintiff (minor) only if it is a *bona fide* compromise of a disputed claim." This view was repelled by their Lordships in the following observations: "How far the acts of a father or managing member may affect a minor, who is a party to the suit represented by another person as next friend or guardian *ad litem*, is a question which does not arise in the case, and their Lordships are not called upon to express an opinion on it. But they consider it to be clear that when he himself is the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment." The transaction of mortgage now in question cannot, therefore, be upheld on the ground that it was entered into by the father of the plaintiff and was for the benefit of the latter. It must stand or fall with the Judge's sanction.

The finding of the Court below that the sanction accorded by the District Judge of Sitapur on the 31st March 1905 in respect of the mortgage in question is 'not legal and sufficient' is based on two Single Judge's decisions of this Court in *Gopal* v. *Mahtaba* (5) and *Banke Lal* v. *Swami Dayal* (6). The first case came before this Court in revision against the order granting the sanction. This Court was, therefore, competent in the exercise of its revisional jurisdiction to correct any error of law or procedure amounting to an illegality or material irregularity under the provisions of s. 622 of the old C P. C. The learned Judge who decided the case was not called upon to consider and did not consider the effect of the bar created by s. 48 of the Guardians and Wards Act. In the case of *Banke Lal* v. *Swami Dayal* (6), the view taken in the first mentioned case as to the mandatory nature of the provisions of sub-s. (2) of s. 31 of the same Act was followed and no reference seems to have been made to s. 48. These cases are, therefore, not of much help to us. The argument before us by the learned Counsel for the appellant has proceeded on the same lines as the judgment in the case of *Gopal* v. *Mehtaba* (5). As regards the mandatory character of the provisions of sub-s. (2) of s. 31 of the Act, we are quite clear in our mind that the violation of the procedure prescribed by that sub-section for recording the order granting the permission cannot be made the ground of brushing aside the finality of the order as enacted by section 48. The only condition in which the finality prescribed by s. 48 can be avoided is to establish that the order granting the permission was a nullity. An order passed by a Court in violation of such rules of procedure, however, mandatory as relate merely to the form of the order cannot be treated as a nullity. The omission to follow such rules of procedure can amount to no more than a mere irregularity or a material irregularity in the circumstances of a particular case. On the other hand, an order passed by a Court in violation of such rules of procedure as the observance of which only invests the Court with jurisdiction to pass the order is a nullity. The first proposition is illustrated by the case of *Malkarjun* v. *Narhari* (7) and the second by *Raghunath Das* v. *Sundar Das Khetri* (8). In the present case there is no question of the absence of jurisdiction. Section 31, sub-s. (1), of the Guardians and Wards Act lays down the conditions on the existence of which alone permission shall be granted. In view of the contents of the application presented by Dal Singh and the interval between it and the order we must presume that the Court was of opinion that those conditions existed in the case before it. That is enough for our purposes—see *Rameshwar Singh* v. *Dhanpat Singh* (9). Sub-section (2) relates to the form of the order granting the permission, to enquire into the propriety of which we are now debarred by the provision of s. 48 of the Act. Obviously the transferee cannot be made to suffer for defects of procedure. For his protection the order of the Court is sufficient—see *Gangapershad Sahe* v. *Maharani Bibi* (10). On

(5) 2 Ind. Cas. 237, 12 O. C. 78.
(6) 53 Ind. Cas. 328, 23 O. C. 72; 7 O. L. J. 207; 2 U. P. L. R. (O.) 82.
(7) 27 I. A. 216; 25 B. 337; 2 Bom. L. R. 927; 5 C. W. N. 10; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).
(8) 24 Ind. Cas. 304; 42 C. 72; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 159; 16 M. L. T 353; (1914) M. W. N. 747; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154; 41 I. A. 251 (P. C.).
(9) 5 Ind. Cas. 334; 11 C. L. J. 197.
(10) 11 C. 379; 12 I. A. 47; 4 Sar. P. C. J. 621; 9 Ind. Jur. 158; 5 Ind. Dec. (N. s) 1012 (P. C.).

these grounds we hold that there was a valid permission and, therefore, the mortgage of the 1st April 1905 is binding on the plaintiff.

Point No. 3.—The record of the rent suit seems to have been altogether destroyed in June 1918 (Ex. A-33) and the only material, which we have before us, is a certified copy of the decree passed in that suit, which copy, as we have said before, was filed by the defendant No. 1 in a suit which she had brought against Dal Singh and the plaintiff in the year 1918 in the Court of the Subordinate Judge of Kheri. That copy proves the following facts.

1. That the suit was instituted against the plaintiff under the guardianship of his father, Dal Singh.

2. That Dal Singh did not put in appearance.

3. That consequently an *ex parte* decree was passed in favour of the defendant No. 1 and against the plaintiff.

4. That the decree was for a sum of Rs. 68-9-0 on account of arrears of revenue for the years 1315 to 1317 *Fasli*.

On this foundation the Court below has raised the presumption that the procedure prescribed by O. XXXII, r. 3, of the C. P. C., was observed—*Omnia præsumuntur rite et esse acta*. This presumption must be applied to the acts of the Court alone. We will, therefore, presume that the necessary notices were issued and that the formal order appointing Dal Singh guardian *ad litem* of his minor son, the present plaintiff, was drawn up; but in the circumstances of the present case we find it very difficult to raise any further presumption. We cannot possibly hold on the basis of mere presumption, that Dal Singh was a fit person to be so appointed. During the period for which the revenue fell into arrears Dal Singh was in actual possession of the plaintiff's property and the arrears must be attributed to his mismanagement. The defendant No. 1 was in possession of the other 10 *biswas* of the *mahal*. She was also the *lambardar*. It is, therefore, reasonable to presume that she was aware of the precedent mismanagement of the minor's property by his guardian Dal Singh. Three years before the date of the rent suit Dal Singh had delivered possession of the 10 *biswas* now in suit to the defendant No. 1. This was done amicably as is shown by the pleadings in the case. It is difficult to believe in the circumstances that any liability for the revenue of the minor's share was left outstanding at the amicable settlement. Nor is it possible to entirely dissociate the defendant No. 1's claim for the arrears of revenue from her position as a mortgagee in possession under the deed of the 1st April 1905 executed by Dal Singh himself. In the year 1900 Dal Singh had sold the 5 *biswas* share to Kawal Singh and that was the only share left after the mortgage of 1884. It was the plaintiff's mother who recovered it by means of the suit for pre-emption and payment of the decree in that suit. On these grounds we hold that Dal Singh though a guardian appointed by a competent authority was not a fit person to be appointed guardian *ad litem* of his minor son, the plaintiff, in the rent suit. As pointed out just now with reference to several incidents, the minor's interest clashed with that of his guardian. Sub-rule (1) of r. 4 of O. XXXII of the C. P. C., laying down the qualification of a person who could act as a guardian for the suit has an important proviso attached to it and it is as follows:—"Provided that the interest of such person is not adverse to that of the minor." We are of opinion that there is no legal bar to our entering into the inquiry as to whether Dal Singh was or was not a fit person to be appointed guardian *ad litem* for this minor, Rameshar Bakhsh. The question raised in the present case is as to whether the plaintiff was or was not properly represented in the rent suit. That such a question can be raised is beyond any doubt and it follows that with a view to determine that question we must have the power to enter into the inquiry stated above. Further sub-r. (3) of r. 4 of O. XXXII of the C. P. C., lays down that no person shall without his consent be appointed guardian *ad litem* for the suit. It has already been stated that Dal Singh did not appear in the suit. There is, therefore, no conduct of his from which we could have inferred that he gave his consent to be so appointed. This, in our judgment, is a serious defect and as the plaintiff has eventually suffered great injury, as will show hereafter, the defect cannot be condoned. In the course of his arguments the learned Counsel for the respondents cited the decision of their Lordships of the Privy Council in the case of *Walian* v. *Banke Behari Pershad Singh* (11). We think, however, that the decision in that case is

(11) 30 I. A. 182; 30 C. 1021; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.).

of no help to us. In that case though no formal order appointing the mother of the plaintiffs to be their guardian *ad litem* was drawn up and though service of summons on the infants and the guardian was not proved yet it was held on facts that the mother did act in the proceedings of the suit and it was not shown that the minor's interests were not duly protected. In the present case we have shown, in the first place, that Dal Singh was not a proper person to be appointed guardian in the rent suit and we have also pointed out the entire absence of any act on the part of Dal Singh in relation to the proceedings of that suit. On these grounds we hold that the plaintiff was not properly represented in the rent suit of 1915.

Point No. 4.—The point which we now propose to decide is clearly covered by the latter part of Issue No. 7 and Issue No. 9. The general principles which should govern the decision of this part of the case are not in doubt. In *Gregory* v. *Molesworth* (12), Lord Hardwicke said that "it was right for Courts of Equity to follow the rule of law, where it was held, an infant is as much bound by a judgment in his own action as if of full age; and this is general, unless gross *laches* or fraud and collusion appear in the *prochein amy*, then the infant might open it by a new bill." A decree may be impeached where there has been gross negligence by the guardian in the conduct of the infant's case—Simpson on the Law of Infants, Second Edition, page 512. Reference is made in that book to the decision of Sir R. Mallins, Vice-Chancellor, *In re Hoghton*, *Houghton* v. *Fiddey* (13). The learned Vice-Chancellor made the following observation:—"The question which I have to decide is, whether this infant, on whose behalf a decree was taken by consent in 1867, is to suffer by any negligence or want of knowledge on the part of her then next friend. I am clearly of opinion she cannot be called upon to endure that inconvenience." It is equally clear that if the negligence of the guardian results in injury to the infant the infant is entitled to redress. In the same judgment the learned Vice-Chancellor said:—"However that may be, the proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her next friend is so monstrous that I cannot pay attention to it." This rule of law has been constantly applied to cases arising in this country. In the case of *Kylash Chunder Sircar* v. *Gooroo Churn Sircar* (14), Jackson and Glover, JJ., said:—"On this we observe that, when Goluck Monee instituted the suit on behalf of Kylash, the latter was a minor, and there is no law that prevents a minor, when he comes of age, suing in his own name for anything that his guardian, either through ignorance or negligence has omitted to prosecute. If this were the law no minor would be safe and we do not see how Kylash, when he attained majority, was debarred from claiming, and that in the suit originally instituted by his guardian, such property as that guardian had omitted in the schedule of plaint." The cases mentioned above were relied upon by two learned Judges of the Calcutta High Court in the case of *Sheo Churn Lal* v. *Ramnandan Dobey* (15) and this case was followed by the High Court of Bombay in *Cursandas Natha* v. *Ladkavahu* (16). Further "the relation of guardian and ward is strictly that of trustee and *cestui que trust*... It is a peculiar relation of trusteeship... A guardian is not only a trustee of the property, as in an ordinary case of trustee, but he is also the guardian of the person of the infant with many duties to perform, such as to see to his maintenance and education." Per Lord Romilly *Mathew* v. *Brise* (17). Section 20, sub-s. (1) of the Guardians and Wards Act, 1890, says that a guardian stands in a fiduciary relation to his ward. These being the general principles we have next to see how far they apply to the facts of this case.

As to the value of the property in suit the finding of the Court below is that it was about Rs. 1,300 at the time of the rent suit. It further points out that the property had an incumbrance of Rs. 10,000 at the time and, therefore, the equity of redemption was slightly over Rs. 3,000. Both sides have disputed the correctness of this finding. The appellant wishes to establish that the value of the property was much more than Rs. 13,000. On the other hand, the respondent No. 1 contends that the lower Court has erred in calculating the value of the incumbrance by omitting the amount of

(12) (1747) 3 Atk. 625; 26 E. R. 1160.
(13) (1874) 18 Eq. 573; 43 L. J. Ch. 753; 22 W. R. 851
(14) 3 W. R. 43.
(15) 22 C. 8; 11 Ind. Dec. (N. S.) 7.
(16) 19 B. 571; 10 Ind. Dec. (N. S.) 381.
(17) (1851) 14 Beav. 341 at p. 345; 51 E. R. 317; 92 R. R. 130.

interest due for the period prior to possession. We, however, accept the finding of the learned First Subordinate Judge as proper in the light of the evidence which he has examined in detail. At any rate the value of the equity of redemption was accepted by the defendant No. 1 to be Rs. 3,286 in the execution proceedings and this was the value which was set forth for the purposes of the auction.

There is nothing certain on the record in what right the defendant No. 1 claimed the sum of Rs. 68-9-0 from the plaintiff. On the date of that suit she occupied the position of the *lambardar* of the whole *mahal* but she was also a mortgagee in possession of the other half of the *mahal* and the 5 *biswas* of the *mahal* now in suit were in the possession of Udenath and Sitaram under their mortgage of the 12th May 1893 during the period for which the revenue had fallen into arrears. More than three years before the institution of the rent suit the defendant No. 1 had come into the possession of the entire 10 *biswas* and the moiety of the *jethansi* lands in virtue of her own mortgage of the 1st April 1905. In these circumstances and at this distant date we are unable to be so sanguine as the Court below obviously is that there was no defence for Dal Singh to make on behalf of his infant son against the claim of the defendant No. 1. We must presume that Dal Singh had received notice of the suit for the recovery of the arrears of revenue, but how does he conduct himself? He deliberately avoids putting any appearance in the suit. Again the decree was for a trifling amount of Rs. 68-9-0. What does he do to satisfy that decree? Nothing. The property was valuable enough to bear the burden of a mortgage of Rs. 10,000 and according to the finding of the Court below the equity of redemption left with the plaintiff was at least worth over Rs. 3,000. Dal Singh inspite of the notice of the execution proceedings allows this property to be sold and who buys it? The mortgagee, who knew that it was the minor's property and who also knew that Dal Singh occupied the position of a trustee and that it was Dal Singh who had been in actual possession of the 5 *biswas* share for some time before the defendant No. 1 entered into the possession of the same. Besides the property in suit, there is evidence that the plaintiff owned other property also. Presumably that property must have been in the actual possession of Dal Singh. Dal Singh could well have satisfied the rent decree from the income of the property. In the circumstances we are of opinion that Dal Singh was certainly guilty of gross negligence which resulted in serious injury to the plaintiff. The result of our findings on points Nos. 3 and 4 is that the sale of the 21st June 1915 in execution of the decree of the Rent Court dated the 15th December 1911 of the property in suit is not binding on the plaintiff.

On the question of the bar of *res judicata*, which was argued at the hearing of this appeal on behalf of the respondent No. 1, we are of opinion that there is no such bar. The grounds for that opinion are substantially the same as are given by the learned First Subordinate Judge in his judgment under appeal and it will serve no useful purpose to repeat them here. We may, however, add that the questions which have arisen for determination in this case were wholly foreign to the nature of the previous suit. The title set up by the guardian of the plaintiff in that suit, which related to 50 *bighas* of land only, was paramount to the title which he subsequently acquired under the pre-emption decrees. Nor can the omission of the guardian to raise any other defence on behalf of his ward which he might and ought to have raised preclude the ward from raising that defence in a subsequent suit, otherwise the minor would be made to suffer for the laches of his guardian. Lastly, we have upheld the mortgage of the 1st April 1905 and we are going to reject the relief as to the recovery of possession in this suit. The defendant No. 1 will, therefore, be entitled to remain in possession till redemption. Our decree, therefore, is not inspite of but consistent with the previous decree.

The result of our decision is that the plaintiff is entitled only to the declaration contained in cl. (2) of relief (*b*) in para. 11 of his plaint. We, therefore, allow this appeal, set aside the decree of the Court below and grant to the plaintiff the declaration just now mentioned but dismiss his suit in respect of the other reliefs. It will hereafter be open to him to sue for redemption of the mortgage of the 1st April 1905 in suit properly framed for that purpose. In view of the result we direct that the parties shall bear their own costs throughout.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1616 OF 1922.

October 31, 1924.

Present:—Mr. Justice Venkatasubba Rao.

NARRA SRI SALIM, MINOR, BY MOTHER AND GUARDIAN VENKAMMA —DEFENDANT No. 3—APPELLANT

versus

KOGANTI BHUSHAYYA AND OTHERS —PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Mortgage of several items of property—Sale of one item—Oral agreement between mortgagee and purchaser to release item purchased from mortgagor, whether can be proved.

A mortgagee of several items of property agreed with a subsequent purchaser of one of the items to release that item from the mortgage security. In a suit by the mortgagee to enforce the mortgage against all the items mortgaged:

Held, that the purchaser of the item released was not precluded by the provisions of s. 92 of the Evidence Act from giving evidence of the oral agreement between himself and the mortgagee whereby the latter agreed to release the item purchased by the former from the mortgage. [p. 247, col. 1.]

Section 92 of the Evidence Act has no application if only some of the representatives-in-interest of the parties to a document are parties to the later oral agreement. [*ibid.*]

Goseti Subba Row v. *Varigonda Narasimham*, 27 M. 368, followed.

Second appeal against the decree of the Court of the Subordinate Judge, Masulipatam, in Appeal Suit No. 46 of 1921, preferred against that of the Court of the Additional District Munsif, Gudivada, in Original Suit No. 422 of 1919 (O. S. No. 63 of 1919, Principal District Munsif's Court, Gudivada).

Mr. *V. Ramadoss*, for the Appellant.

Messrs. *K. Ramanatha Shenai* and *K. Sanjeeva Kamath*, for the Respondents.

JUDGMENT.—This suit has been instituted by the plaintiff to enforce a mortgage executed by the 1st defendant. Subsequent to the date of the mortgage, the 1st defendant sold the second item of the properties mortgaged to Subbiah the father of the 3rd defendant. The contest is now between the plaintiff and the 3rd defandant. The latter pleads that the plaintiff agreed to release the item purchased by Subbiah and to confine his mortgage right to the other properties mentioned in the deed of mortgage. The first question that has to be decided is, whether the plaintiff did agree to release the second item. The learned District Munsif found it somewhat difficult to decide this question on account of the fact that at least three conflicting versions were placed before him. It is not necessary for me to refer at any length to the evidence on this part of the case. The learned Munsif has found that the plaintiff did agree to release the property. The oral evidence was meagre in the extreme. But the probabilities strongly pointed to the fact that the agreement set up was true. The sale-deed in favour of Subbiah referred to the outstanding mortgage. There is a recital in the sale-deed that out of the price, a sum of Rs. 600 was paid to the first defendant in order to enable him to pay it in part discharge of the mortgage in favour of the plaintiff. After the sale-deed was executed by the 1st defendant and attested by several witnesses it was taken to the plaintiff who was living in a different village for the purpose of his attestation being obtained. The plaintiff attested the deed and received Rs. 300 in part payment of his mortgage. There is some dispute regarding the balance of Rs. 300 out of the sum set apart, namely, Rs. 600, but that has no bearing on this part of the case, for, in any event, it is clear that some amount out of the consideration for the sale was received by the plaintiff towards the mortgage. Mainly relying on this and similar circumstances, the District Munsif found that the plaintiff agreed with Subbiah to release Item No. 2 of the mortgage properties. The Subordinate Judge concurred in this finding and in second appeal this finding must be treated as final.

The lower Courts having found that there was an agreement as pleaded by the 3rd defendant, the further question that had to be decided was, who were the parties to this agreement? It was assumed by the District Munsif as well as the Subordinate Judge that if the parties to the agreement were the plaintiff, the 1st defendant and Subbiah, oral evidence of that agreement would be inadmissible under s. 92 of the Evidence Act. Under that section, no evidence of any oral agreement between the parties to the original instrument or their representatives-in-interest is admissible for the purpose of contradicting, varying, adding to or subtracting from the terms of such instrument. Both the lower Courts dealt with the case on the footing that all the three were parties to the agreement and that oral evidence could not be given of it. It is unnecessary to enquire whether if the subsequent oral agreement pleaded was between the plaintiff, the first defendant and

Subbiah, evidence of it is or is not admissible. The lower Courts failed to direct their attention properly to the point at issue. I have searched in vain for a finding on this point in the long judgment of the District Munsif. There is no distinct finding in his judgment at all. This is not disputed at the bar. The Munsif overlooked the fact that he did not give a finding and when discussing the law on the subject he assumed that he had found on this point against the 3rd defendant. In the absence of any criticism of the evidence or any discussion of the matters that had to be considered in relation to this issue, I cannot treat the judgment of the District Munsif as containing a finding upon this very material point; *viz.*, who the parties were to the subsequent oral agreement.

The learned Subordinate Judge made also a mistake, one which goes to the very root of the matter. Having said in his judgment that the District Munsif's view that there was an agreement was correct, he definitely put to himself the question "Who were the parties to that agreement?" The answer is somewhat obscure. The Judge seemed to think that the real parties to the agreement were the plaintiff and Subbiah, but that the 1st defendant was also present at the time of the agreement. The mere presence of the 1st defendant in the Judge's opinion made him a party to the agreement. If the Subordinate Judge held that as a fact, the 1st defendant was also a party to the agreement, whether his conclusion was correct or not, it would, at any rate, be intelligible. I would then not be justified in interfering with his finding. But the whole of this part of the Subordinate Judge's judgment is vitiated by a fundamental error. Whether the 1st defendant was a party to the agreement or not must be decided on the evidence. If he was not in fact a party, he could not be said by a fiction of law to be a party merely because he was present at the agreement or paid a sum of money to the plaintiff.

In this state of things, I was taken through the whole evidence myself. I have come to the conclusion that the only parties to the agreement were the plaintiff and Subbiah. The Subordinate Judge says that the 1st defendant in the witness-box did not speak to the release of Item No. 2. If, according to the 1st defendant, there was no such agreement, it follows that he could not be a party to it at all. But I find that the Judge omitted to notice that in cross-examination the 1st defendant referred to the agreement but it was not elicited from him whether or not he was a party to it. Then again, D. W. No. 4 referred in his evidence to the agreement by the plaintiff to release the property. No questions were put to this witness either, to elicit further particulars. There are two circumstances which have an important bearing on this point. The lower Court points out in its judgment that when 'final negotiations were proceeding the plainitiff and Subbiah retired into the interior of the house and had a private talk. It was only subsequent to this incident that the plaintiff attested the sale-deed. The District Munsif points out that Subbiah and the plaintiff were near relations and that it was Subbiah that was able to prevail upon the plaintiff to release the property. These two circumstances in the light of the evidence in the case, make it highly probable that the agreement was between Subbiah and the plaintiff alone. It is not necessary to deal with this question in greater detail. It is conceded that the evidence is very meagre and on a very careful consideration I have come to the conclusion that the only parties to the agreement were Subbiah and the plaintiff.

The words "representatives-in-interest" in s. 92 were construed in *Goseti Subba Row* v. *Varigonda Narasimham* (1). Subramania Iyer and Boddam, JJ., held that the section had no application if only *some of* the representatives were parties to the later oral agreement. To the instrument in question the parties were the plaintiff and the 1st defendant. Subbiah who purchased only a portion of the mortgaged property is not under s. 92 precluded from giving oral evidence of the agreement. The evidence, therefore, of the agreement set up was admissible and the judgment of the lower Court is set aside and the appeal is allowed. The 3rd defendant will have his costs throughout from the plaintiff.

V. N. V. *Appeal allowed.*

Z. K.

(1) 27 M. 368.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 115 OF 1923.

November 28, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

THE BENGAL COAL COMPANY, LIMITED—PLAINTIFFS—APPELLANTS

versus

APCAR COLLIERIES, LIMITED, AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Compromise—Order recording compromise—Decree—Appeal against order recording compromise, whether competent.

Where a preliminary decree or order is followed by a final decree an appeal does not lie against the former after the final decree is passed. [p. 248, col. 1.]

Where an order recording a compromise under O. XXIII, r. 3, of the C. P. C. is followed by a decree, all proceedings previous to the decree, including the order recording the compromise, merge in the decree and no appeal lies against the order recording the compromise. [p. 249, col. 1.]

(Case-law referred to.)

Appeal against an order of the Subordinate Judge, Asansole, Burdwan, dated the 8th of December 1922.

Mr. *S. R. Das* and Babu *Hamendra Nath Sen*, for the Appellants.

Mr. *N. Sarkar*, Babus *Atul Ch. Dutt*, *Bireswar Bagchi* and *Manmatha Nath Ganguly*, for the Respondents.

JUDGMENT.—This is an appeal from an order recording a compromise or a partial settlement of a suit under O. XXIII, r. 3, C. P. C. The order appealed against was passed on 8th December 1922. On 15th January 1923 a decree was prepared in pursuance of that order in accordance with the provisions of r. 3. On the 26th February this appeal was filed only against the order of the 8th December but no appeal was preferred against the decree. A preliminary objection was taken by Mr. Sirkar on behalf of the respondent that the present appeal is incompetent in that the decree having been passed before the appeal was filed an appeal lay from the decree and not from the order which is superseded by the decree. We think this objection must prevail. So far as this Court is concerned it must be now taken to be settled that where a preliminary decree or order is followed by a final decree an appeal does not lie against the former after the final decree is passed. All the cases on this point have been cited considered and followed in *Nanibala Dasi* v. *Ichhamoyee Dasi* (1). In *Madhu Sudan Sen* v. *Kamini Kanta Sen* (2), the learned Judges observe that under s. 588 of the old Code (corresponding to O. XLIII of the new Code) appeal has been allowed from two classes of orders some of which do not affect the decision of the case and some that do. In both cases the right to appeal from the order is lost after the preparation of the final decree. In that case the appeal was brought against an order of remand after the final decree was passed in the case. The learned Chief Justice in the course of his judgment laid down the principle that there could be no appeal against an order whether interlocutory or otherwise after the final disposal of the suit. In the case of *Nanibala Dasi* v. *Ichhamoyee Dasi* (1), the appeal was preferred against the preliminary decree in a partition suit after the final decree was made. The principle underlying these decisions is stated in *Mackenzie* v. *Narsingh Sahai* (3) to be that if the appeal is brought from the preliminary decree after the passing of the final decree which is not appealed from and if the appeal succeeds the result would be that the final decree which had not been appealed against would have to be indirectly set aside, a state of things the Legislature could never have contemplated, or there would be a final decree binding on the parties inconsistent with the preliminary decree or order.

The learned Advocate-General for the appellant concedes that the law is settled as above but he attempts to distinguish the present case on the ground that in the cases above referred to and those which they follow, some act had to be done and some further steps taken by the Court or the parties before the passing of the final decree whereas in the present case the decree automatically followed the order and, therefore, any variation of the order must *ipso facto* govern and modify the decree. The distinction suggested is that in cases of remand orders and preliminary decree in suits for partition or account the final decree is independent of the preliminary decree while in a case like the present the decree is dependent on and subordinate to the order which it merely follows and embodies.

As no authority directly in point has been placed before us, we have anxiously

(1) 84 Ind. Cas. 674; 40 C. L. J. 291.

(2) 32 C. 1023; 9 C. W. N. 895.

(3) 1 Ind. Cas. 413; 26 C. 762; 10 C. L. J. 113.

considered the point raised in all its aspects but we have not been persuaded that any real distinction as has been suggested exists between the two classes of cases. The question relating to dependent and subordinate decrees was fully considered in the case of *Nanibala Dasi* v. *Ichhamoyee Dasi* (1) and is the *ratio decidendi* of the case of *Ram Nath Singh* v. *Basanta Narain Singh* (4). The latter case is instructive and lays down the proposition that if the appeal is preferred from the preliminary decree before the final decree is passed the later decree should be held to be contingent on the result of the appeal. The principle of dependent and subordinate decree was first adumbrated in *Shama Purshad Roy Chowdhury* v. *Hurro Purshad Roy Chowdhury* (5) as applying to several actions based on the same foundation of right or 'cause of suit' where the first action is challenged before the subsequent actions are decided. The same principle under similar circumstances has been extended to proceedings in the same suit.

There is doubtless the distinction as suggested by the learned Advocate-General but on principle the final decree in a suit for partition or accounts or after remand is as much dependent on the preliminary decree which it follows, for its correctness and effect, as the decree in the present case may be said to be on the order.

There is another consideration which has weighed upon us in holding that the two classes of cases above referred to stand on the same plane. Section 96, C. P. C., confers the right of appeal from every decree if such right is not otherwise barred. It does not seem reasonable to presume that the Legislature intended that the right of appeal against two proceedings in one suit—the order and the decree—should co-exist. If the decree follows the order it will be no straining of the language to say that the order, and for that matter all previous proceedings, get merged in the decree which is the final declaration of the Court's mind and decision and lose their separate existence.

We cannot hold that the appeal from the order alone is maintainable unless we agree with the learned Counsel in holding that as a matter of law if the order appealed against is vacated or varied the decree must be similarly effected. We find no authority or logic in support of this contention.

We see no reason why the principle laid down in the case of *Madhu Sudan Sen* v. *Kamini Kanta Sen* (2) is not applicable to the present order. The learned Chief Justice in deciding that case made no distinction between interlocutory or other classes of orders and in that view of the case the appeal is incompetent and must be dismissed.

We are of opinion that considerations which govern the case of a preliminary and final decree apply with equal force to the case like the present.

In our judgment this appeal is incompetent and cannot proceed.

Counsel for the appellant has verbally prayed that in the event of our holding against him on this point the appellant may be permitted to convert the present appeal into an appeal from the decree. In view of the fact that there is no authority of this Court directly bearing on the above question and the appellant may have *bona fide* preferred the present appeal we think we ought to accede to the request and give him the necessary permission as was given in the case of *Nanibala Dasi* v. *Ichhamoyee Dasi* (1). The order we propose to pass is that if the appellant files a certified copy of the decree and puts in the proper Court-fees within two weeks from this date, this appeal will be registered as an appeal from original decree: in default, the appeal will stand dismissed.

We think the respondents are entitled to their costs of the hearing before us. We assess such costs at 10 gold *mohurs* to be paid by the appellant to respondent No. 1 and five gold *mohurs* to each of the remaining respondents who have appeared.

Z. K. *Appeal dismissed.*

(4) 19 Ind. Cas. 630; 17 C. W. N. 868; 18 C. L. J. 209.

(5) 10 M. I. A. 203; 3 W. R. P. C. 11; 2 Suth. P. C. J. 103; 19 E. R. 948.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 781 OF 1921.
March 5, 1925.
Present :—Mr. Justice Martineau and Mr. Justice Scott-Smith.
PANNA LAL—PLAINTIFF—
—APPELLANT
versus
BALWANT AND OTHERS—DEFENDANTS
—RESPONDENTS.

Fraud—Compromise signed by some of defendants—Decree against all defendants—Suit to set aside decree, whether maintainable.

A compromise was put in during the pendency of a suit signed by all the parties to the suit, except one of the defendants, but the Court proceeded to pass a decree on the basis of the compromise against all the defendants. The defendant who had not signed the compromise subsequently brought a suit for a declaration that the decree passed against him was void on the ground that it had been obtained by fraud:

Held, that it was the duty of the Court in the previous suit to satisfy itself that all the parties had consented to the compromise and that the failure of the plaintiff in the previous suit to inform the Court that one of the defendants had not joined in the compromise did not amount to fraud so as to entitle the defendant in the present suit to succeed.

Second appeal against a decree of the District Judge, Karnal, dated the 12th January 1921, reversing that of the Senior Sub-Judge, Karnal, dated the 11th October 1919.

Lala *Rama Nand*, for the Appellant.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—In this case Panna Lal sued for a declaration that a decree obtained against him by Nanu Mal on the 10th December 1913 was void on the ground that it had been obtained by fraud. The First Court decided in his favour but the District Judge has dismissed the suit, finding that there was no fraud on the part of Nanu Mal and Panna Lal has filed a second appeal.

The facts are as follows:—Nanu Mal brought a suit against three persons as the proprietors of a certain firm and on their objecting that Panna Lal was also a partner in the firm he was directed to implead Panna Lal as a defendant and he paid the necessary process-fee. At the next hearing compromise written out by a petition-writer was put in to which all the parties had put their thumb marks except Panna Lal. Whether a summons had been served on Panna Lal does not appear but the decree passed on the compromise was passed against him as well as against the other defendants in the case.

It is urged on behalf of Panna Lal in the present appeal that Nanu Mal ought to have brought to the notice of the Court in the former case, when the compromise was put in, that Panna Lal was not a party to it. It was, however, the business of the Court to satisfy itself that all the parties had consented to the compromise and we cannot agree with the contention that Nanu Mal's omission to inform the Court that Panna Lal had not joined in the compromise constituted fraud. Panna Lal was not without a remedy, for he could either have appealed against the decree or made an application to the Court under O. IX, r. 13, C. P. C., to set it aside. He did in fact make such an application but he made it too late, so that it was rejected as time-barred. We agree with the decision of the lower Appellate Court and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

CIRCUIT COURT, CUTTACK.
APPEAL FROM APPELLATE ORDER No. 14 OF 1920.
November 26, 1921.
Present:—Mr. Justice Das and Mr. Justice Adami.
NIDHI PARIDA—JUDGMENT-DEBTOR—
APPELLANT
versus
KARUNAKAR PADHAN—DECREE-HOLDER
—RESPONDENT.

Evidence Act (I of 1872), s. 115—Estoppel—Compromise of suit—Holding liable to sale in default of payment—Execution—Objection that holding is not transferable, whether can be taken.

A rent suit was compromised and one of the terms of the agreement was that in case of default of payment of the decretal amount by the judgment-debtor the decree-holder would be entitled to realise the amount by the sale of the judgment-debtor's holding. There was default in payment and the decree-holder proceeded to attach the judgment-debtor's holding. The judgment-debtor objected that the holding was not transferable and was, therefore, not liable to sale:

Held, that a representation having been made by the judgment-debtor to the decree-holder that his holding was attachable and the decree-holder having acted upon that representation and having changed his position to his detriment, the judgment-debtor was estopped from contending that the holding was transferable and was not liable to attachment.

Appeal from an order of the District Judge, Cuttack, dated the 18th March 1920, modifying that of the Munsif, Kandrapara, dated the 13th September 1919.

Mr. *G. C. Ray*, for the Appellant.

Mr. *B. N. Das*, for the Respondent.

JUDGMENT.

Das, J.—The only point that has been argued before us is that there was no waiver of the legal right of the petitioner. In my opinion there was. He did compromise the suit on an agreement that in default of payment of the decretal money, the decree-holder would be entitled to realize the sum by the sale of the attached holding. There was a clear representation made to the decree-holder that his occupancy holding was attachable by the judgment-debtor. The decree-holder acted upon that representation and changed his position to his detriment. In my opinion the judgment-debtor must make good his representation.

This application is dismissed with costs.

Adami, J.—I agree.

Z. K. *Application dismissed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 79 OF 1921.

November 22, 1921.

Present :—Mr. Justice Piggott and Mr. Justice Walsh.

LACHMI PRASAD—APPELLANT

versus

BALDEO DUBE AND OTHERS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 30, 47—Order cancelling alienation by guardian—Appeal, whether lies.

No appeal lies from the order of a District Judge, made under s. 30 of the Guardians and Wards Act, cancelling an alienation made by the guardian of a minor in contravention of the sanction of the Court.

First appeal from an order of the District Judge, Ghazipur.

FACTS.—The guardian of a minor applied to the District Judge for permission to sell the property of the minor in order to pay off certain debts While this application was pending the respondent, who was one of the creditors made an application to the District Judge and offered to purchase the property at a certain price. The District Judge accepted the offer and made an order that the property should be sold to the respondent at the price offered by him. Subsequently the guardian made an alienation in the form of a perpetual lease of a portion of the property in favour of the appellant and executed a sale-deed in favour of a third person. The respondent thereupon made an application to the District Judge for cancellation of the lease and of the sale-deed executed by the guardian. The application was allowed and the alienations made by the guardian were cancelled. The appellant came up to the High Court in appeal against the order cancelling the alienations.

Mr. *Peary Lal Banerji*, for the Appellant.

Mr. *Kamalakanta Verma*, for the Respondents.

JUDGMENT.—We are satisfied that no appeal lies in this case, and we are not disposed to interfere in revision. The appeal is dismissed with costs, including fees on the higher scale.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

CIRCUIT COURT, CUTTACK.

APPEAL FROM APPELLATE DECREE No. 22 OF 1921.

December 1, 1921.

Present:—Mr. Justice Das and Mr. Justice Adami.

SOVANI JENA—PLAINTIFF—APPELLANT

versus

BHIMA RAY—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 97, 99, 100—Decree for possession—Obstruction—Subsequent suit for possession, whether maintainable.

Plaintiff obtained a decree for possession against defendant No. 1. He subsequently brought another suit for possession on the allegation that in execution of the previous decree he had recovered possession of the property but that he had been subsequently dispossessed by defendants Nos. 1 and 2. It was found that the plaintiff had not obtained possession in execution of the previous decree and that he had been unable to prove a title as against defendant No. 2:

Held, that plaintiff's suit was barred as against defendant No. 1 by the provisions of s. 47 of the C. P. C., and was liable to be dismissed as against defendant No. 2 for want of proof of better title.

Appeal from a decree of the District Judge, Cuttack, dated the 4th May 1921, reversing that of the Munsif, Cuttack, dated the 30th April 1920.

Mr. *Subodh Chandra Chatterjee*, for the Appellant.

Mr. *Durga Prasanna Das Gupta*, for the Respondent.

JUDGMENT.

Das, J.—We must affirm the decree passed by the Court below. The plaintiff obtained a decree against the defendant No. 1. His allegation is that in execution of that decree he recovered possession of the property but that he was subsequently dispossessed by defendants Nos. 1 and 2. On that allegation he instituted a suit for declaration of title and for recovery of possession. His allegation that he recovered possession but was subsequently dispossessed is disbelieved. The learned Judge in the Court below has come to the conclusion that so far as the defendant No. 1 is concerned the plaintiff's suit is barred by the provisions of s. 47 of the Code and so far as the defendant No. 2 is concerned he must fail because he has not proved his title against him. Now the learned Vakil who appears on behalf of the appellant urges before us that s. 47 is not applicable to his suit. I am of opinion that it is. His remedy was to proceed under the Code and if he was obstructed at all either by defendant No. 1 or defendant No. 2 he should have applied under O. XXI, r. 97, of the Code for investigation of the matter. The Court would then have fixed a day for investigating the matter and would have summoned the party against whom the application was made for him to appear and answer the same. Then the Court would have passed an order either under r. 99 or r. 100 of O. XXI, and that would have given a right to the plaintiff to sue the party successfully obstructing him. So far as the defendant No. 2 is concerned the learned Judge in the Court below has recorded a finding that the plaintiff has not established his title as against him

This appeal must be dismissed with costs.

Adami, J.—I agree.

Z. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

October 23, 1924.

Present:—Lord Dunedin, Lord Atkinson and Lord Salvesen and Mr. Ameer Ali.

DASARAJU JAGANNADHA RAO PANTULU GARU—APPELLANT

versus

Sri VYRICHERLA SURYANARAYANARAJ BAHADUR GARU AND OTHERS—RESPONDENTS.

Privy Council appeal—Finding of fact—Interference.

Where the question depends not upon any question of law but upon the general conclusion that is to be drawn from many minute portions of the evidence, the Privy Council will not on appeal disturb the judgment of the Court below unless there are brought before them particular instances of where the Court below has gone wrong. [p. 253, col. 1.]

Appeal from a judgment and decree of the Madras High Court.

Messrs. *A. M. Dunne* and *K. Brown*, for the Appellant.

Sir *G. Lowndes*, *K. C.*, and Mr. *B. Dube*, for the Respondents.

JUDGMENT.

Lord Dunedin.—This is a case which has the appearance of great complexity, owing to the meticulous enquiry into all sorts of circumstances which has been undertaken by the learned District Judge, and has been more or less taken up by the High Court on appeal; but in the end the real questions resolve themselves into two, and into two only. The case has to do with the fate of the *zemindari* of Chemudu, which at the relevant time was possessed by a *zemindar* of the name of Chandra Raj. During his lifetime, and after him, the estate was more or less in the hands of a set of people who seem to have indulged in every form of money lending, in suits to evade their creditors, and, indeed, in every tortuous device which is, unfortunately, too well known in India. On the 19th January, 1888, the *zemindar* executed a mortgage. The present suit is one in respect of a sale in execution of a very small debt of Rs. 300 and it was raised by one Jagannadha against the representative of Chandra Raj and against Appan Dhora, who was the mortgagee under the mortgage mentioned. There is extant a sale-deed of the 12th March, 1889, and if that sale-deed is valid, it at once cuts out any possible claim against Chandra Raj, but it leaves, as will appear presently, a certain claim against Appan Dhora. The main

question which was raised in the case was: Was this deed of the 12th March 1889, a valid deed, or was it not? Their Lordships do not think it necessary to go piece by piece through the various items of evidence which have been examined by the learned District Judge and the learned Judges in the High Court. In a case such as this, where the question depends, not upon any question of law, but upon the general conclusion that is to be drawn from many minute portions of the evidence, it is evident that their Lordships would not disturb the judgment of the Court below unless there were brought before them particular instances of where the Court below had gone wrong. Their Lordships do not find any such instances here, and they have, therefore, no hesitation upon this point in affirming the judgment of the learned Judges in the Court below, and saying that they are quite satisfied with the sufficiency of the reasons that they have set forth. But while this disposes of the case so far as Chandra Raj is concerned, it does not entirely dispose of the case as far as Appan Dhora is concerned, because the sale-deed is, of course, under the burden of the mortgage, and what is still due on the mortgage must be paid. The mortgage was in this form, there were only Rs. 10,000 advanced in actual cash, the other consideration being that a certain scheduled list of debts was to be paid by the mortgagees. That scheduled list of debts is before their Lordships. It is at page 113 of the Record, and it is headed: "Particulars of all debts which constitute a charge on our estate . . . which have to be discharged by you, as stated by me." Then follow a number of debts due to various people. It is admitted that, so far as all these debts are concerned, the whole thing has remained a dead letter; nothing ever was done under it. It is also admitted that so far as the Rs. 10,000 in cash were concerned, they have been duly repaid; but at the end of the list there is an item of Rs. 9,500, "the loan previously got through Appan Dhora and to be repaid to the same Appan Dhora." It is now pleaded that this at least ought to be given to the plaintiff in right of his judgment. Their Lordships admit that this matter has given them considerable trouble, because undoubtedly if there is a scheduled list of debts in a deed, it would be in general necessary to show that that was wrong. But, on the whole, their Lordships think that there is not enough to lead them to disagree with the learned Judges of the High Court.

The matter seems to stand thus. There is no evidence whatever, except the recital, that these Rs. 9,500 were ever paid to Chandra Raj, and, moreover, there were these very pregnant circumstances. In the first place, who was Appan Dhora? He was the confidential servant of Chandra Raj, of whom it is known that he attempted, falsely after Chandra Raj's death, to father on him a supposititious child, and who, on the attempt being opposed, disappeared. The deed was executed by a man of eighty-two within two days of his death, and then there is the still more pregnant fact that although the Rs. 10,000 were repaid, not only were these Rs. 9,500 not repaid, but no claim was ever made in respect of them during all the twelve years that have elapsed. Those circumstances led the learned Judges of the High Court to consider that really there was no proof whatsoever that this sum remained due, and, accordingly, they did not give effect to the plaintiff's view upon this part of the case.

Their Lordships will, therefore, humbly advise His Majesty that the appeal be dismissed with costs.

K. S. D. *Appeal dismissed.*

Solicitor for the Appellant.—Mr. *H. Polak.*

Solicitors for the Respondents.—Messrs. *Barrow, Rogers* and *Nevill.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 21 OF 1924.

September 8, 1924.

Present:—Mr. Baker, J. C.

BALWANTRAO AND OTHERS—DEFENDANTS—APPELLANTS

versus

FARID SAHEB—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 49—Lease, permanent—Lessee, whether "proprietor"—Determination of lease—Lessee, whether occupancy tenant of sir lands—Transfer of Property Act (IV of 1882), s. 52—Lis pendens, *doctrine of, effect of.*

A lessee whether permanent or not is not a "proprietor" within the meaning of s. 49 of the C. P. Tenancy Act and does not retain any interest as an occupancy tenant in the *sir* land comprised within his lease on the determination of the lease.

[p. 256, col. 2.]

Under s. 52 of the Transfer of Property Act, a transfer during the pendency of a suit, of property directly and specifically in question in the suit, cannot affect the rights of any other party thereto with respect to any decree or order which may be made therein. [p. 256, col. 2.]

Appeal against the decree of the District Judge, Nagpur, dated the 23rd February 1924, in Civil Appeal No. 186 of 1923.

Mr. *M. R. Bobde*, for the Appellants.

Mr. *V. R. Pandit*, R. B., for the Respondent.

JUDGMENT.—This case raises an important point of law under the Tenancy Act.

The facts are that the plaintiff, who is the *Mokasdar* of *Mouza* Saigaon, leased an 8-annas share of the village, including the *sir* and *khudkast*, to one Gopala in perpetuity. In 1917 Gopala mortgaged his rights in favour of the defendants. Gopala died in 1919. After his death the defendants sued his widows on the mortgage. The suit was instituted on 27th July 1920 and a preliminary decree was passed on 15th September 1920 in the defendants' favour, the final decree being passed on 10th August 1921 On 7th September 1920, during the pendency of this litigation, Gopala's widows surrendered all their rights in the property to the plaintiff.

The plaintiff brought the present suit against the defendants for possession of the *sir* fields only. The First Court dismissed the suit, holding that under s. 49 of the present Tenancy Act the widows of Gopala became ex-proprietary occupancy tenants of the *sir* land and, therefore, the *farkatnama*, on which the plaintiff relied, could not be registered under paragraph (2) of the same section as the right of occupancy was not reserved and the deed was, therefore, void under the ruling in *Nilkant* v. *Ghulya* (1) and also that the principle of *lis pendens* applied to the suit, the *farkatnama* having been passed during the pendency of the defendants' suit on Gopala's mortgage.

On appeal, the District Judge, Nagpur, reversed the decision of the First Court, holding that Gopala and his heirs the widows were not proprietors within the meaning of s. 49 of the Tenancy Act, and that the doctrine of *lis pendens* does not vitiate the *farkatnama*, and remanded the suit for disposal on the merits.

The defendants make this second appeal.

(1) 12 Ind. Cas. 384; 13 N. L. R. 165.

The principal point raised in appeal is whether the term "proprietor" used in s. 49 of the Tenancy Act includes a permanent lessee or *thekadar*, so as to render it impossible for him to divest himself of occupancy rights in the *sir* land. This is a question which does not appear to have arisen before in this Court.

It is contended on behalf of the appellants that the District Judge has relied merely on the definition of "proprietor" given in s. 2, cl. (13), of the Land Revenue Act. The learned Pleader of the appellants refers to the definition of "*sir*-land" given in s. 2, cl. (17), of that Act and says that the land was recorded under s. 68. Under s. 68 of the Land Revenue Act, Explanation (1), it is stated that "in this section 'proprietor' includes a transferee of proprietary rights and a *thekadar* with protected status, but not a *malik-makbuza*." It is urged that *khudkasht* land, which has been continuously cultivated by the transferee for six years consecutively, becomes his *sir* land.

It is contended that the land becomes *sir* by reason of the lessee's personal cultivation of it, and, therefore, for the purposes of s. 68, the widows of Gopala are the proprietors of the *sir* land.

The learned Pleader for the appellants further refers to s. 47, cl. (4), of the Land Revenue Act, and argues that Gopala or his widows were the persons, lawfully entering into possession of the proprietary right, and also refers to the rules under s. 50, printed on page 49 of the Land Revenue Act, in which r. 1 lays down that "the term 'proprietary rights and interests in land' used in s. 47, sub-s. (2), shall be deemed to include the rights and interests of a transferee of proprietary rights in possession, a *thekadar* with protected status, a mortgagee with possession and a lessee, holding under a lease for a period exceeding one year, but shall not include the rights and interests of a *malik-makbuza*."

He further relies on Explanation to s. 53, which runs: "In this section 'proprietor' includes a transferee of proprietary rights in possession and a *thekadar* with protected status." He also refers to ss. 187, 202 and 203 of the Land Revenue Act, in all of which sections the word "proprietor" is declared to include "a transferee of proprietary rights in possession and a *thekadar* with protected status."

It is further contended that if Gopala was not a proprietor, there could not have been any *sir* land in the village at all, as personal cultivation by a proprietor is necessary to constitute *sir* land. The appellants' Pleader further relies on the ruling in *Sheoram* v. *Tikaram* (2), where it is stated that "the *sir* right is undoubtedly made up of two parts, one the proprietary and the other the occupancy, and it can accrue synthetically by the union of these two parts in the same person."

It is further argued that the *sir* land of the protected *thekadar* is recognized by s. 107 of the Land Revenue Act. The effect of this argument is to show that the lessee of a village acquires by law permanent rights in it and cannot be got rid of; as if the argument is correct he cannot lose occupancy rights in the *sir* land.

It is further contended that there is no distinction between a permanent lessee and a permanent alienee, and that Gopala divested the plaintiff of the plaintiff's proprietary rights, and, therefore, under s. 49 of the Land Revenue Act Gopala or his widows must be considered proprietors and are entitled to the occupancy rights in the *sir*.

It is contended on behalf of the respondent that under the proviso to cl. (17) of s. 2, Land Revenue Act, *sir* land ceases to be so when it becomes the subject of a tenancy, and again becomes so on the revival of the proprietary right, and that this is the temporary loss of proprietary rights referred to in s. 49 of the Tenancy Act.

It is further argued that under s. 82 of the Land Revenue Act a special exception is made in the case of a mortgagee, who is the transferee of proprietary rights, but no such exception is made in the case of a lessee. Section 68 of the Land Revenue Act does not require that *sir* land should be continuously cultivated by a proprietor himself or by his lessee. But this does not mean that the *sir* would be the *sir* of the lessee or *thekadar* to the exclusion of the proprietor. There is a special reference in this section to the word "proprietor," including lessee or *thekadar*; and throughout the Land Revenue Act, where the Act proposes to impose a duty on persons actually in possession or managing the village, it says so: *cf.* s. 2, sub-s. (21) of the Land Revenue Act, referring to village cesses, and s. 53 which refers to the maintenance of boundary lines in villages adjoining Government forest.

It is further contended that the ordinary meaning of a proprietor does not include a lessee and that if it were intended to include it in s. 49 of the Tenancy Act, it would have stated so. It is contended that it was never suggested that this land was *khudkast*, which had become *sir* land owing to the occupation by the defendants.

It is further pointed out that the appellants' argument is a *reductio ad absurdum*. That if a proprietor leases his land to a lessee for, say, 5 or 10 years, and the lessee transfers his rights, he, according to the appellants' contention, becomes an ex-proprietor and occupancy tenant. He can never re-gain the proprietary rights on the expiry of the lease, as the lessor re-enters. But the lessor would be unable to re-gain possession of the *sir* land although it had been leased for a limited period only. I think there is a good deal of force in this argument. It can never have been intended by the Legislature that the lessee should be entitled to retain the possession of the *sir* land as an occupancy tenant against the original proprietor after the expiry of the lease. The lease in the present case is a permanent one and has been terminated by the consent of both parties.

It is further pointed out that under s. 2, sub-s. (11) of the Tenancy Act, "*thekadar*" which is merely the vernacular word for "lessee" is not a tenant, and that if he were a proprietor, there was no necessity of excluding him from the definition of "tenant." The strongest argument, however, in favour of the respondent is that derived from s. 107 and the following sections of the Land Revenue Act, which deal with "*thekadars*." Under s. 107 it is open to the Deputy Commissioner to confer on the *thekadars* "the rights of an occupancy tenant in respect of the whole or part of his *sir* land or *khudkast* and determine the rent payable by him." This shows that the *thekadar* is not a proprietor, as he cannot be his own occupancy tenant, and there would be no necessity of this provision if under s. 49 of the Tenancy Act the occupancy rights in the *sir* land vested in a *thekadar*, and cannot be taken away from him.

It is further contended that under the Transfer of Property Act there is a distinc-

(2) 71 Ind. Cas. 129; 19 N. L. R. 26 at p. 27; (1923) A. I. R. (N.) 93.

tion between a permanent lease and a sale, and that some rights remain in the lessor. In the present case Rs. 60 rent has to be paid, and if rent is reserved the lessee does not become proprietor. Under the Land Revenue Act, assessment is settled with a proprietor and not with a lessee. There is no reference to proprietary rights in s. 107 of the Land Revenue Act, which deals with *thekadars*.

It is further argued that under s. 111 of the Transfer of Property Act, the lessee can yield up his interest to the lessor. There is no reason why he should be bound to continue as a lessee against his will, which should be the result of holding that his interest as an occupancy tenant in the *sir* land was an interest of which he could not divest himself. I am of opinion that the contention of the respondent is correct for the reasons which have been argued by the learned Counsel for him.

It would be absurd to suppose that if a proprietor leased land including *sir* land to a lessee, the lessee should acquire permanent occupancy rights in the *sir* land after the expiration of his lease. If such had been the intention of the Legislature, there would be some provision to that effect. Chapter IX of the Land Revenue Act leads to the conclusion that a *thekadar* is not a proprietor within the meaning of the Land Revenue Act. Throughout that Chapter, a distinction is made between the proprietor and the *thekadar*. I may point out that under s. 111 of the Land Revenue Act, where a protected *thekadar* forfeits his protection, the Deputy Commissioner may reserve to him the rights of an occupancy tenant in the whole or part of his *sir* land or *khudkasht*. This provision obviously indicates that this reservation of occupancy rights in favour of the *thekadar* is a matter of grace and not a matter of right, and no such provision would be necessary if a *thekadar* was a proprietor and, therefore, entitled by law to retain the rights of an occupancy tenant in the *sir* land, in any circumstances under the provisions of s. 49 of the Tenancy Act.

The learned Pleader for the appellants has drawn a distinction between the case of a permanent lessee and that of a *thekadar*. But, as I have already said, *thekadar* is only the *kindi* word for lessee. The fact of the lease in this case being a permanent lease does not make any difference, as such a lease is terminable under s. 111, para. (*e*), of the Transfer of Property Act, by express surrender, and has, as a matter of fact, been so terminated. When, therefore, a lease terminates, the rights of a lessee in perpetuity terminate, whereas on the interpretation of the law put forward by the appellants the lessee would be compelled to remain as a lessee or occupancy tenant of the *sir* land, even against his will. This appears to me to be a *reductio ad absurdum*, and in the absence of any clear statement to that effect in the Tenancy Act I have no hesitation in holding that the interpretation put upon s. 49 of the Tenancy Act by the appellants is not correct and that a lessee, whether permanent or not, is not a proprietor within the meaning of that section, and, therefore, he does not retain any interest as an occupancy tenant in the *sir* land on the determination of the lease.

It is further contended that in para. 4 of his judgment the District Judge has held that the defendants' mortgage did not give them any proprietary rights in the *sir* land, as it excludes cultivating rights, and in para. 5 he says that pleadings should be recorded on the point, if so, it is contended, there should be no finding in para. 4 that the proprietary rights were not mortgaged.

The learned Pleader for the appellants has discussed the meaning of the words *sir saine* in the mortgage-deed. It is contended that under s. 52 of the Transfer of Property Act the transfer *pendente lite* could not transfer even the proprietary rights in the *sir* to the plaintiffs. The question whether the proprietary rights or the cultivating rights in the *sir* were excluded from the mortgage-deed, is affected by the fact that the decree already passed in the suit on the defendants' mortgage does not mention the *sir* fields. Under s. 52 of the Transfer of Property Act the transfer, during the pendency of the suit, of the property, directly and specifically in question, cannot affect the rights of any other party thereto under any decree or order which may be made therein. We are only concerned in this appeal with the *sir* land, and as the decree does not give the defendants any rights to *sir* land, s. 52 of the Transfer of Property Act has no application.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 491 OF 1923.

February 26, 1925.

Present:—Mr. Justice Mukerji and Mr. Justice Boys.

KANDHAIYA SINGH—DEFENDANT—APPELLANT

versus

Musammat KUNDAN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. II, r. 2—Res judicata—*Inconsistent suits.*

Where a claim made in a subsequent suit, if added to the claim in a previous suit, would have been likely to embarass the trial of the suit or to place the plaintiff in a false position, it must be held that it was not incumbent upon the plaintiff to ask for that relief in the former suit, and a suit to enforce such relief cannot, therefore, be barred by the operation of the rule of *res judicata*. [p. 253, col. 1.]

Mahomed Ibrahim Abdul Rahman v. *Sheikh Hamja Mahommedally*, 12 Ind. Cas. 387; 35 B. 507; 13 Bom. L. R. 895, *Veerana Pillai* v. *Muthukumara Asary*, 27 M. 102 and *Mohandar Singh* v. *Janki Singh*, 2 A. L. J. 342, referred to.

The mere fact that the parties to a subsequent suit are the same as those to a previous suit and that some allegations are common to both the suits, does not necessarily lead to the conclusion that the second suit is barred by *res judicata*.

Plaintiff brought a suit to set aside a sale-deed on the ground that it was fictitious, was not made to pass title and that she had received no portion of the consideration money. It was found that she was entitled to avoid the sale but that she had received a portion of the consideration and a decree was granted in her favour for recovery of possession of the property dealt with by the sale-deed on payment of the sum held to have been received by her as consideration for the sale. She failed to pay the amount and to execute the decree. Subsequently she brought a suit to recover the balance of the consideration money:

Held, that the relief which was claimed in the subsequent suit was entirely inconsistent with the position taken up by the plaintiff in the previous suit and that, therefore, she could not have asked for the relief in the previous suit and that consequently her suit was not barred by *res judicata*. [p. 258, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Benares, dated the 5th January 1923.

Mr. *D. C. Banerji*, for the Appellant.

Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.—The sole question for determination in this appeal is one of law, namely, whether the present suit is barred as *res judicata* on account of a previous judgment.

The facts involved in the point of law are briefly these:

The respondent, who was the plaintiff in the Court of first instance, brought a suit in the year 1917 against the defendant-appellant for the setting aside, *inter alia*, of a sale-deed, executed by her on the 13th of April 1914 in favour of the appellant. She said that the sale-deed was a fictitious one, that no title was meant to pass by it, that although it was, on the face of it, for the sum of Rs. 2,000 she got no portion of the consideration money, that her statement before the Sub-Registrar that she had received a consideration of Rs. 1,600 was false and that the sum of Rs. 400 that was actually handed over to her before the Sub-Registrar had been returned by her after the registration of the document was over. On these allegations, she sought cancellation of the sale-deed and also recovery of possession of the house.

The Court of first instance held that the sale was obtained in circumstances under which it was open to her to avoid it. But it also held that she had received a portion of the consideration money. A decree was accordingly made in favour of the plaintiff for recovery of possession of the house on condition of payment of a certain amount of money. The plaintiff appealed and she contested the findings that she had to pay any thing at all. The learned District Judge, who heard the appeal reduced the amount payable by her but otherwise upheld the decree. By the final decree that was passed in the case the plaintiff was ordered to pay a sum of Rs. 600 within a certain period of time and it was further ordered that in case of default of payment the suit should stand dismissed. The plaintiff failed to pay the sum of Rs. 600 and the result was that her suit for recovery of possession stood dismissed. Thereafter, the respondent brought the suit out of which this appeal has arisen, for the recovery of Rs. 1,400 being the balance of the purchase-money, by the sale of the property sold. She evidently wanted to enforce what is known as vendor's lien over the property.

The defence, *inter alia*, was that the suit was barred as *res judicata* and this is the only point which we have to decide in this appeal.

Both the Courts have found against the defendant. In the various cases that have come before the Court from time to time the question of *res judicata* has been decided on the facts of each case. It would always be difficult to get a case exactly in point. The principle laid down, how-

ever, seems to be this, that where the subsequent claim, if added to the former claim was likely to embarass the trial of the suit or was likely to place the plaintiff in a false position, it would not be incumbent on the plaintiff to ask for the relief in the second suit, along with the relief asked for in the earlier suit. For example in the case of *Mahomed Ibrahim Abdul Rahman* v. *Shcikh Hamja Mahomedally* (1) a suit was brought for redemption and it having failed a second suit was brought in ejectment. It was held that the second suit was not barred as *res judicata*. Similarly in *Veerana Pillai* v. *Muthukumara Asary* (2), a mortgagee brought a suit for sale and it was held that his mortgage was really an usufructuary one and he could not maintain a suit for sale. Then he brought a second suit for recovery of possession on foot of the same mortgage. It was held that the second suit was maintainable. In *Mahandar Singh* v. *Janki Singh* (3) a suit was brought claiming an entire property. It was dismissed, the Court having found that the parties were joint owners. The second suit of the plaintiffs, for a declaration that they were entitled to collect a half share of the rents from the land was held to be maintainable.

It will, therefore, be seen from these cases that simply because the parties to both the suits are the same and some allegations common it does not necessarily follow that a second suit brought by the same plaintiff should be held barred as *res judicata*.

Coming to the facts of the case. As already stated, the plaintiff wanted a declaration that the sale was fictitious that it was obtained from her by fraud and that she received not a single shilling out of the consideration money. Under the circumstances. the plaintiff could not very well say, in the same breath, that if the Court held the sale to be a genuine one she should be given the sum of Rs. 1,400 as a part of the consideration money, she having received the balance.

The second 'ground of attack' would have been entirely inconsistent with her first case and any evidence that she might lead on the two contradictory cases was not at all likely to be accepted by the Court.

We hold that in the circumstances of the present case the second suit is not barred as *res judicata*.

The appeal fails and is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

(1) 12 Ind. Cas. 387; 35 B. 507; 13 Bom. L. R. 895.
(2) 27 M. 102.
(3) 2 A. L. J. 342.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 37 OF 1918.

February 27, 1919.

Present:—Mr. Fawcet, J. C., and Mr. Kemp, A. J. C.

COMMITTEE OF MANAGEMENT OF HYDERABAD—APPLICANT

versus

Seth RAMCHAND ZOWNKIRAM —OPPONENT.

Bombay District Municipal Act (III of 1901), ss. 59, 60, 71—Water supplied by Municipality through private connection—Charge leviable, whether "tax"—Rules regulating supply of water and payment therefor—Procedure.

Where it is optional with the owner of certain premises to have water supplied to him by the Municipality by means of a private connection and the water is so supplied to him under an arrangement with him, the payment which the owner is required to make in respect of the supply of water cannot be regarded as a "tax" which has been "imposed" upon the owner. It is merely the price of water supplied to him by the Municipality. Such a charge does not constitute a tax imposed within the meaning of s. 59 of the Bombay District Municipal Act, but is only a payment due under s. 71 sub-s. (1) cl. (*b*) of the Act. The rules relating to the levy of such a charge cannot, therefore, be regarded as *ultra vires* and illegal merely because they have not been made in accordance with the provisions of s. 60 of the Act. [p. 259, col. 1; p. 262, col. 1.]

Appeal from the decree of the Sub-Judge, Hyderabad.

Mr. *T. G. Elphinston*, for the Applicant.

Mr. *Isardas Oodharam*, for the Opponent.

JUDGMENT.

Fawcett, J. C.—The plaintiff has sued the Committee of Management of Hyderabad for refund of certain payments made by him on account of charges for water supplied to him by the Municipality through a private connection to his house. His contention is that these charges were made under certain rules sanctioned by the Commissioner-in-Sind in his letter No. 49 dated 12th January 1917, and that these rules are illegal because, they were

made without objections being invited thereto, in accordance with the provisions of s. 60 of the Bombay District Municipal Act, 1901. The First Class Subordinate Judge, Hyderabad, who heard the case in his small causes jurisdiction has allowed this contention and passed a decree in plaintiff's favour. The Committee of Management now apply to this Court in revision.

The contention of the defendants both in this Court and the lower Court, is that the charges in question do not constitute a tax imposed under s. 59 of the Municipal Act but are payments due under s. 71, sub-s. (1) cl. (*b*) of the Act. If this contention be correct then (unless charging such payments amounts to imposing a tax) it is clear that the provisions of s. 60, on which the plaintiff relies do not apply, for that section only prescribes that every Municipality *before imposing a tax* shall observe the preliminary procedure there laid down. If a tax is not imposed, then that procedure is not required. All that s. 71, sub-s. (1) cl. (*b*) in itself requires is an agreement with the person to whom the water is supplied. Section 46 cl. (1), however, provides for the Municipality making rules "prescribing, subject to the provisions of Ch. VII, the taxes to be levied in the Municipal District for Municipal purposes, and amongst other things the limits of the charges or payments to be fixed in lieu of any tax under s. 71". Apart from the words "subject to the provisions of Ch. VII" such rules do not require preliminary publication for the purpose of inviting objections, but merely require the sanction of the Governor-in-Council or the Commissioner under proviso (*a*) to s. 46. The words "subject to the provisions of Ch. VII" cannot in themselves make the provisions of s. 60 applicable to a case which is outside the particular one dealt with in it, namely the case where a Municipality proposes *to impose a tax*. If, therefore, the contention of the defendants is correct, then I think it is clear that this objection of the plaintiff to the rules in question falls to the ground.

The first thing, therefore, is to see exactly what are the facts in regard to the rules objected to by the plaintiff. These are contained in Ex. 17, which are headed "Revised private water service rules, (as sanctioned by the Commissioner-in-Sind in his No. 49 dated 12th January 1917)". These lay down certain rates to be charged for water supplied by pipe to private lands or buildings. In this connection the applicant's Counsel has referred us to the "Rules for the supply of water to private individuals," which are contained in the published Manual of Revised Rules and Bye-Laws of the Hyderabad (Sind) Municipality, as sanctioned by the Commissioner-in-Sind in his letter No. 787 dated 30th June 1914, at pp. 92 and 93. He states that the rules in Ex. 17 are merely an alteration of r. 6 of these rules. It is objected by Mr. Isardas for the opponent that these rules have not been exhibited in the case. No doubt this is so, but as they purport to be rules having the force of law in the Hyderabad Municipal District, we can take Judicial notice of them under s. 57 (1) of the Evidence Act; and it is further to be noted, that this Manual was referred to in the evidence of the Assistant Chief Officer Mr. Khubchand, who said that the general water tax rules were those at pages 74 and 75 of this printed Manual, so it was presumably before the Court. It is also obviously essential that we should be in a position to know the exact facts in regard to the charges objected to; and it is a case where (if necessary) the rules should be admitted as additional evidence in this application. These rules are headed "Rules for the supply of water to private individuals" and begin "The Municipality will supply water to private persons on the following terms." Rule 2 then provides that on the application of any person the Managing Committee may, if it thinks fit, comply with his request to lay a pipe in his house or premises. Rule 3 provides for the pipe being laid under the control of the Municipality and at the cost of the applicant, and r. 4 provides for any Hindu servant of the Municipality or water works establishment having a right to enter the house of any person to inspect or repair the pipe, and for recovering the cost of any such repairs from the water rate-payer. Rule 5 requires a report of any accident to the pipe and its repair as soon as possible, under the control of the Municipality. Rule 6 states that the rate at which water will be supplied will be settled annually at the general meeting of the Municipality in January. Rule 17 prescribes that the rate shall be levied yearly and allows a refund of one-third the amount paid to a person giving notice that his pipe may be cut off, provided he has used the

pipe for not more than two months of the half year. Rule 8 is regarding water being used for irrigation purposes, in which case the rate is to be fixed by mutual agreement. Rule 9 provides that if any accident occurs to the pipe, or if from any proper reason there is a stoppage in the water supply or a defective supply, the rate-payer shall not be entitled to claim any reduction in the rate, but compensation may be granted by the Managing Committee, provided application is made within 2 months. Rule 10 says "the Municipality may at any time stop the supply of water to private houses whenever it may appear to them for the benefit of the public that it should be stopped and they shall not be liable to any civil action for so doing."

Reading Ex. 17 with these rules, there can, I think, be no reasonable doubt that the rules in that exhibit are an alteration of r. 6 just referred to so that instead of the rate at which water will be supplied being settled annually at the general meeting of the Municipality in January it is fixed permanently in accordance with Ex. 17. The rules at pp. 92 and 93 of the Manual of Rules and Bye-Laws are not otherwise affected except that the rate for watering gardens is expressly provided for in rr. 10 to 13 of Ex. 17 instead of being left indefinite, as it is in r. 8 of the other rules. This alteration did not, however, affect the plaintiff. It is further I think, quite clear that the rules are ones under s. 46 (*i*) read with s. 71 (1) of the Municipal Act. The main provision in the rules is that "the Municipality will supply water to private persons on the following terms," and this clearly makes an offer to such private persons to supply them with water on the terms there laid down. It is quite different to the form followed in the general water-rate rules which provides that "a water rate throughout the town of Hyderabad shall be levied as follows" (page 75 of the Manual). The rules also comply with provisos (*a*) and (*b*) to s. 71, in all the matters there specified. Thus under rr. 2 and 5 the laying down of the pipe and its repair are at the applicants' cost, and under rr. 3, 4 and 5 it is under the control of the Municipality. There are provisions as to the stoppage of the supply in rr. 5, 9 and 10, and as to the limit of the supply in r. 8. Rule 7 furthermore provides for periodical payment such as is mentioned in cl. (*b*) of sub-s. (1) and the amended rules in Ex. 17 further specify a rate according to the quantity as ascertained by measurement and different rates for water supplied for domestic, irrigational, trade purposes, etc., as contemplated by s. 71 (*a*) and (*b*). Therefore, the form of the rules does very strongly support the defendants' contention, and a further fact, that is almost conclusive on the point, is that the payments depend on the actual supply of water and are not, like a general water-rate, leviable, whether the rate-payer takes the water or not. Thus as already mentioned r. 7 enables the rate-payer to have his pipe cut off, and thereupon he ceases to be liable to the rate. This distinction will be clearly seen by reference to the provisions of ss. 140 and 141 of the Bombay City Municipal Act, III of 1888, compared with the provisions of s. 169, on which those of s. 71 (1) of the District Municipal Act are obviously based. In the case of a water-tax under s. 141 the Municipality has power to enforce the rate, even though there be no actual pipe connection to a house, and if there had been a similar provision in these rules, then no doubt the case would be on a very different footing. But taking the rules as they stand, it is, in my opinion, a case where the liability of the plaintiff for the rate depends not on the fact of its being imposed under ss. 59 and 60 of the Act, but on an arrangement of the kind referred to in s. 71 (*a*) (*b*) by the Municipality with him or his predecessor-in-title, who applied to have a pipe connection.

The question, however, still remains whether the rate chargeable under these rules, though being dependant on such an arrangement, is in effect a *tax imposed* within the meaning of ss. 59 and 60 of the Act. On this point, there is a very high authority in the decision of the Court of Appeal in *Badcock* v. *Hunt* (1). That was a case where a lease contained a covenant requiring the lessor to pay all rates, taxes and impositions whatsoever imposed by the Corporation of the City of London or otherwise howsoever, and the lessee sought to recover from the lessor the water rates which he had paid in respect of water supplied to the premises for domestic purposes by the New River Company under the provisions of the Waterworks Clauses Act, 1847. It was

(1) (1889) 22 Q. B. D. 145; 58 L. J. Q. B. 134; 60 L. T. 314; 37 W. R. 205; 53 J. P. 340.

held that such water-rates were not rates or impositions imposed on or in respect of the premises within the meaning of the covenant and, therefore, the lessees were not entitled to recover the same from the lessor. In his judgment Lord Esher, M. R. said: "The words here are, 'all rates, taxes, and impositions whatsoever, whether Parliamentary Parochial, or imposed by the Corporation of the City of London, or otherwise howsoever." The question appears to me to be whether this water-rate can be said to be a rate or imposition 'imposed,' within the meaning of those words. I do not think that it can. I do not think that a charge to which a person can only be made liable with his own consent can be said to be imposed upon him within the meaning of this covenant. If a man buys things in a shop, the liability to pay the price may be said in one sense to be imposed upon him by law, but that is not, in my opinion, the sense in which the terms 'imposed' and 'imposition' are used in this covenant."

Fry, L. J. said: "I am of the same opinion. It is argued that this charge for water or so-called water-rate is a rate or imposition within the meaning of this covenant. It is a rate in one sense, because it is so called in the Statute, but it is in substance a payment for water supplied. The obligation to pay it is one which is voluntarily incurred by the person supplied, because he is not bound to take the water. The water Company, is compelled to supply if required, but the occupier is not bound to take a supply."

Lopes, L. J. said: "I am clearly of opinion that this is not a rate or imposition within the words of the covenant, any more than the price of wine or beer which had been supplied to the occupier of the premises would be such a rate or imposition."

This ruling applies directly to the present case. The more so, inasmuch as the Municipal Act invariably in connection with a tax used the word "imposed" and the definition of tax contained in s. 3 (14) of the Act implies that a rate, in order to be a tax, must be an "impost" *i. e.*, imposed under ss. 59 and 60 of the Act. That an arrangement under s. 71 (1)(*b*) is not such a tax is further shown by the provision in sub-s. (4) of s. 71 that every sum claimed by the Municipality as due under sub-s. (1) shall be recoverable in the same manner as an amount claimed on account of any tax recoverable. If such a payment was a tax then such a provision would be obviously unnecessary, for it would be recoverable under the provisions of Ch. VIII without any further provision.

The Subordinate Judge has discussed this question in his judgment. The reasons he gives for not agreeing with the contention that this is a case of a contractual charge are five in number. The first is that the way in which a Municipality enters into contracts is provided for by s. 40, under which a special mode of executing contracts is laid down, and he says there is no evidence nor even suggestion that there is any such contract between the plaintiff and Municipality also that a mere application by the plaintiff cannot be regarded as a contract. The classes of contracts dealt with in s. 40 are, however, those in which the Municipality leases, sells or otherwise transfers property or which it considers necessary or expedient to enter into in order to carry into effect the provisions and purposes of the Municipality Act, (s. 40 sub-s.(1)). It obviously contemplates formal contracts which are reduced to writing and does not, in my opinion, cover a case like the one now in question. For s. 71 (1) (*b*) does not use the words "enter into a contract with any person" but merely the words "arrange with any person", and it does not say that the terms and conditions shall be fixed *by written agreement* with such person, as it does in sub-s. (2) cl. (*ii*) of the same section, but merely "as they shall fix by agreement with such person." A written agreement is, therefore, not requisite and the reason for this is obvious. The terms which the Municipality offers are contained in the rules and those terms are impliedly accepted by a person receiving water through a private pipe connection, so as to make a valid agreement under ss. 8 and 9 of the Contract Act. Similarly when a Municipal peon is engaged, there is a contract of master and servant between the parties, but it would be absurd to say that written contract in accordance with the provisions of s. 40 are required in order to make it a valid agreement. Yet this would be the result of the Sub-Judge's interpretation of s. 40. The contract in such a case is made by the person accepting his appointment on the terms laid down in the Act and the rules thereunder. And in any case the plaintiffs' objection to the

rules is not based on any plea of there being no valid contract.

The second reason given is that s. 71 appears in special provisions relating to certain taxes. This, no doubt, is the sub-heading under which the section appears but it does not show that a charge or payment under cls. (*a*) and (*b*) of s. 71 sub-s. 1, is, therefore, a tax. These provisions *relate to* certain taxes, because as stated in sub-s. 1 the Municipality may, *instead of imposing a water-rate, etc.*, do what is authorized by those clauses, and as already pointed out, the provisions of sub-s. (4) imply that the Legislature did not regard such a charge or payment as itself a tax.

The third reason is that the water-rate for private service is as much a general tax as a general water-rate relating to public hydrants. This, however, is not correct, for the general water-rate is imposed whether or not the water is taken, and without the rate-payer's consent, whereas this water rate is only leviable if the water is actually supplied and the rate payer consents to its being supplied. There is a clear distinction between the two, as is pointed out in the case of *Badcock* v. *Hunt* (1).

The fourth reason is that s. 71 (1) (*b*) contemplates the case of supply of water by meter or arrangement in individual cases of cantonments, railways, religious and secular public institutions and the like. No authority is given for this view and it is opposed to the wording of cl. (*b*) which makes no reference to measurement as does cl. (*a*) and says "*arrange with any persons*", not with any body of persons of the kind mentioned above.

The fifth reason is that the Municipality has in all previous revisions of water-rate issued notices and has also issued a similar notice in the new proposed revision of water-rates. This may be true but it does not affect the legal question already discussed.

It is only evidence of conduct which might lend support to the plaintiff's contention, if the point were not free from doubt. And such notices were required by law in the other case mentioned because the rules as to stoppage and limit of the supply (Nos. 5, 8, 9 and 10) fall under s. 48 (*k*), and, therefore, have to be previously published under s. 48 (2). An alteration of the rules as to charges or payments, like that contained in Ex. 17, falls on the other hand under s. 46 (*i*) and requires no such previous notice. It may also be remarked that s. 60 requires a notice in the particular form of Sch. A, and Sch. A is confined to a notice of a desire to impose a tax, rate etc. This is further evidence that s. 60 is not intended to apply to the case where a rate is not a tax, but is chargeable under an obligation which is voluntarily incurred by being supplied with water on payment.

I am, therefore, of opinion, that the lower Court erred in holding that it was necessary for the Committee of Management to publish the alterations in Ex. 17 in the form of Sch. A; and that in consequence of their not having done so the levy of the water-rate in dispute was illegal. In this connection, it may be noted that the alterations were in one way less prejudicial to the plaintiff than the old r. 6, under which he was bound to pay any rate that the Municiaplity might fix. It is also in evidence that the alterations were published after being sanctioned, and the plaintiff had, therefore, prior notice of the alterations. If he considered the amount that he had to pay was too high, the proper remedy lay in his hands. He could have applied to have his pipe cut off.

I hold, therefore, that there was an error of law on the part of the lower Court and would reverse its decree and dismiss the plaintiff's suit with costs throughout.

Kemp, A. J. C.—I entirely concur.

Z. K. *Decree reversed; Suit dismissed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 929 OF 1924.

February 3, 1925.

Present:—Mr. Justice Mukerji.

PANCHAITI AKHARA—DECREE-HOLDER—APPELLANT

versus

BENI BAHADUR SINGH—JUDGMENT-DEBTOR—RESPONDENT.

Bundelkhand Alienation of Land Act (II of 1903), ss. 2, 16- Civil Procedure Code (Act V of 1908), s. 102—Provincial Small Cause Courts Act (IX of 1887), s. 25 r-Execution of decree of Small Cause Court on Regular Side—Appeal, second, whether lies—Revision—Trees constituting grove, whether land.

Appellant obtained a decree from the Court of Small Causes against the respondent. The decree was transferred to the Court of the Munsif in order to enable the decree-holder to attach immoveable property. The appellant sought the attachment of certain groves held by the judgment-debtor in an

area to which the Bundelkhand Alienation of Land Act applied. The respondent objected that under s. 16 of the Act the groves were not saleable in execution of the decree. The objection was allowed by the Executing Court and its order was upheld on appeal. Appellant came up to the High Court in second appeal:

Held, (1) that a second appeal was barred by the provisions of s. 102 of the C. P. C.;

(2) that the order of the lower Appellate Court was, however, subject to revision under s. 25 of the provincial Small Cause Courts Act;

(3) that the trees which constituted the groves, apart from the land on which they stood, were not "land" within the meaning of the definition laid down in s. 2 of the Bundelkhand Alienation of Land Act, and that, therefore, s. 16 of the Act was not a bar to the sale of the trees appertaining or belonging to the groves held by the respondent in execution of appellant's decree.

Execution second appeal from a decree of the Judge, Small Cause Court, exercising the powers of a Subordinate Judge, Allahabad, dated the 23rd February 1924.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Mushtaq Ahmad*, for the Respondent.

JUDGMENT.—A preliminary objection is taken that no second appeal lies and that objection seems to be valid.

It appears that the decree-holder, the appellant in this case, obtained a decree from the Court of Small Causes against the respondent. The decree was transferred to the Court of Munsif, Allahabad, in order to enable the decree-holder to attach immoveable property. He sought the attachment of certain groves, held by the judgment-debtor, in an area to which the Bundelkhand Alienation of Land Act applies. The judgment-debtor objected that under s. 16 of the above mentioned Act the groves were not saleable in execution of a decree. The decree-holder then made a statement to the effect that he wanted to sell not the groves as they stood but only the trees. Evidently he meant that the purchaser would be required to cut the trees and take the timber or wood away. The question, therefore, that arose in the case was whether the trees were, apart from the land or as a part of the groves, situated in an area to which the Bundelkhand Alienation of Land Act applies, saleable, the judgment-debtor being a member of the agricultural tribe.

The learned Munsif allowed the objection of the judgment-debtor and held that the trees were not saleable. The learned District Judge affirmed this decision on appeal. The decree-holder has come in second appeal.

There can be no doubt that, on the authority of this Court, a second appeal is barred under s. 102 of the C. P. C.

The decree-holder has asked this Court to take up the matter under s. 25 of the Small Cause Courts Act. It is contended by the learned Counsel for the respondent that s. 25 has no application in a case like this. In my opinion this contention of the respondent has no force. The order has been passed "in a case decided by the Court of Small Causes" and, therefore, it is an order which is subject to a revision by the High Court.

Coming to the merits of the case, the question stands thus:—"Whether the trees as apart from the land on which they stand are 'land' within the definition of s. 2 of U. P. Act II of 1903 Bundelkhand Alienation of Land Act." The definition of "land" is the following:—

"The expression 'land' means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, and includes etc., etc."

Now, the question is, "whether the trees are 'land', and, if so, whether the trees are 'land let for agricultural purposes or for purposes subservient to agriculture'? It will be noticed that groves are a well-known thing and abound in villages. It cannot for a moment be believed that the Legislature could possibly lose sight of the existence of such an article as a grove or even trees as apart from the land on which they stand. I am driven to the conclusion that they never meant that groves of trees should be included within the term land held for agricultural purposes or for purposes subservient to agriculture." In numerous cases decided under the U. P. Tenancy Act, 1901, the words, 'land for agricultural purposes' have been interpreted as not including groves or trees. See *Kesho Prasad* v. *Sheo Pragash Ojha* (1), affirmed by the Privy Council in *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (2).

I am of opinion that s. 16 of the Bundelkhand Alienation of Land Act is no bar to the selling by the appellant of the trees

(1) 64 Ind. Cas. 248; 21 A. L. J. 749; 3 U. P. L. R. (A.) 117; 44 A. 19; (1922) A. I. R. (A.) 301.

(2) 82 Ind. Cas. 932; 46 A. 831; (1924) A. I. R. (P. C.) 247; 10 O. & A. L. R. 1105; 40 C. L. J. 461; 47 M. L. J. 824; 51 I. A. 381; 23 A. L. J. 168; 27 Bom. L. R. 130; 21 L. W. 295; 1 O. W. N. 640; L. R. 6 A. (P. C.) 1; 29 C. W. N. 606 (P. C.).

appertaining or belonging to the groves held by the respondent.

I set aside the orders of the Courts below disallowing the application for attachment made by the decree-holder, and direct that the decree-holder's application for execution as amended by the Vakil's statement dated the 14th July 1923, be restored to its original number and be disposed of according to law. The respondent must pay the costs of the appellant in this Court and in the Courts below.

Z. K. *Order set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 397-B OF 1921.

December 13, 1923.

Present:—Mr. Kinkhede, A. J. C.

NARAYAN—PLAINTIFF—APPELLANT

versus

Syed HAFIZ AND OTHERS—DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 101—Limitation Act (IX of 1908), ss. 19, 20, Sch. I, Art. 132—Mortgages, prior and subsequent—Subsequent mortgagee paying off prior mortgage—Subrogation, doctrine of, applicability of—Intention of parties—Presumption—Suit by subsequent mortgagee on basis of prior mortgage redeemed by him—Limitation—Hindu Law—*Damdupat, *rule of, applicability of, to mortgage to which one party is non-Hindu—Assignment by non-Hindu debtor in favour of Hindu; effect of.*

Where a subsequent mortgagee pays off a prior mortgage, an intention to hold up the mortgage redeemed as a shield for his own benefit as against intermediate mortgagees must be presumed on behalf of the person paying off the mortgage, whenever necessity arises for such a presumption. [p. 267, col. 2.]

Where a man had a right to act in either of two ways he must be assumed to have acted according to his interest. [p. 268, col. 1.]

Where a subsequent mortgagee paid off a decree obtained by a prior mortgagee the day after the execution of his own mortgage and obtained a receipt in the name of the mortgagor but kept it with himself and recited the fact of the existence of the decree on the prior mortgage in his own mortgage stating that part of the money under the mortgage was required for paying off the decree:

Held, that all the circumstances pointed to the conclusion that it was the intention of the subsequent mortgagee to keep the security under the prior mortgage alive for his own benefit. [p. 266, col. 1.]

The principle underlying s. 101 of the Transfer of Property Act is applicable to the case of a subsequent mortgagee paying off a prior mortgage. [p. 266, col. 2.]

Where a prior mortgage is paid off with money borrowed from a subsequent mortgagee and the document creating the first charge is handed over to the subsequent mortgagee, the latter is entitled to the benefit of subrogation on the principle that there is an assignment in his favour by operation of law. [p. 267, col. 1.]

The advantages of the doctrine of subrogation are available to strangers who are mere volunteers having no pre-existing rights to protect and even to persons holding under invalid transfers, for instance, a transfer made *pendente lite*. [p 268, col. 1.]

The question as to whether the claim of a subsequent mortgagee based upon an earlier mortgage redeemed by him is within time depends upon the question, when the amount sued for became due to the prior mortgagee with reference to Art. 132 of Sch. 1 to the Limitation Act. If the due date fixed by the prior mortgage is found to have been beyond 12 years from the date of the suit, a further question of extension of time by payment of interest or by acknowledgment within 12 years of the due date would become material. [p. 268, col. 2.]

The rule of *damdupat* is not applicable to the case of a mortgage where only one of the parties thereto is a Hindu and the other is a non-Hindu. This rule cannot be let into the prejudice of a Hindu creditor by a non-Hindu debtor assigning his equity of redemption to a Hindu. [p. 268, col. 2; p. 269, col. 1.]

Appeal against a decree of the District Judge, East Berar, Amraoti, in Civil Appeal No. 80 of 1921, dated the 13th August 1921.

Mr. *A. V. Khare*, for the Appellant.

Mr. *M. B. Niyogi*, for the Respondent.

JUDGMENT.—The defendant Syed Hafiz executed the following mortgage-deeds in favour of the persons named against each:—

Serial No.	No. of Exhibit.	Date of the Mortgage.	Name of the Mortgagee.	Consideration.	Remarks.
1	P-6	27-4-1904	Bhagirath Ram-Pratap.	Rs. 2,000	Civil Suit No. 48 of 1912 decreed for Rs. 1,269-13-9 (Ex. P-8) on 10-7-1912.
2		16-9-1906	Sheo Narayan, Defendant.		C. S. No. 32 of 1915 decree dated 29-9-1915.
3		23-4-1907	Sheo Narayan, Defendant.		
4	P-1	6-10-1913	Narayan, Plaintiff.	Rs. 5,000	

Out of the consideration of the 4th mortgage Rs. 1,250 were employed for the satisfaction of the 1st mortgage decree dated 10th July 1912 passed in Civil Suit No. 48 of 1912. The plaintiff had undertaken *hawala* for Rs. 3,750 which he promised but could not pay to the intermediate mortgagee Sheonarayan as the latter refused to accept it on the ground that it was insufficient to satisfy his debts (Ex. P-10). The plaintiff brings this suit upon the basis of the mortgage redeemed by him for the recovery of the amount paid with interest at the rate provided in that deed. The First Court gave plaintiff a decree against the mortgagor and the mortgagee Sheonarayan who held two intermediate mortgages, but the lower Appellate Court has dismissed the suit. The plaintiff has, therefore, come up in second appeal.

In Suit No. 48 of 1912 which was brought by Bhagirath Rampratap on the basis of the mortgage dated 27th April 1904 the present plaintiff was not a party, as his mortgage came into existence to pay off the preliminary decree passed in that case. When Sheonarayan instituted his Suit No. 32 of 1915 he had, however, impleaded him as a co-defendant, but he was discharged from the suit on the ground that he having redeemed the earliest mortgage dated 27th April 1904, claimed to be subrogated to all the rights of the prior mortgagee (Ex. P-9). It is contended on behalf of the plaintiff that he paid off the earliest incumbrance on 7th October 1913 (Ex. P-2). It is argued before me that the appellant's intention was to take advantage of the prior mortgage paid off by him and that it was to his benefit to keep that mortgage security alive. On the other hand it was contended for the defendants that unless there is an agreement between mortgagor and mortgagee that he shall have priority over the other intermediate mortgagees the intention to keep the mortgage intact cannot be presumed and that in the particular case inasmuch as payment of the money to the 1st mortgagee was by the hand of the mortgagor the plaintiff cannot be said to have intended that the payment was to enure for his benefit, and that even if the payment was made by the plaintiff, he acted merely as an agent of the mortgagor and as such he was performing his own obligation and no presumption of an intention to keep the prior mortgage alive, can be made in the case.

In this case the receipt dated 7th October 1913 (Ex. P-2) evidencing the payment of Rs. 1,265 to the prior mortgagee was produced in Court by the plaintiff along with his own mortgage-deed dated 6th October 1913 (Ex. P-1). As the mortgage-deed dated 27th April 1904 of which Ex. P-6 is a certified copy was sued upon by the mortgagee and already filed as an Exhibit in Suit No. 48 of 1912 (Exs. P-7 and P-8), the same could not be got back from the mortgagee. Although the receipt Ex. P-2 stands in the name of the mortgagor defendant No. 1 still the fact that the plaintiff has produced it in Court clearly shows an intention, on his part, to rely upon it, and to base his rights thereon, in case of need. The case of *Seetaram* v. *Lachman* (1) is a direct authority for this view. The fact that the plaintiff got it inserted in the mortgage-deed (Ex. P-1) that the purpose of the loan to the extent of Rs. 1,250 was to satisfy the decree passed in Suit No. 48 of 1912 clearly signifies his intention to bring into existence a piece of evidence which may hereafter be useful to prove the existence of an agreement whereunder his money was borrowed and advanced and actually employed in redeeming the earliest encumbrance. The lower Appellate Court's observation that the mortgage-deed Ex. P-1 merely refers to the decree in Suit No. 48 of 1912 (Ex. P-8) and makes mention of the mortgage Ex. P-6 is without meaning. There is absolutely no reason to think that merely because the mortgage-debt becomes merged in a mortgage-decree and only a mention of the decree and not of the mortgage was made the intention of the transferee in doing so could have been not to use the mortgage, on which the decree was based, for the purposes of claiming the benefit of the doctrine of subrogation. Whether the right to subrogation arose under a mortgage or under a decree and whether s. 74 or s. 101 of the Transfer of Property Act applied, it was immaterial as will be seen from the observations of their Lordships of the Privy Council in *Gopi Narain Khanna* v. *Bansidhar* (2). The recitals in the mortgage about the existence of the decree, coupled with the circumstance that there was an immediate payment, the next day, of the full

(1) 12 C. P. L. R. 70.

(2) 27 A. 325; 2 C. L. J. 173; 9 C. W. N. 577; 7 Bom. L. R. 427; 15 M. L. J. 191; 2 A. L. J. 336; 32 I. A. 123; 8 Sar. P. C. J. 779 (P. C.).

amount due to the mortgagee, and the fact, that the receipt, evidencing the payment, was produced from the custody of plaintiff, in this case all clearly point to one conclusion, and that conclusion is that it was the intention of plaintiff to keep the mortgage security alive, and that such keeping of the mortgage security alive was for his benefit.

The second point which the District Judge seems to have made out against the plaintiff's intention to keep the mortgage security alive is the undertaking of a *hawala* by him to pay Rs. 3,750 to the subsequent mortgagee Sheonarayan towards the satisfaction of his two mortgages dated 16th September 1906 and 24th March 1907 and his failure to discharge that undertaking or objection. On the basis of these two documents Sheonarayan instituted his suit, in 1915, *i. e.*, 2 years after the plaintiff took his own mortgage. The District Judge does not seem to have at all directed his attention to some of the exhibits in the case which have a direct bearing on this point. He has simply indulged in surmises of his own for which there is absolutely no foundation. Exhibit P-10 is a certified copy of a written statement filed by the plaintiff on 2nd July 1915 in Sheonarayan's Suit No. 32 of 1915. It has been duly proved by the evidence of P. W. No. 4 whose testimony was not challenged by the defendant by cross-examination. It clearly mentions in para. 3 that on or about 9th October 1913 the plaintiff had carried the amount of the *hawala* to the house of Sheonarayan plaintiff in that case, for being paid to him but that the latter declined to receive the same, alleging that more was due and that consequently the amount of the *hawala* remained unpaid. Exhibit P-10 contains in paras. 4 and 5 a distinct declaration by plaintiff of his intention in taking the mortgage dated 6th October 1913, and also an assertion on his part that he claims priority in respect of the mortgage redeemed as against the present defendant Sheonarayan's mortgages of 1906 and 1907. There is also a disclaimer in unmistakable terms of his rights under his mortgage Ex. P-1 and a demand for the money due to him on basis of the mortgage redeemed. Then we have Ex. P-9 which is a certified copy of the oral pleadings dated 2nd July 1915 wherein we find the plaintiff's Pleader stating as under :—

"Since defendent No. 2 (described through mistake as defendant No. 1) falls back upon his former mortgage and does not wish to redeem plaintiff in this suit, he should be discharged. He is not necessary party in this suit."

This Ex. P-9 also contains the following order of the Court :—

"Since defendant No. 2 Narayan Ramji claims no interest on his subsequent mortgage and *falls back upon prior mortgage of Nathmal Rampratap he has redeemed*, and does not wish to redeem plaintiff in this suit, he becomes an unnecessary party and is discharged."

If the lower Appellate Court had cared to look into this documentary evidence on record, and realised the real signficance thereof, or the bearing it had, on the question of plaintiff's intention, I dare say his finding would not have been as it is.

The principle underlying s. 101 of the Transfer of Property Act as laid down by the Privy Council in the leading case of *Gokaldas Gopaldas* v. *Puranmal Premsukh Das* (3) which was applied in *Seetaram* v. *Lachman* (1) a case of a subsequent mortgagee paying off an earlier mortgage, is equally applicable to the facts of this case also:

"The obvious question to ask in the interests of justice, equity and good conscience is what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention ? If there is no express evidence of it what intention should be ascribed to him ? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest."

The learned District Judge says that the Privy Council case is distinguishable because there the person paying was a purchaser at an execution sale. If he thereby means that s. 101 or rather the principle underlying that section is applicable only to the cases of purchasers and not to subsequent encumbrancers, I must say it is a point of distinction which has long ceased to exist. As observed by Ismay, J. C., in *Seetaram* v. *Lachman* (1) the principle is applicable to puisne mortgagees paying off prior mortgages. The District Judge's view seems to be that there should be a definite assignment of the mortgage security, and that the payment should not be made by the hand of the mortgagor. His conclusion

(3) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 8 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.).

can well be stated in his own words:—

"If the subsequent mortgagee merely pays off the prior encumbrance, or a part of the mortgage-money is retained for satisfying a prior encumbrance there can be no right of subrogation. The prior encumbrance is discharged and is not kept alive. It also seems that it is of some importance whether the prior encumbrance is discharged by the mortgagor, whether it be by money obtained from the subsequent mortgagee or not, or whether it is discharged by the subsequent mortgagee himself. The lower Court has glossed over this point and has remarked that it does not matter whether the money was actually paid by the mortgagor or by the subsequent mortgagee. This is a view with which I am unable to agree."

Even in cases where the mortgage is paid off with the money borrowed from the subsequent mortgagee, and the document creating the first charge is handed over to the subsequent mortgagee, the benefit of subrogation is available on the principle that there is an assignment by operation of law, for, in such cases, there is no need of an assignment: see *Nathuram* v. *Sheolal* (4). Their Lordships of the Privy Council, in *Mahomed Ibrahim Husain Khan* v. *Ambika Pershad Singh* (5) which was a case of an agreement between the mortgagor and the subsequent mortgagee followed by a payment of first charge *by the mortgagor*, held, that the subsequent mortgagee was clothed with the rights created by the first charge as against the mesne encumbrancer, but that in the circumstances of that case the remedy had become barred by limitation. Looking at the present case from the point of view which finds support in the Privy Council case, I fail to see why the arrangement, recited in the mortgage-deed (Ex. P-1), to the effect that Rs. 1,250 were required, and actually advanced, for redeeming the decree based on the prior mortgage, should not be held to represent an agreement between the morgagor and the plaintiff, that the latter will be entitled to subrogation, followed as it is by a payment of the first charge by the mortgagor as was done in the aforesaid Privy Council case. Justice Mittra in *Nathuram* v. *Sheolal* (4) has reproduced with approval a quotation made by the eminent Judge Sir Asutosh Mookerjee in *Surjiram Marwari* v. *Barhamadeo Persad* (6) as clearly explaining the principle of subrogation and I cite it as an authority which lays down the law correctly and clearly:

"The true principle is, that where money due upon a mortgage is paid, it shall operate as a discharge of the mortgage, or in the nature of an assignment of it, as may best serve the purposes of justice and the just intent of the parties. It makes no difference whether the party on payment of the moneys took an assignment of the mortgage or a release, or whether a discharge was made, and the evidence of the debt cancelled. The debt itself may be held still to subsist in him who paid the money, as assignee, so far as it ought to subsist, in the nature of a lien upon the land, and the mortgage be considered in force for his benefit, so far as he ought in justice to hold the land under it, as if it had been actually assigned to him."

In view of the authorities just cited I do not at all feel pressed by the argument used by the learned District Judge to defeat the plaintiff's right of subrogation. In support of the proposition that an intention to hold up the mortgage redeemed as shield for his own benefit must be always presumed in the case of a subsequent mortgagee paying off a prior mortgage, whenever necessity arises for the same, I may cite the following cases:—

Anand Prasad Dube v. *Krishna Chandra Mukerji* (7), *Ram Sarup* v. *Ram Lal* (8), *Bai Reva* v. *Valimahomed Miyamahomed* (9), *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (10), *Dinobundhu Shaw Chowdhury* v. *Jogmaya Dasi* (11) and *Chidambara Nadan* v. *Musuvathi Munni Nagendrayyan* (12).

The law which ordinarily is an embodiment of strong common sense, will always presume the intention to keep the security alive particularly where there are inter-

(4) 42 Ind. Cas. 796; 13 N. L. R. 217 at p. 221.

(5) 14 Ind. Cas. 496; 39 C. 527; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 I. A. 68 (P. C.).

(6) 2 C. L. J. 288 at p. 298.

(7) 63 Ind. Cas. 738; 44 A. 9; 19 A. L. J. 792; 3 U. P. L. R. (A.) 152; (1922) A. I. R. (A.) 185.

(8) 75 Ind. Cas. 472; 44 A. 659; 20 A. L. J. 596; (1922) A. I. R. (A.) 394.

(9) 70 Ind. Cas. 912; 24 Bom. L. R. 720; (1922) A. I. R. (B.) 211; 46 B. 1009.

(10) 33 C. 425; 3 C. L. J 205.

(11) 29 C. 154; 29 I. A. 9; 6 C. W. N. 209; 12 M. L. J 73; 4 Bom. L. R. 238; 8 Sar. P. C. J. 217 (P. C.).

(12) 58 Ind. Cas. 813; 39 M. L. J. 445; (1920) M. W. N. 534; 12 L. W. 393; 28 M. L. T. 300.

mediate encumbrances still subsisting against the mortgaged property and the continuance of the security redeemed is certainly for the benefit of the person redeeming.

It is next argued before me that the benefit of the doctrine of subrogation cannot be availed of by a stranger or a mere volunteer, who, has nothing at stake, or, who has no pre-existing rights of his own to protect, or is a person whose interest has come into being during the pendency of a mortgage suit, his transaction being invalid as against the mortgagee who is paid off on the principle of *lis pendens*. In view of the overwhelming authority to the contrary I see no force in this contention. The advantage of this doctrine of subrogation has been extended to all such persons in several cases decided by American, English and Indian Courts. I need only cite the following:—

Syamalarayudu v. *Subbarayudu* (13), *Chama Swami* v. *Padala Anandu* (14) and *Tangya Fala* v. *Trimbak Daga* (15), where several other cases are also cited in support of the extension of the benefits of the doctrine of subrogation to such strangers or persons holding invalid transfers.

There is also an additional reason why the defendant should pay off the mortgage Ex. P-6 redeemed by plaintiff. The mortgagee in favour of defendant Sheonarayan were at their date, subject to the prior encumbrance Ex. P-6 in favour of Bhagirath Rampratap. Sheo Narayan was not required to pay up the decree (Ex. P-8) based on that mortgage although he was a party to the suit No. 48 of 1912 and the decree was passed against him. That decree was paid off with the present plaintiff's money. Sheonarayan has thus reaped the advantage of the payment. In spite of the invalidity of plaintiff's mortgage (Ex. P-1) on the grounds of *lis pendens* as against the prior mortgagee Bhagirath Rampratap with which the defendant Sheonarayan has absolutely no concern, he is entitled to be reimbursed by the defendant with the moneys paid by him to redeem a subsisting prior charge, and therefore, to be subrogated to the position of the said prior mortgagee. The plaintiff was perfectly right and legally justified in making his election to fall back on the prior mortgage Ex. P-6 and use it as a shield in answer to the suit No. 32 of 1915 brought by Sheonarayan to enforce his own mortgages.

Having thus held that plaintiff is entitled to subrogation, the next question which I have to consider is whether the claim based upon the earlier mortgage redeemed by him is within time. This will depend upon the question when the money sued for became due, to the plaintiff, under Art. 132 of Sch. I of the Limitation Act. In view of the decision of the Privy Council in *Mahomed Ibrahim Husain Khan* v. *Ambika Pershad Singh* (5) followed by Mittra, A. J. C., in *Nathuram* v. *Sheolal* (4) this question must be decided with reference to the due date of mortgage which was paid off, so that if the due date as fixed by the said mortgage is beyond 12 years from the date of the suit, a further question of an extension of time by payment of interest *as such* or by acknowledgments within 12 years of the due date, would ordinarily become material. But in the present suit which was instituted on 12th April 1919 the cause of action is stated to have accrued on 1st January 1919. While the defendant's written statement nowhere denies this express allegation in the plaint. Under O. VIII, r. 5, C. P. C., the allegation must, therefore, be considered as admitted and the claim is, therefore, well within 12 years from the due date. There is, therefore, no necessity for me to decide in this case the question whether limitation could be counted from the date of payment that is 7th October 1913, as was done in *Bora Shib Lal* v. *Munni Lal* (16) although that is a fairly sound and arguable point.

The only other point that now remains for consideration is whether the interest to be allowed to the plaintiff should be subject to the rule of *damdupat*. It is contended that the principal sum left unpaid under the prior mortgage was Rs. 400 and, therefore, nothing more than Rs 800 should be claimable by the plaintiff. In the alternative it is also contended that under no circumstances the plaintiff should get more than Rs. 2,500, which is double the amount he paid for the satisfaction of that mortgage. This argument loses sight of the fact that the mortgage, Ex. P-6, was a mortgage where only one of the party thereto was a Hindu and the other was a non-Hindu.

(13) 21 M. 143; 7 Ind. Dec. (N. S.) 457.
(14) 31 M. 439; 3 M. L. T. 395; 18 M. L. J. 306.
(15) 35 Ind. Cas. 794; 40 B. 646; 18 Bom. L. R. 700.
(16) 63 Ind. Cas. 604; 44 A. 67; 3 U. P. L. R. (A.) 193; 19 A. L. J. 840; (1922) A. I. R. (A.) 153.

The mere circumstance that because the person who enforces the mortgage now is a Hindu and the person against whom it is enforced is also a Hindu, instead of the original mortgagor who was a Muhammadan ought not to improve the position of the present defendant Sheonarayan for the simple reason that the rule cannot be let into the prejudice of a Hindu creditor by a non-Hindu debtor assigning his equity of redemption to a Hindu. It is interesting to find that the present defendant himself has defeated a similar objection urged on behalf of the Muhammadan mortgagor in answer to his own mortgage suit. No authority has been cited in support of this proposition but authority to the contrary is not wanting see *Hiralal Girdharlal* v. *Nagar Jeyram* (17). I, therefore, see no reason to reduce the claim of the plaintiff for interest to any extent. I, therefore, allow the appeal and set aside the decreee of the lower Appellate Court dismissing the suit, and restore that passed by the Court of first instance.

As the due date fixed by the decree of the First Court has long passed by, and the defendant is justly entitled to ask for extension of the period of redemption, it follows there must be a modification in the decree thus revived as regards the date and the price thereby fixed for redemption. I, therefore, direct that interest at the rate provided for in the prior mortgage be calculated for the period between 30th May 1921 and 13th April 1924, the date hereby fixed as the due date and the same be added to the price of redemption already fixed. Besides this, plaintiff's costs of the two appeals will be added to the price of redemption. A decree embodying these directions be passed in the case. The respondent Sheonarayan will bear his own costs throughout. The other respondents were unnecessarily joined as parties to this appeal. They will have no right of redemption and no costs as none has appeared for them.

Z. K. *Appeal allowed.*

(17) 21 B. 38; 11 Ind. Dec. (N. S.) 26.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 254 OF 1918.

September 6, 1921.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

MOTILAL HIRABHAI AND OTHERS—OPPONENTS NOS. 1 TO 5—APPELLANTS

versus

BAI MANI—APPLICANT—RESPONDENT.

Company—Mortgage of shares—Issue of new shares—Redemption—New shares, whether accretion.

The question whether an accretion to mortgaged Company shares by the issue of fresh capital can be treated as belonging to the corpus depends on whether accumulated profits are distributed as dividend or converted into capital. If a sum that is entered in the Balance Sheet to the credit of the Reserve Fund is transferred from the Reserve Fund to the Capital Account and new shares are issued to the existing share-holders, it may be said that there is a distribution of capital and the mortgagee is only entitled to interest on the new shares, but if the share-holders prefer that instead of getting dividends paid to them in cash, the amount to the credit of Profit and Loss Account available for payment of dividends in a particular year should be transferred to the Capital Account and new shares issued in respect thereof, there is a distribution of dividends and the mortgagee would be entitled to retain the new shares. [p. 271, col. 2.]

Plaintiff's father was the owner of certain Company shares but was entitled to retain only a certain sum out of the dividend, the balance being payable to *A* and *G* during their lifetime. Subsequently he mortgaged some of the shares with *A*. In the meantime the capital of the Company was increased by the issue of new shares called B shares, each of the original share-holders being allotted one B share for each old share held by him, and the B shares were to be paid for out of the dividends payable on the original shares, such dividend being payable to the share-holders at a certain rate and the balance being credited towards the calls on the B shares. After the death of *A* and *G*, plaintiff, who had become entitled to the shares, brought a suit to redeem them from the trustees of the estate of *A*. The plaint did not specifically mention the B shares but claimed to redeem the original shares "together with the issues thereof." The trustees of the estate of *A* filed a statement showing the dividends received in respect of the original shares as well as in respect of the B shares. The decree eventually passed in the suit allowed redemption of "the mortgaged shares together with the issues mentioned in the suit" and the decree was confirmed on appeal. In execution the question arose whether the mortgagor was entitled to the B shares or whether the *B* shares merely represented the dividend on the original shares and consequently belonged to the mortgagee:

Held, that having regard to all the circumstances of the case it was a fair inference that the profits of the Company were capitalized and that the new shares were allotted to the holders of the old shares as part of the capital and did not represent the dividends on the old shares and that consequently the plaintiff was entitled to the *B* shares. [p. 274, col. 2.]

Appeal against the decision of the First Class Subordinate Judge at Ahmedabad.

Mr. *Coyajee* (with him Messrs. *G. N. Thakor* and *H. V. Divatia*), for the Appellants.

Mr. *Bahadurji*, Acting Advocate-General (with him Mr. *N. K. Mehta*), for the Respondent.

JUDGMENT.

Macleod, C. J.—This is an appeal by some of the defendants in Suit No. 673 of 1918 in the First Class Subordinate Judge's Court at Ahmedabad against an order passed by the Subordinate Judge in Darkhast No. 96 of 1918 issued by the successful plaintiff in execution of his decree. That decree provides as follows: "The plaintiff do pay Rs. 11,939-15-0 to defendants Nos. 1 to 5 and redeem from them the mortgaged shares, together with the issues mentioned in the suit and the defendants Nos. 1 to 5 do on receiving the above sum get the said shares transferred to the name of the plaintiff in the books of the defendant No. 6 Company." This decree was confirmed on appeal to the High Court.

In order to understand the questions which are at issue in this appeal it will be necessary to set out the facts relating to the mortgage which was sought to be redeemed in that suit. The plaintiff was Mani, the daughter of one Girdharlal Dalpatram, who had a dispute with one Achratlal regarding the ownership of forty-eight shares in the Ahmedabad Ginning and Manufacturing Company. That dispute was settled by arbitration. As a result, twenty-four shares were transferred by Girdharlal to Achratlal, the remaining twenty-four were to remain in the name of Girdharlal but he was only to retain Rs. 1,100 out of the dividends, the balance being payable to Achratlal and Gulab his mistress. In 1883 Girdharlal in consideration for Rs. 7,500 borrowed from Achratlal transferred to the latter five out of the twenty-four shares retained by him, Girdharlal, under the arrangement of 1883. Achratlal died in 1885 and thereafter Girdharlal not having paid the excess dividends over Rs. 1,100 to Gulab borrowed Rs. 4,439-15-0 from the trustees of Achratlal on the same security. Thereafter the trustees continued to receive the dividends on the shares. Gulab is now dead and Girdharlal is entitled to the shares and all dividends declared thereon on redemption of the mortgage. The principal issue in the suit was on what terms the plaintiff should be allowed to redeem. The defendants claimed to retain the dividends without an account being taken and also to be entitled to interest on the principal debt.

The Trial Court held that the plaintiff should be allowed to redeem on payment of the principal debt without any account being taken of interest or dividends. It is important to note that throughout the judgment the Subordinate Judge refers to the mortgaged property as consisting of five shares which were numbered in the plaint 266 to 270. The original face value was Rs. 1,000 for each share. It is admitted, however, that before 1883 for each original share a sub-share of Rs. 500 had been issued, although Beaman, J., in his judgment refers to the face value of the five shares as amounting to Rs. 7,500, as if in some way or other the sub-shares were considered as increasing the face value of the original shares. These sub-shares presumably were transferred to Achratlal although they are nowhere referred to in the judgment, but the decree allows redemption of the mortgaged shares together with the issues mentioned in the suit. It is these last words which have formed the foundation for the present dispute. The five shares numbered 266 to 270 with their five sub-shares existing at the date of the mortgage of 1883 constituted the mortgaged property, as stated in para. 4 of the plaint. But in the prayer of the plaint, the plaintiff asked for an account to be taken, and for a direction, that on payment being made, the five shares in dispute as also the issues thereof that there might be *at present*, should be transferred to the plaintiff's name. There was no averment that any fresh issues had come into existence after the mortgage.

Now in 1886 certain special resolutions were passed by the Company, to the effect that—

(1) The capital of the Company should be increased by Rs. 5,25,000 to be called B capital divided into 350 whole shares of Rs. 1,000 and 350 half shares of Rs. 500. To those of the present share-holders who had a whole share of Rs. 1,000 one whole share of B capital was to be given and to those who had a present half share of Rs. 500 one-half share of Rs. 500 of the B capital was to be given.

(2) At the time of declaring a dividend the share-holders should be paid a dividend at the rate of 6 per cent. in cash and

the rest should be credited in the certificate for call.

We have been given to understand that the B capital has been fully paid up out of dividends declared in excess of 6 per cent. but there is nothing on the record of the suit or of the *Darkhast* to show by what instalments the B capital became fully paid up.

Considering that it was perfectly well known that the trustees of Achratlal, by reason of the five shares 266 to 270 and their five sub-shares, representing A capital, standing in their name, had become the holders of five whole shares and five sub-shares of B capital, it is almost incredible that the question whether the B shares should also be transferred on payment of the principal debt should have passed unnoticed. Even the five sub-shares of A capital are nowhere specifically referred to. It was eminently a question to be decided in the suit and not in execution proceedings. The Execution Court can only give effect to the decree as it stands. The defendants have to transfer to the plaintiff the mortgaged shares with the issues mentioned in the suit, but there is no mention of B shares throughout the proceedings except in Ex. 14 referred to by the learned Judge below. If they had been referred to in the course of the suit then it might be said that the Execution Court might order all shares and sub-shares issued after the mortgage to be transferred after ascertaining what shares had been so issued. But the mere fact that the plaintiff prayed that all subsequent issues should be transferred does not give the Execution Court power to deal with subsequent issues if there was no evidence before the Trial Court of subsequent issues and it could not be said that they were mentioned in the suit.

We do not even know whether the sub-shares of A capital which are mentioned in the special resolution of 1886 as half shares bore the same numbers of the corresponding whole shares or were given fresh numbers. But as far as we can gather from the meagre information on the record the calls on the B capital were paid by means of dividends which would otherwise have been paid to the holders of the A capital, their dividends in the meanwhile being restricted to 6 per cent. Eventually, therefore, the mortgagee instead of getting Rs. 7,500 in cash as dividend in excess of the 6 per cent. actually paid on the A capital mortgaged became the owner of fully paid shares of B capital. In any event, it might be argued that the mortgagor would not be entitled to have these shares transferred to him without an account being taken of the amount of dividend which was utilised in paying the calls on the shares instead of being paid in cash to the mortgagee. But this Court has decided that the mortgagor is not entitled to an account of the dividends as he was not liable to pay interest on the loan. It would seem, therefore, that if the question had been considered at all in the suit proceedings the mortgagor would at the least have been directed to pay Rs. 7,500 before he would get back the B shares, but obviously that is not an order which can be made in execution. It has been contended that a mortgagee of shares is in the same position as a life tenant, and that any accretion to the mortgaged shares by the issue of fresh capital must be treated as belonging to the corpus but as pointed out by Lord Herschell in *Bouch* v. *Sproule* (1) that depends on whether accumulated profits are distributed as dividend or converted into capital. If, as in that case, a sum which is entered in the Balance Sheet to the credit of the Reserve Fund is transferred from the Reserve Fund to the Capital Account and new shares issued to the existing share-holders, it may be said that there is a distribution of capital and the life-tenant can only get the interest on the new shares, but if the share-holders prefer that instead of getting dividends paid to them in cash, the amount to the credit of Profit and Loss Account available for payment of dividends in a particular year should be transferred to the Capital Account and new shares issued in respect thereof, clearly there is a distribution of dividends, and the life-tenant would be entitled to retain the new shares. But we have to endeavour to ascertain what was actually decided by the Court which passed the decree.

The learned Subordinate Judge in allowing the plaintiff, under the terms of the decree, to redeem the B capital as well as referred to Ex. 14 (which seems to be a mistake for Ex. 78) in the suit which was a statement brought in by the defendant of the dividends of the five

(1) (1887) 12 App. Cas. 385; 56 L. J. Ch. 1037; 57 L T 345; 36 W. R. 193.

shares received after *Bhadarva* 1939. It contains the dividends on the five shares and sub-shares in existence at the date of the mortgage as also of the five shares and five sub-shares of B capital. He deduces from that statement that the defendant did not claim the B capital shares themselves as representing payment of dividends. He also points out that the mortgagee had always treated the B shares as part of the property mortgaged, and that when the mortgagor prayed for redemption of the five shares with all the issues thereof up to the date of the suit, no objection was made to the claim by the defendants in their written statement and as the five mortgaged shares mentioned in the decree clearly included the five A sub-shares without mentioning them, they also must be taken as including the five whole and five holf shares of B capital. There is considerable force in this argument. If there was no evidence at all on the record from which it could be deduced that the learned Judge was aware of the issue of the B capital it might be said that the mortgaged shares referred only to A capital, but with Ex. 78 before him the learned Judge was aware of the B capital and yet throughout the case the mortgaged property is referred to as the five shares. If the defendants when asked to bring in an account of the dividends made no claim to include the B shares as representing dividends but only mentioned the dividends on the B shares and if they allowed the mortgaged property to be referred to throughout as the five shares Nos. 266 to 270, I think it may fairly be assumed that it was so obvious to the Court and to the parties that the B shares were accretions to the A shares that no one thought of taking the precaution of stating that as a fact. I should prefer to take this view, rather than the opposite one, that both parties understood that the B capital should be treated as dividends, so that it was not necessary for the Court to make it clear that only the A capital could be redeemed. I think the appeal should be dismissed with costs.

Shah, J.—[After stating the facts of the case his Lordship proceeded:—] The defendants have appealed to this Court and it is argued on their behalf that the decree does not refer to these new shares and that the plaintiff is not entitled to them, as the High Court must be deemed to have by necessary implication negatived her claim to them. It is further urged that the question arising between the parties with reference to these new shares cannot be dealt with in execution ; that these shares represent the dividends of the old shares and not an accretion to capital, that they should go to the representatives of Achratlal and Bai Gulab and not to the plaintiff, and that in any case the plaintiff should pay back the original profits used by the Company in paying up the calls of the new shares.

On behalf of the respondent it is urged that the terms of the decree are wide enough to cover these new shares, that the decree should be interpreted in the light of the prayer clause whereby she claimed five shares with all the issues in relation thereto up to the date of suit which would include the new shares of the B capital now in question. It is also urged that the defendants never raised the contention that they were entitled to these shares of the B capital even though they contended that they were entitled to all the profits of the old shares and were in no way liable to account for the same, and that the point must be deemed to have been decided against them by implication. It is also urged on her behalf on merits that these new shares formed an accretion to the capital and that as between the remainderman and the life-tenant, on the expiry of the interest of the life-tenant, the shares must go to the remainderman, according to the principle of the decision in *Bouch* v. *Sproule* (1).

As regards the first question relating to the construction of the decree, it is by no means free from difficulty. In the plaint no express reference was made to these shares of 1886 though the fact must have been known to the plaintiff. In the prayer clause, however 'the five shares Nos. 266—270 together with the issues thereof that there may be at present' have been referred to. In the written statement the original five shares are referred to, but no contention is raised as to the new shares of the B capital. The judgment of the Trial Court is silent and so are the judgments of the High Court on the question. At the same time it may be mentioned that the trustees filed a statement (Ex. 78) of the dividends received from time to time, in which they showed the dividends received not only on the old shares of the A capital but also on the new shares of the B capital. They,

however, did not show the new shares as forming part of the dividends received. The question was not raised on either side and the expression "mortgaged shares" used in the judgment of the Trial Court and the words "the mortgaged shares together with the issues mentioned in the suit" are not clear enough to place the matter beyond controversy. Having regard to the importance of the point and the absence of any evidence as to whether the shares represented the dividends on the old capital, it is difficult to hold that the decree gave to the plaintiff something, to which no express reference was made in the judgments or in the pleadings. The proceedings in the suit do not throw any light on the meaning of the words used; and the words used in the decree are capable of being interpreted in either sense. The "mortgaged shares" might include the accretion to the shares: but where the question, whether the new shares were an accretion to the capital, has not been raised and decided on its merits, I do not think that under the terms of the decree the new shares could be held to be included in the expression "mortgaged shares".

As regards the point that the question must be deemed to have been decided by implication, I do not see how it could be treated as having been decided against the plaintiff. There is some force in a similar contention urged on behalf of the plaintiff against the defendants. Though the new shares were not expressly mentioned in the plaint the words used in the prayer clause were clearly wide enough to include them. The trustees might have, and it may be said with some justice, ought to have, raised the point as to the new shares; and if they did not raise it, it must be deemed to have been decided against them. After a careful consideration of the question and taking into consideration the attitude of the trustees as indicated by the statement of accounts filed by them in the suit, I am not satisfied that the effect of the omission on their part to raise the question ought to be pressed against them to the extent of holding that the point must be deemed to have been decided against them by implication. It would be reading the *mofussil* pleadings with a strictness which might work injustice and which under the circumstances of this case I must decline to do.

The question then arises whether the rights of the parties to the new shares could be determined in these proceedings.

I think they could be determined. The words of the decree are not unequivocal: and under the circumstances the question whether the new shares are an accretion to the mortgaged property appears to me to be a question relating to the execution, discharge or satisfaction of the decree. The scope of the inquiry in the execution proceedings must be determined with reference to the terms of s. 47 of the C. P. C. but it is not necessary to put any strict construction upon that section, so as to exclude the consideration of a question which seems to be so closely connected with the subject-matter of the decree. Further, under s. 47 it would be open to us to treat the proceeding as a suit, if necessary, under s. 47 subject to the conditions mentioned in that section. I do not think, however, that it is necessary to adopt that course in this case.

In connection with this question, I must say that the evidence adduced by the parties is meagre. As to the proceedings of the Company, there is a *purshis* put in by the defendants which gives some information as to the way in which the new capital was raised and the new shares issued. But the difficulty of deciding a question of fact of this nature has been pointed out in various English cases, of which *Bouch* v. *Sproule* (1) is a type. We have to consider the provisions of the Settlement of 1883, and the statement of accounts filed by the trustees.

I should have preferred to have the copies of the Articles of Association and of the Resolutions of the Company with reference to the B capital and the way in which the calls were made in respect of the new shares. It is needless, however, to delay these proceedings any further: neither party has asked for any further opportunity to adduce evidence on this question.

According to the terms of the Settlement of 1883 as also on the findings of the High Court in the appeals from the Trial Court's decree, it is clear that Achratlal and Bai Gulab had only a life-interest in the old five shares and that ultimately they were to belong to Girdharlal or his heirs subject of course to the mortgage right created subsequently by Girdharlal in favour of Achratlal. Thus all the dividends would go to Achratlal and Bai Gulab and

the old shares would absolutely belong to the plaintiff after the mortgage amount was paid. The accident of the shares having been transferred to Achratlal as security for the loans makes no difference to the rights of the parties to the shares apart from the mortgage. It is clear that the old shares carried with them the right to the allotment of the new shares. For instance it is difficult to hold that if the shares had not been mortgaged and transferred to Achratlal and had continued in the name of Girdharlal, the new shares could have been or should have been issued to Achratlal as part of the profits of the old shares, and it is not suggested on behalf of the defendants that in respect of the remaining nineteen shares or such of them as continued in the name of Girdharlal, the trustees of Achratlal, have or could have claimed the shares of the new capital B issued to Girdharlal as part of the dividends which were claimable by them under the Settlement. The right to be allotted the new shares went with the old shares; and I find nothing on the record to support the view that the new shares formed part of the dividends in respect of the old shares. The evidence as to how the calls were received is not clear; but it seems to me to be a fair inference under the circumstances that the profits of the Company were capitalized and that the new shares were allotted to the holders of the old shares as part of the capital and did not represent the dividends on the old shares. At any rate the trustees have produced no evidence to show that that is not the correct inference. On the contrary their own statement of the profits received shows that the new shares were not treated as part of the dividends received on the old shares. It is very doubtful whether under the terms of the Settlement, apart from the mortgage, Bai Gulab could have claimed the dividends on these new shares as part of the dividends on the old shares during her life-time from Girdharlal. The money was advanced to Girdharlal on the security of the old shares; and the new shares, as I understand the effect of the Company's proceedings, were an accretion to the old shares. The title to these shares would follow the title to the old shares: and in my opinion the plaintiff is entitled to claim them. The special Resolutions of the 5th September p886, a printed copy whereof has been produced before us, also show that in substance what the Company did was to capitalize the profits.

No doubt the question would arise as to whether there is any equity in favour of the trustees as regards the amount of the shares which but for the capitalisation of the profits the Company might have distributed as dividends on the old shares. The trustees had the benefit of the security afforded by new shares during the continuance of the mortgage; and the question of their right to the profits of these shares as forming part of and going with the profits of the old shares has already been decided in the suit in favour of the trustees. I do not think, therefore, that there is really any equity in their favour; and if the profits were capitalized by the Company, I do not see how the defendants can claim those profits on the footing that if they had not been capitalized they would have been distributed as dividends on the old shares. I do not think that under the circumstances the principle underlying the decision in *Malam* v. *Hitchens* (2) can apply to this case.

I, therefore, concur in the order proposed by my Lord the Chief Justice.

Z. K. *Appeal dismissed.*

(2) (1894) 3 Ch. 578; 63 L. J. Ch. 797; 13 R. 38; 71 L. T. 655

PATNA HIGH COURT.

CIRCUIT COURT, CUTTACK.

APPEAL FROM ORIGINAL DECREE No. 4 OF 1921.

November 22, 1922.

Present:—Justice Sir B. K. Mullick, KT. and Mr. Justice Ross.

RADHAKANTO PARHI—PLAINTIFF —APPELLANT

versus

MATHURA MOHAN PARHI— DEFENDANT—RESPONDENT.

Estates Partition Act (V of 1897), ss. 5, 119—Proprietor in possession of fractional share in estate—Allotment on partition—Jurisdiction, meaning of—Error in mode of partition—Civil suit, whether maintainable.

Sub-clause (3) of s. 5 of the Estates Partition Act applies only to cases where a proprietor has an undivided share held in common tenancy in specific *mouzas* forming part of the parent estate but where he has no interest which extends over the whole estate; in other words, it applies only to proprietors who have an interest in some out of the total number of villages constituting the estate. [p. 276, col. 1.]

A proprietor of a *mahal* which is composed of two *mouzas* and who is in possession of a fractional interest in each is not entitled to claim an allotment in each *mouza* representing his assets in that *mouza*. [p. 276, col. 2.]

A Court is said to exercise jurisdiction when it exercises its power to adjust any jural relationship between the parties before it. [p. 277, col. 1.]

A Court has jurisdiction to decide rightly as well as wrongly and if a Deputy Collector has, in making a partition, disobeyed the provisions of sub-cl. (3) of s. 5 of the Estates Partition Act and, instead of making an allotment under that sub-clause, has proceeded under sub-cl. (5), then that error cannot be remedied in a Civil Court. Section 119 of the Act would be a clear bar. [p. 277, col. 2.]

Appeal from the judgment of the Sub-Judge, Balasore.

FACTS.—Plaintiffs were the owners of a two-annas and eight-pies share in a *mahal*. Subsequently they acquired a further five-annas and four-pies share in twenty villages in the *mahal*. During certain partition proceedings between the co-owners of the *mahal*, who were for purposes of partition formed into separate groups indicated by letters of the alphabet, plaintiffs, who were included in group *F*, were allotted a certain share in *M* which was one of the twenty *mouzas* and certain other shares in other villages of the *mahal*. The interest allotted to the plaintiffs in *M* exceeded the value of their five-annas and four-pies share in the twenty *mouzas* but did not come up to the value of an eight-annas share in those *mouzas*, which the plaintiffs owned by virtue of their two-annas eight-pies shares in the entire *mahal* and five-annas four-pies share in those particular *mouzas*. The total interest, however, allotted to the plaintiffs was equal to the total value of their interest in the entire *mahal*. The order of the Collector making the allotment was confirmed by the Commissioner and finally by the Board of Revenue. Plaintiffs thereupon instituted the present suit for a declaration that the partition made by the Revenue Authorities was irregular, illegal and *ultra vires* and that they were entitled to get assets to the extent of eight-annas interest in the twenty villages and to the extent of two-annas eight-pies share in the remaining *mouzas* of the *mahal*. The suit was dismissed by the Trial Court and the plaintiffs went up to the High Court in appeal.

Mr. *S. A. Asghar* (with him Messrs. *G. P. Das* and *B. N. Das*), for the Appellant.

Messrs. *B. N. Sinha*, *B. R. Chaudhuri*, *S. N. Roy* and *S. C. Chatterjee*, for the Respondent.

JUDGMENT.

Mullick, J.—[After setting out the facts his Lordship proceeded :—] Now, the first question that arises is whether in fact any error was committed by the Revenue Authorities? If the Revenue Authorities complied with the provisions of the Bengal Estates Partition Act then clearly no suit can lie. The matter turns upon the construction of s. 5 of the Bengal Estates Partition Act (Act V, B.C., of 1897) which runs as follows:

"(1) If the interest of any recorded proprietor who is entitled to claim partition is an undivided share in an estate held in common tenancy, he shall be entitled to have assigned to him as his separate estate, land of which the assets shall bear the same proportion to the assets of the parent estate as his undivided share in the parent estate bears to the entire parent estate.

(2) If the interest of such recorded proprietor is the proprietary right over specific *mouzas* or lands forming part of the parent estate and held by him in severalty, he shall be entitled to have assigned to him as his separate estate the said *mouzas* or lands.

(3) If the interest of such recorded proprietor consists of an undivided share held in common tenancy in specific *mouzas* or tracts forming part of the parent estate but not extending over the whole area of the parent estate, he shall be entitled to have assigned to him as his separate estate land, situated within such specific *mouzas* or tracts, of which the assets shall bear the same proportion to the assets of such specific *mouzas* or tracts as his undivided share in such specific *mouzas* or tracts bears to the entire *mouzas* or tracts:

Provided that, if the interest of such recorded proprietor consists of such an undivided share in more than one *mouza* or tract, he shall not be entitled to have land assigned to him in every such *mouza* or tract, but the Collector may assign to him as his separate estate land situated in any one or more of the said *mouzas* or tracts, subject to the condition that the assets of such land are in proportion to the aggregate of the interests which he holds in all such *mouzas* or tracts.

(4) If the interest of such recorded proprietor consists partly of land held in severalty, and partly of an undivided share either in the whole estate or in specific land held in common tenancy, he shall be en-

titled to have the portion of the common land falling by partition to his share added to the land held by him in severalty, and the estate thus formed shall be assigned to him as his separate estate, so that the assets shall bear the same proportion to the assets of the whole estate as his interest in all the land and undivided shares held by him bears to the aggregate interests of all the proprietors.

(5) If the interest of such recorded proprietor is of more than one of the kinds specified in the preceding sub-sections, land shall be assigned to him as far as possible in accordance with the principles therein laid down."

It is contended by the learned Counsel for the appellants that as a result of the plaintiff's purchase of the 5-annas 4-pies share in the twenty *mouzas* they, at the time of the partition, became possessed of an 8-anna share in twenty *mouzas*, and of a 2-annas 8 pies share in the remaining fifty-four *mouzas*, and that under the provisions of sub-cl. (3) of s. 5 they were entitled in one or more of the twenty *mouzas* to an allotment of which the assets shall be proportionate to their total interest in the entire twenty *mouzas*.

The learned Counsel also applies the same principle to the 2-annas 8-pies interest of the plaintiffs in the remaining fifty-four *mouzas*.

In my opinion this contention is unsustainable. Sub-clause (3) of s. 5 applies only to cases where a proprietor has an undivided share held in common tenancy in specific *mouzas* forming part of the parent estate but where he has no interest which extends over the whole estate; in other words, it applies only to proprietors who have an interest in some out of the total number of villages constituting the estate. If he has a share in the remainder also, then it follows that he has a fractional interest in the entire estate as well as a fractional interest in a part, the latter fractional interest being the difference between the larger and the smaller interest; that is to say, if, as in this case, he has a half-share in twenty *mouzas* and a one-sixth share in fifty-four *mouzas*, it must be held that he has a one-sixth share in the entire estate and in the twenty *mouzas* a fractional interest represented by the difference between one-half and one-sixth. That is the view taken by the Deputy Collector, who passed the order, dated the 28th August, 1917. Although the Collector appears from his order, dated the 4th of December, 1917, to have been of the erroneous opinion that the case fell within sub-cl. (4) of s. 5, in the result his final order of the 4th September, 1913, was correct. The plaintiffs in fact are proprietors coming within sub-cl. (1) and sub-cl. (3) of s. 5 and, therefore, under sub cl. (5), the Deputy Collector was entitled to make the allotment as far as possible in accordance with the principles contained in the first two of these sub-clauses. In this case it has been found impracticable to give to the plaintiffs in *Mouza* Mandari or in any other *mouza* within the twenty *mouzas*, an interest which will compensate the plaintiffs for their entire interest in the twenty *mouzas*. So the Deputy Collector has assigned to the plaintiffs an interest in *Mouza* Mandari only to the extent of Rs. 5,234-12-11 and has allotted lands in *mouzas* other than the twenty *mouzas* to compensate for the balance of the plaintiffs' assets in the twenty *mouzas* which amounts to Rs. 1,271-5-0.

And even if it be held that the case is one falling exclusively within sub-cl. (3) then under the proviso to that sub-clause the Deputy Collector was entitled to give the plaintiffs their 8-annas share in the twenty *mouzas* and their 2-annas 8-pies share in the remaining *mouzas*, in any one or more *mouzas* of either group. As I read this sub-clause a proprietor of a *mahal* which is composed of two *mouzas* and who is in possession of a fractional interest in each is not entitled to claim an allotment in each *mouza* representing his assets in that *mouza*; such a construction would defeat the entire principle of compactness where there are many villages and when the proprietor holds a different fractional interest in each.

It is next contended on behalf of the appellants that the allotment contravenes sub-cl. (3) because the plaintiffs have not obtained in *mouza* Mandari, which is the only *mouza* appertaining to the group of twenty *mouzas* which has been allotted to them, an interest equal to their interest in the entire group. Now although the assets of their half-share in the twenty *mouzas* are Rs. 6,506 1-11 the assets of their 5-annas 4-pies share amount only to Rs. 4,400, and as this is a case falling under sub-cl. (5) and as lands of which the assets are Rs. 5,234-12-11 have been allotted to them in Mandari, there has been a strict

compliance with the terms of the Statute. He is only entitled to land within the twenty *mouzas* of which the assets are Rs. 4,400 and that claim has been more than satisfied.

On the merits, therefore, it seems clear that the Deputy Collector has not only acted with jurisdiction but that he has fully complied with the law, and, therefore, the general question as to the jurisdiction of the Civil Court to set aside revenue partitions does not really arise in this case.

The second point that was made by the learned Counsel for the appellants was that there had been a failure to comply with the provisions of s. 30 of the Act inasmuch as the claimants in groups *A*, *B*, *K* had been allowed at a late stage of the proceedings to claim one joint block. It appears that in the preliminary stages they had each applied for a separate block in the Court of the Deputy Collector; but that after the general arrangement had been made, they changed their minds and wished to have one compact block in joint tenancy. There is no provision of law forbidding such a request. The Deputy Collector granted it and the terms of s. 4 (2) of the Act clearly show that it is open to one or more co-sharers to ask that their interest shall be formed into one separate estate to be held as a joint undivided estate. There is no limitation as regards the stage at which such an application can be made; and, in my opinion, there was no irregularity in the Deputy Collector's having entertained the application even after he had made the general arrangement and had given each of these co-sharers a separate block.

Finally the question of jurisdiction has been argued before us at some length and although it does not arise in the view I take, I will deal with it shortly. Jurisdiction, I think, in reference to the matter before us, must mean the power or authority to judge and a Court is said to exercise jurisdiction when it exercises its power to adjust any jural relationship between the parties before it. The exercise of jurisdiction with which we can here interfere must relate to the subject-matter, pecuniary value, locality or the parties; these are the matters which form the foundation of a Court's jurisdiction, and if a Court wrongly assumes that the foundation exists when in fact it does not exist then and then only it is wrongly exercising jurisdiction. But jurisdiction in its wider sense is sometimes understood to mean the power to do certain specific things which are ordained by Statute; it is in the narrower sense that we must understand the word here. If the Court has assumed jurisdiction correctly, that is to say, if by reason of its local situation or pecuniary authority, or by reason of the subject-matter, or the position of the parties the Revenue Court had power under the Statute to entertain the partition proceeding, then, in my opinion, every error made in carrying out the partition in accordance with the terms of the law would not necessarily invalidate the proceeding and render it null and void. As has been often observed a Court has jurisdiction to decide wrongly as well as rightly and if the Deputy Collector has, in making the partition, disobeyed the provisions of sub-cl. (3) of s. 5 of the Estates Partition Act and instead of making an allotment under that sub-clause he has proceeded under sub-cl. (5) then that error cannot be remedied in a Civil Court. Section 119 of the Estates Partition Act would, in my opinion, be a clear bar. Where the foundation of jurisdiction does not exist as in cases where a revenue sale is held though there is no arrear of revenue at all, or a certificate sale is held in execution of a certificate issued without authority, a Civil Court has an undoubted right to declare the sale to be a nullity and to restore the property to the owner. So again where a property such as a burial ground, which the Estates Partition Act forbids the Deputy Collector to partition, is partitioned, I think a suit will lie to declare that the partition so far as the burial ground is concerned is null and void; but if the Deputy Collector merely commits an error of law, it would be contrary to principle to hold that a Civil Court can interfere for the purposes of re-adjusting the arrangement and making a fresh partition.

But, then, the learned Counsel for the appellants contends that in the case before us a question of title or interest in the parent estate is involved and, therefore, the appellants are entitled, on the authority of *Kalanand Singh* v. *Kamlanand Singh* (1) and *Raghunath Prasad Narayan Singh* v. *Khajeh Muhammad Gawhar Ali* (2) to obtain a declaration that they have

(1) 14 Ind. Cas. 225.
(2) 2 C. L. J. 351.

an 8-annas share in the twenty *mouzas*. In my opinion these decisions have no bearing on the present case. What was decided in these cases was that it was open to a party to sue for a declaration to, and possession of a property if his interest or title to such property had been affected by the Deputy Collector's proceeding. Sections 23 to 27 of the Estates Partition Act expressly recognize the jurisdiction of a Civil Court to make decrees in these matters, and there can be no question that s. 119 would not bar a suit for declaration of title or of the extent of interest claimed by a recorded proprietor if aggrieved by an order made by the Deputy Collector under s. 23. In the present case there is no denial whatsoever that the plaintiffs are entitled to an 8-annas interest in the twenty *Mouzas* and obviously no declaration in this respect need be given. The sole question is whether it is open to the plaintiffs to get a declaration that the proceeding of the Deputy Collector was null and void by reason of his having misconstrued the provisions of s. 5 of the Act. In my opinion such a suit would not lie and the learned Subordinate Judge was right in dismissing it.

The result is that the appeal is dismissed with costs to the contesting respondents only.

Ross, J.—I agree that the appeal should be dismissed; and, for the reasons given by my learned brother, I hold that the partition conformed to the requirements of s. 5 of the Act.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 74 OF 1924.

January 26, 1925.

Present:—Mr. Justice Walsh and Mr. Justice Sulaiman.

Munshi RAVI NANDAN PRASAD —DECREE-HOLDER—APPELLANT

versus

JAGAR NATH SAHU AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90 —Execution of decree—Sale—Auction-purchaser, whether entitled to apply to set aside sale—Substantial loss, meaning of—Misrepresentation as to quality of property, effect of.

The expression, "a person whose interests are affected by the sale" in r. 90 of O. XXI of the C. P. C., is wide enough to include the auction-purchaser. An auction-purchaser is, therefore, entitled to make an application under this rule to set aside the sale and is consequently debarred from bringing a separate suit for that purpose. [p. 279, col. 2.]

Where an auction-purchaser makes an application under O. XXI, r. 90 of the C. P. C., to set aside the auction-sale, the principle of *caveat emptor* does not apply where it is shown that there has been a misdescription or a concealment amounting to a substantial misrepresentation affecting the quality and value of the property. [p. 281, col. 1.]

The expression "substantial loss" in r. 90, O. XXI of the C. P. C., is not confined to pecuniary loss. [*ibid.*]

An auction-purchaser at a Court auction is entitled to make his own choice, and he is entitled to know what it is for which he is asked to pay, and when he discovers that he is burdened with some charge of which he was ignorant, he is entitled to say "the amount of this charge is not in itself a matter of great consequence to me, it is its existence which stamps the property with a character I do not like, and I should not have purchased, or, at any rate, I was not prepared to pay a substantial price for, the property if it was charged in any way." [p. 281, cols. 1 & 2.]

A decree-holder who even honestly misdescribes the subject-matter of the sale by misrepresentation, such as the description "free from encumbrances," when there is an encumbrance, cannot be heard in a Court of Law to complain that the purchaser should have known what he was buying. [p. 281, col. 2; p. 282, col. 1.]

Case-law referred to.

First appeal from an order of the Subordinate Judge, Benares, dated the 3rd April 1924.

Sir *T. B. Sapru* and Mr. *K. Verma*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.

Walsh, J.—This is a first appeal from an order which raises an important question—though to my mind a simple question—of the proper construction of O. XXI, r. 90 of the C. P. C. In the Court below an auction-purchaser who had purchased property put up for sale under a decree, applied to have the sale set aside on the ground that he had suffered substantial loss owing to irregularity in the publication and conduct of the sale. An objection was taken in the Court below that the auction-purchaser had no right to apply under this rule. That objection was overruled by the learned Judge, who adopted the view taken by the Madras High Court in a case to which I will refer in a moment, and he then went on to hold that the property had been misdescribed by a material omission from the sale proclamation which omitted to mention that the property was subject to a charge called a *perjawat*, that

the applicant was unaware of it, and that he was induced to enter into the purchase by misrepresentation, which led him to believe that he was purchasing an absolute ownership, whereas it was only a lease-hold property, and he, therefore, set the sale aside and directed that the money should be refunded to the purchaser.

The main question which has been very fully argued before us—all the authorities both before and since the present Code having been referred to during the discussion—was whether the learned Judge was right in holding that an auction-purchaser can apply under O. XXI, r. 90. The question whether he can or cannot is obviously a very important one to auction-purchasers as a class, because if he can, and does not, or if he does, and applies unsuccessfully, he is clearly prohibited under r. 92 of the same Order from bringing a suit. This prohibition may, in certain cases, turn out to be a serious disadvantage to auction-purchasers. Under the old Code he could, and often did, bring a suit, and in some Courts a sort of traditional belief has taken root that he can bring a suit and cannot apply under this rule. If he has to apply under the rule, he has by the provisions of the Code very little time at his disposal in which to do so, and if he allows the time to run out, he cannot fall back upon a right to sue, which, if it existed, would give him much more time to prepare for his case and to collect the relevant material. It might, however, on the other hand be pointed out that there are very good reasons why the Code should have provided that he should apply, and not bring a suit. Everybody else who can conceivably be affected by the sale—using that term in its widest sense—has to apply and cannot sue. There does not seem any real reason why the auction-purchaser should stand in any different category. Moreover the Court executing the decree, controlling and carrying out the sale, is obviously the Court best equipped for determining the question whether there has been irregularity or fraud in the publishing or conduct of it, and *a fortiori* if it is the best Court for the purpose, it is clearly best in the interests of the parties and for the Court that the matter should be disposed of as speedily as possible and by an application, rather than by a dilatory suit, for after all it is the execution proceedings which are concerned, and it is desirable that the question whether the sale ought to be confirmed or not should be settled as speedily as possible. But whether the foregoing observations are sound or not—and they are merely *obiter*—they cannot affect the interpretation of this rule if the language of the rule is clear.

The question whether an auction-purchaser is entitled to apply, depends on the question whether he is included in the expression 'a person whose interests are affected by the sale." It is necessary to observe that this expression was not contained in the corresponding provision which was in force up to 1908, and up to that date the auction-purchaser could not apply but could bring a suit. It follows, therefore, that for the purpose of determining this question, the cases decided before 1908, or decided after 1908, with reference to proceedings which had begun before 1908, bearing upon the question whether auction-purchasers could apply or could properly bring a suit, are wholly irrelevant, and for my part, I decline to look at them. Unfortunately I find them still cited, as though they were relevant and authoritative, in text books dealing with the law under this rule, and they have been cited as authorities in one decision from which I feel compelled to differ. The expression to be considered is:—"whose interests are affected by the sale." I find myself compelled to hold as a matter of law that a person who is the highest bidder, whose bid is accepted, who is compelled by law to pay a deposit, and unless something intervenes, is compelled by law to complete his purchase, is a person "whose interests are affected by the sale:" It is impossible to use a wider term than "a person's interests." In the ordinary use of the word in the English language it is a term covering every sort of interest recognized by law, such as, in the case of an auction-purchaser, liability to pay the money, liability to complete and take a transfer of the property, and from his own point of view the necessity of finding the necessary funds, and also the necessity of carrying through to fruition the provisional contract into which he has entered. If the expression were "interests in the property," it would, of course, be confined to an interest in the property sold antecedent to the sale. If the word were merely "interest" without the plural and without the words "in the property" it might be possible to hold that the word "interest" was confined to interest in the thing itself at the time of

the sale. But that is not the expression, and to my mind the actual expression in the rule is free from ambiguity or difficulty of any kind and ought to be construed as meaning what it says. It would be unnecessary further to labour this point if it were not for two decisions of the Patna High Court relied upon by the appellant. The first is the case of *Khetre Mohan Datta* v. *Sheikh Dilwar* (1) decided in the year 1918. No reference is contained, either in the judgment, or in the head-note, to the rule which the Court was construing. The Court seems to have assumed that the question was settled beyond controversy and not open to argument. The judgment says:—"The Munsif very properly held that the auction-purchaser was not a person who could come in and attack his own purchase," and it went on to say "it is quite clear that it is not open to a party who purchases at an auction-sale to impugn the validity of his own purchase." It is clear, therefore, that the Court was treating it as a matter which was well-settled. I cannot, with great respect, accept the expression used in the foregoing quotation, that an auction-purchaser complaining of any irregularity antecedent to the sale, is attacking his own purchase. What he is attacking is the conduct of the sale on the publication of the material factors or description of the property put up for sale, and it seems to me a misdescription to say that in seeking relief from a burden which has been unjustly imposed upon him by an irregularity misdescribing the subject-matter of his purchase, or concealing material facts, he is making an attack upon his own purchase. It is merely a complaint that he has, either as the result of a mistake, or of a trick, bought something which he had not the slightest intention to buy, and that he is saddled with something which was not, so far as he is concerned, his purchase at all. The Madras High Court in 1921 in the case of *Bhavirisethi Gopala Krishnayya* v. *Pakanati Pedda Sanjeena Reddy* (2) without apparently being aware of the decision in Patna held that the expression included the auction-purchaser. This is the decision which the Court below has rightly followed. I merely wish to say with regard to it, that I find it puts too narrow an interpretation even on the word "interest." It treats the word "interest" as being an interest in the property which he has acquired at the sale, declining to hold as the Patna High Court has done, that it was confined to the narrow meaning of interest prior to the sale. For my part, as I have already said, I see no reason for limiting it even to the notion of interest in the property sold. The matter came again before the Patna High Court in the year 1923 in the case of *Kartik Chandra Chatterji* v. *Nagendra Nath Roy* (3) and that Court had before it, and had to construe r. 90 with which we are now concerned, and it also had the advantage of considering the decision I have just referred to of the Madras High Court. The learned Judge who delivered judgment in that case repeated what he had said in the previous case of the Patna High Court to which I have referred, saying that it was settled in that Court, that is to say Patna, that the auction-purchaser could not apply except under r. 91, and in explaining that r. 90 was not designed for the relief of the auction-purchaser at all, it cited decisions from the Calcutta High Court and by the Privy Council antecedent to 1908, which to my mind are irrelevant. The Court declined to follow the view taken in Madras, holding that it was precluded from doing so by the language of r. 90, and held that "interest affected by the sale" mean "interests in the property existing before the sale." I do not think that we have any right to insert fundamental amendments of this kind into the plain language of a rule. To my mind that is not interpretation but legislation, and I can only repeat that we are bound to take the words as they stand, and that it is quite obvious that an auction-purchaser whose bid is accepted and who is provisionally bound to complete his purchase, is a person whose "interests are affected by the sale." I would even be prepared to go further by way of attempting to explain why the word "auction-purchaser" is not used in the rule as it is used in the next rule, which provides that the auction-purchaser may apply to set aside the sale where the judgment-debtor has no saleable interest in the property, and say that in a case, for example,

(1) 46 Ind. Cas. 614; 3 P. L. J. 516; 5 P. L. W. 151.
(2) 55 Ind. Cas. 333; 38 M. L. J. 228; (1920) M. W. N. 152; 11 L. W. 184.
(3) 74 Ind. Cas. 760; 5 P. L. T. 41; (1924) A. I. R. (Pat.) 319.

where the auction-purchaser was a mere trustee or agent employed to purchase on behalf of a syndicate of persons who were either unwilling or unable to be present, and who entered into the purchase on their behalf in his own name, and then quarrelled with them and declined to take the necessary steps to set aside the sale if there has been irregularity against which they desired to protect themselves, yet although they were not actually the purchasers at the sale in so many words, they would be persons whose interests were affected by the sale, and who might ultimately apply on the ground that the auction-purchaser declined to do so on their behalf. The result is that, in my view, the auction-purchaser is now brought into the same category as the decree-holder judgment-debtor and other persons in previous rules upon the subject, and may apply under r. 90 with the natural result that he is prohibited from bringing a suit on the same complaint. On this ground I hold that the appeal fails subject to the further question whether we are prepared to confirm the learned Judge on the merits.

The question of the merits is really a much more difficult one, largely by reason of the fact that the learned Judge is so satisfied, that the merits of the application are established, that he has omitted to state the steps by which he arrives at certain conclusions or inferences which he has summarized in his judgment. I agree with him that the principle of *caveat empter* does not apply under this rule where it is shown that there has been a misdescription or a concealment amounting to a substantial misrepresentation affecting the quality and value of the property. I use the word "quality" advisedly, because I do not think that the expression "substantial loss" is necessarily confined to "pecuniary loss." It is not true to say that if a man thinks he is buying unencumbered property and finds afterwards that it is encumbered to no greater extent than Rs. 5 per annum, that the difference is necessarily represented by capitalizing the annual sum of Rs. 5. A man making a decision whether he shall bid and purchase a property is a free agent. He is entitled to make his own choice, and he is entitled to know what it is for which he is asked to pay, and, in my judgment, he is entitled to say—when he discovers that he is burdened with some charge of which he was ignorant—"the amount of this charge is not in itself a matter of great consequence to me, but its very existence is a thing which stamps the property with a character I do not like, and I should not have purchased, or at any rate I was not prepared to pay a substantial price for the property if it was charged in any way." Now there are two features about this case which impress me very much in favour of the finding that substantial loss has been made out. The proclamation described the property as free from encumbrance. To my mind that was a fundamental misdescription and misrepresentation of the character of the property. It was a misrepresentation holding out the property to be free when it was not free. One attack which the appellant has made upon the finding of the learned Judge is that the learned Judge says in his judgment: "he, the purchaser purchased it thinking that it is *muafi* land, and, therefore, paid a very big sum for it," and it is said that the learned Judge has gone beyond the evidence in holding that fact in favour of the applicant, because the applicant did not, as he really should have done, go into the box. Whether by a sort of mutual understanding, which frequently happens without a clear record being left behind to testify to it by those present at the trial, it was treated as common ground that the applicant thought he was getting free property one cannot say with certainty in this case. But it seems to me that the appellant is in this difficulty. He had been the mortgagee of the property and he was in possession of the documents relating to it, and a very superficial acquaintance with them must have shown him the existence of this encumbrance. Either he was guilty of gross carelessness in supplying the materials to the Court without consulting the relevant documents which would have shown him what the materials were, or he knew and wilfully concealed the existence of this small charge. Inasmuch as he himself allowed the Court to describe the property in the proclamation as free from encumbrance, it does not lie in his mouth to complain that the learned Judge has attributed to the purchaser the same belief which the decree-holder allowed the Court to advertise. A man who even honestly misdescribes the subject-matter of a sale

by misrepresentation, such as the description "free from encumbrance" when there is an encumbrance, cannot be heard in a Court of Law to complain that the purchaser knew what he was buying. The learned Judge has found that the purchaser has suffered substantial loss, and even conceding that a pedantic criticism of the judgment may succeed in showing that there are gaps in the reasoning by which he has reached his conclusion, the judgment satisfies me that the learned Judge was convinced that this was one of those cases—which I described in the foregoing observations—in which the mere monetary amount of the existing charge was not the only material factor in holding that the purchaser had suffered substantial loss by reason of the irregularity in the publication and description of the sale in the proclamation, but that he arrived at that conclusion because he was satisfied—and I think rightly that the purchaser objected to buy the property with any encumbrance at all quite apart from the question what its amount might be. I think there was abundant evidence to justify the finding that substantial loss had been suffered in the sense in which that expression is used in s. 90, even though the sum was not a large one, and upon the evidence I should have come to the same conclusion.

We, therefore, hold that the appeal must be dismissed with costs including in this Court fees on the higher scale.

Sulaiman, J.—I agree. Under s. 311 of the old Code the decree-holder or any person whose immoveable property had been sold could apply to have the sale set aside on the ground of a material irregularity in publishing or conducting it. On the language of that section it was quite clear that an auction-purchaser could not apply. The Privy Council in the case of *Birj Mohan Thakur* v. *Rai Uma Nath Chowdhury* (4) held that an anction-purchaser did not come within the meaning of that section. In the later case of *Kala Mea* v. *Harperink* (5), their Lordships of the Privy Council affirmed the decree in a civil suit brought by an auction-purchaser on the ground of misrepresentation made by the sale officer. The language of the corresponding provision in the new Code has been materially altered. Under O. XXI, r. 90 in addition to the decree-holder and to any person entitled to share in a rateable distribution of assets, every person *whose interests are affected by the sale*, has a right to apply. There can be no doubt that the expression "any person whose interests are affected by the sale" is much wider and the question is whether it includes an auction-purchaser also or not.

It is impossible to answer this question on mere general considerations. On the one hand it may be conceded that an auction-purchaser purchases the property at an open competition where no warranty of title is given and that, therefore, when he bids he takes a certain amount of risk if it turns out that the property which he has got is not worth the amount which he paid. It must also be conceded that to give him a summary remedy under this rule to apply to have the sale set aside would be taking away from him the right to bring a separate suit, and would also be curtailing the period during which he can seek his remedy. On the other hand it cannot be denied that if there exist heavy incumbrances on a property which is put up for sale and they are not announced at the time of the sale the auction-purchaser may offer a very high price for it and may be seriously prejudiced thereby. An auction-purchaser is not ordinarily a party to the proceedings and he often comes on the scene at the last moment and knows very little about the property that is put up for sale. If all the particulars necessary to disclose to him the nature of the interest he is going to bid for, are not mentioned at the time and he has no right to have the sale set aside by reason of such omission it would be denying him justice As I have said it is unsafe to answer the question on general considerations only. It is our duty to interpret the words of the rule as they stand. The expression perhaps is not as clear as it may have been and it is its ambiguity which has led to a conflict of opinion between the Patna and Madras High Courts. The learned Judges of the Patna High Court in the case of *Khetre Mohan Datta* v. *Sheikh Dilawar* (1) and in the case of *Kartik Chandra Chatterji* v. *Nagendra Nath Roy* (3) seem to take the expression 'interests' as meaning an interest in the property put up for sale. They

(4) 20 C. 8; 19 I. A. 154; 6 Sar. P. C. J. 245; 10 Ind. Dec. (N. S.) 6 (P. C.).

(5) 1 Ind. Cas. 122; 33 C. 323; 13 C. W. N. 249; 6 A. L. J. 34; 5 M. L. T. 126; 9 C. L. J. 165; 11 Bom. L. R. 227; 19 M. L. J. 115; 36 I. A. 32 (P. C.).

therefore, argue that the auction-purchaser's interest in the property is really created by the sale and cannot be said to have been affected by it. On the other hand the learned Judges of the Madras High Court in the case of *Bhavirisetti Gopala Krishnayya* v. *Pakanati Pedda Sanjeeva Reddy* (2) have taken the view that if the interests of an auction-purchaser are affected when the sale is to be set aside they must also be affected if the sale is to be confirmed.

I agree with my learned brother that the expression 'a person whose interests are affected by the sale' must be taken in its general sense and there is no justification for restricting it to mean interest in the property put up for sale. As pointed out by him the word 'interest' is not used in the singular but is in the plural number. It is easy to imagine cases where the interest of a person may be affected by the sale though he may have no actual interest in the property which is put up for sale. The expression is of a much wider scope and there seems to be no good ground for holding that it should not include an auction-purchaser. The Calcutta High Court also has taken the view that the expression is of very wide import [*Abdul Aziz* v. *Tafazuddin* (6).]

I wish, however, to guard myself against being understood to hold that by conceding the right to an auction-purchaser to apply under this rule, I mean to open a door for a general enquiry into the title of judgment-debtors. To do so would be to call upon decree-holders to prove the titles of their judgment-debtors in the property which they are seeking to sell. I take it that if the decree-holder, in a *bona fide* belief that the interest which he wants to sell vests in his judgment-debtor and without any fraud, misrepresentation or concealment, puts up that interest for sale, it cannot be said that there has been a material irregularity in the omission if a subsequent enquiry were to disclose that the judgment-debtor did not really own the entire interest which was put up for sale. Under O. XXI, r. 15 which deals with cases of attachments, all that is required is a specification of the judgment-debtor's share or interest in the property to the best of the belief of the decree-holder, and so far as he has been able to ascertain the same. The same principle it seems to me would apply to a mortgagee-decree-holder also. A decree-holder has a right to put up for sale what he honestly believes to be his judgment-debtor's property and may offer it to be purchased without giving any warranty of title at all.

The only case where a question of title can be gone into in these summary proceedings would be a case where an auction purchaser attempts to prove that the judgment-debtor had no saleable interest whatever. It is supposed that there is an implied guarantee that at least *some* interest is being put up for sale, and, therefore, if it be a fact that the judgment-debtor has no saleable interest whatsoever the auction-purchaser is given a remedy under r. 91 to apply to have the sale set aside. He has no general right to ask the Court to enquire into the interest of the judgment-debtor and set aside the sale if it is satisfied that he did not possess the exact amount of interest which was announced to be sold.

In the present case the property was put up for sale and was described as a free-hold. There was nothing in the proclamation of sale to suggest that the judgment-debtor had merely a lessee's interest in the property. Under O. XXI, r. 66, it is the duty of the decree-holder to see that all incumbrances to which the property is liable are mentioned as well as every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property. Even if it be assumed that the ground rent payable on this land cannot be called an incumbrance on the property, nevertheless it must be conceded that it was a particular which was material for a purchaser to know in order to judge of the *nature* and value of the property. The mortgagee decree-holder had the title deeds in his possession and must be deemed to have been aware that the property was only lease-hold. His omission to describe it as such was a deliberate omission and it certainly amounted to a material irregularity within the meaning of O. XXI, r. 90. All the conditions under which this land is held are not shown in these proceedings. We do not know exactly what the terms are on which the occupier can be ejected. Further there is a claim on behalf of the Municipal Board for a *haq chaharum*. That, however, is not admitted either by the decree-holder or the auction-purchaser. It is reasonable to assume that the auction-purchaser would

(6) 23 Ind. Cas. 839; 19 C. W. N. 326

not have offered such a high price for this property if he had known that the property he was going to purchase was a mere lease-hold and not a free-hold. I, therefore, agree with the Court below that it is estalished that there was a material irregularity in publishing and conducting the sale and in consequence of that irregularity the auction-purchaser has suffered substantial loss.

By the Court.—The order of the Court is that this appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 58 OF 1924.

January 23, 1925.

Present:—Mr. Daniels, J. C., and Mr. Dalal, A. J. C.

MATHURA PRASAD—DEFENDANT—APPELLANT

versus

Kunwar BAHADUR SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 71—Execution of decree—Sale—Non-payment of purchase-money—Re-sale—Order directing payment of deficiency—Suit to set aside order, whether lies.

An order under O. XXI, r. 71 of the C. P. C., directing a defaulting purchaser to pay the balance of the original purchase-money comes within the provisions of s. 47 of the Code and a separate suit to set aside the order is not maintainable. [p. 285, col. 1.]

(Case-law referred to.)

Appeal from the decree of the First Additional District Judge, Lucknow at Barabanki, dated the 22nd September 1924, in Regular Civil Appeal No. 65 of 1924, reversing that of the Munsif, Fatehpur.

Mr. *M. Wasim*, for the Appellant.

Mr. *Naim Ullah*, for the Respondent.

JUDGMENT.—This case has been referred to a Bench for a decision of the question whether a separate suit lies to set aside an order passed under O. XXI, r. 71 of the C. P. C. The appellant Mathura Prasad obtained a Revenue Court decree for profits to an amount of Rs. 2,959, and in execution of this decree brought certain immoveable property to sale. The plaintiff-respondent Kunwar Bahadur Singh purchased the property at auction-sale for Rs. 1,300, but did not deposit 25 per cent. of the price as required by O. XXI, r. 84. The property was thereupon re-sold in accordance with that rule and was purchased by the decree-holder for a sum of Rs. 600. Mathura Prasad then applied in accordance with O. XXI, r. 71 to recover the balance of the original purchase-money from the defaulting purchaser. On 11th December 1922 an order was made in his favour. On 9th January 1924 the present suit was instituted for a declaration that the plaintiff was not liable to make good this deficiency. It was objected that the suit was not legally maintainable. The learned Munsif gave effect to this contention, the learned Additional District Judge overruled it, and hence the present appeal by the decree-holder.

In support of the view that a separate suit lies the appellant relies on two decisions of the Allahabad High Court, *Deoki Nandan Rai* v. *Tapesri Lal* (1) and *Tapesri Lal* v. *Deokinandan Rai* (2). The former decision held that no appeal lay from an order of the kind now in dispute and the latter that a separate suit lay to set it aside. Both rulings proceeded on the principle that the order was a mere administrative order and not a judicial order, and, therefore, could not constitute a decree. This view has been recently overruled by a Full Bench of the Allahabad High Court in *Sita Ram* v. *Janki Ram* (3). It is true that the actual point for decision in that case was whether the order was appealable as a decree, but the case in *Deoki Nandan Rai* v. *Tapesri Lal* (1) was expressly dissented from and the reasoning of their Lordships was fatal to the contention that a separate suit would lie. They held that the order was a judicial order and was a decree within the meaning of s. 47, C. P. C. If the order comes under s. 47 it follows by the very terms of that section that no separate suit lies to set it aside. That no separate suit lies to set aside a decree except on the ground of fraud has been held by two decisions of this Court [*Suraj Bakhsh Singh* v. *Brijraj Kunwar* (4) and *Kishan Dayal* v. *Deputy Commissioner, Partabgarh* (5).] Rulings of other High Courts are in accordance with the most recent ruling of the Allahabad Court. We need only refer to *Amir Baksh Sahib* v. *Venkatachala Mudali* (6), *Gur Baksh Lall* v.

(1) 14 A. 201 A. W. N. (1892) 74; 7 Ind. Dec. (N. S.) 499.

(2) 19 A. 22; A. W. N. (1886) 168; 9 Ind. Dec. (N. S.) 15.

(3) 65 Ind. Cas. 813; 44 A. 266; 20 A. L. J. 105; (1922) A. I. R. (A.) 200.

(4) 57 Ind. Cas. 415; 23 O. C. 140; 7 O. L. J. 291.

(5) 59 Ind. Cas. 566; 23 O. C. 342.

(6) 18 M. 439; 5 M. L. J. 206; 6 Ind. Dec. (N. S.) 656.

Jawahir Singh (7), *Gangadas Dayabhai* v. *Bai Suraj* (8) and *Rajacharya Sheshacharya* v. *Chimanna Gurushantappa* (9).

Quite apart from authority we think that on the language of the Code an order under O. XXI, r. 71 comes within the provisions of s. 47. The matter may be looked at in two ways. In the first place it is a proceeding between the decree-holder and the auction-purchaser as representative of the judgment-debtor. There is ample authority for the proposition that the auction-purchaser is the representative of the judgment-debtor. In the second place the language of r. 71 itself shows that it was intended that these proceedings should be treated as execution proceedings. The rule says that the amount of default shall be recoverable from the defaulting purchaser "under the provisions relating to the execution of a decree for the payment of money." These words clearly indicate that the proceedings should be regarded as execution proceedings.

We accordingly hold that the present suit is not maintainable. We, therefore, set aside the decree of the Court below and dismiss the suit with costs in all Courts.

Z. K. *Decree set aside.*

(7) 20 C. 599; 10 Ind. Dec. (N. S.) 405.
(8) 14 Ind. Cas. 777; 36 B. 329; 14 Bom. L. R. 250.
(9) 59 Ind. Cas. 192; 45 B. 223; 22 Bom. L. R. 1193.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 710 OF 1923.

October 8, 1924.

Present:—Mr. Justice Jackson.

VEERAPPAN *alias* PALANIAPPAN CHETTI—PLAINTIFF—PETITIONER

versus

MYLAI UDAYAN—DEFENDANT No. 3—RESPONDENT.

Registration Act (XVI of 1908), ss. 17, 49—List of properties allotted on partition signed and attested, whether partition deed—Registration, whether necessary—Admissibility in evidence to prove division of estate.

The question whether a document is a deed of partition or a mere memorandum of partition is a pure question of fact to be decided on a perusal of the actual document. [p. 285, col. 2.]

After an award directing a partition was passed by *panchayatdars*, a list was drawn up which contained the shares given to the different members and was signed by them and attested by witnesses:

Held, that the document was a deed of partition declaring an interest in the immoveable property mentioned therein and, if unregistered, it was not admissible in evidence respecting any transaction affecting such property. [*ibid.*]

Semble—If the document were looked at not as evidence of a transaction affecting immoveable property but merely in order to show that a division of status had taken place it would only evidence an intention to divide and not the actual division itself. [p. 286, col. 1.]

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of Small Causes, Trichinopoly, dated the 19th February 1923, in Small Causes Suit No. 5943 of 1922.

Messrs. *S. Muthiah Mudaliar* and *K. Subramanyan*, for the Appellant.

Messrs. *R. V. Sheshagiri Rao* and *K. V. Shesha Iyengar*, for the Respondent.

JUDGMENT.—This is a suit on a pronote. The 3rd defendant denied liability on a plea that he was divided from the family. The Small Cause Judge accepted this plea on the evidence of Ex. I. There is oral evidence to the same effect which he has not discussed. The sole question raised by petitioner (plaintiff) is whether Ex. I is acceptable in evidence inasmuch as it is a deed of partition affecting immoveable property and not registered.

Counter-petitioner raises the usual argument that Ex. I is a mere memorandum. He cites various rulings, but this is a pure question of fact to be decided on a perusal of the actual document. [Spencer, J., has made the same observation in *Ayyakutti Mankondan* v. *Periasami Koundan* (1).] Exhibit 1 is described as a list of partition resultant upon the award passed by *panchayatdars*. It contains the share given to 3rd defendant, mentions three items out of that share made over to Kannusami, is signed by Kannusami and 3rd defendant, and is attested by four witnesses. It is, in my opinion, too formal a document to be described as a mere memorandum. It is a deed of partition declaring an interest in the immoveable property mentioned therein; and as such being unregistered under s. 49 of the Indian Registration Act, it cannot be received in evidence of any transaction affecting such property. However, the counter-petitioner argues that it can nevertheless be received in evidence to prove division

(1) 31 Ind. Cas. 615; 30 M. L. J. 404 at p. 406; 2 L. W. 1184.

of status relying upon *Saraswatamma* v. *Paddayya* (2).

In that case the document in question was a deed of partition which was unregistered. The question arose whether a document which operates to convert a change in the status of the family and effects a division of right was admissible in evidence if unregistered (page 353*). *Ayyakutti Mankondan* v. *Periasami Koundan* (1) and *Pothi Naicken* v. *Nagama Naicker* (3) were admitted authority to the contrary. Venkatasubba Rao, J., holds that a document merely creating a separation in status does not itself create any interest in immoveable property and a deed of partition referring to immoveable property and not registered may be looked at for ascertaining if it contains evidence of an intention to divide. It is admissible as proving the conduct of the parties. Spencer, J., holds that such a document is admissible to prove division of status. He considers that the document if duly registered and used to prove the actual partition would be one affecting immoveable property, but if unregistered and used only to prove division of status it would be one not affecting immoveable property. This view runs counter to that of Sadasiva Iyer, J., in *Ayyakutti Mankondan* v. *Periasami Koundan* (1).

In my opinion if the document is filed on the strict understanding that it must not evidence any transaction affecting immoveable property, its scope in the majority of cases will be very small. At most I think it will evidence, as observed by Venkatasubba Rao, J., an intention to divide. For instance the document now in question is inadmissible from the words "the entire western portion" to the end. All that is admissible is the heading "list of partition as result of award passed by *panchayatdars* on 12th August 1918 in favour of Mayileri Udayan son of etc." From this no doubt it may be inferred that there was an intention to divide at this date. For evidence of actual division the rest of the document would be necessary—but that portion evidences a transaction affecting immoveable property and being unregistered is inadmissible. Therefore, the Small Cause Judge is wrong when he writes "it is seen from Ex. I that the defendants Nos. 2 and 3 are divided," for that is more than Ex. I can prove. He could have found that Ex. I evidenced an intention to divide, and actual division was proved by defence witnesses Nos. 2 and 3. I do not think, however, that anything will be gained by sending this case back for a finding on the oral evidence after a lapse of twenty-four months and I decline to interfere. The petition is dismissed. No costs.

Z. K. *Petition dismissed.*

(2) 71 Ind. Cas. 274; 46 M. 349; 44 M. L. J. 45; (1923) A. I. R. (M.) 297; 18 L. W. 418.

(3) 32 Ind. Cas. 486; 30 M. L. J. 62; 19 M. L. T. 90; 3 L. W. 115; (1916) 1 M. W. N. 79.

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OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 150 OF 1924.

December 9, 1924.

Present:—Mr. Dalal, J. C.

DHANI RAM—PLAINTIFF—APPLICANT

versus

MAIKOO LAL—DEFENDANT—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), ss. 23, 25—Evidence Act (I of 1872), s. 116—Suit for rent—Denial of tenancy—Question of title—Order directing return of plaint—Revision, whether lies—Landlord and tenant—Estoppel.

Where a plaint is returned by a Small Cause Court under s. 23 of the Provincial Small Cause Courts Act, the case is disposed of by the Small Cause Court by its decision that it has no jurisdiction, and its order is open to revision under s. 25 of the Act. [p. 287, col. 1]

The matter is, however, different where the Court after contest comes to the contrary opinion and decides that it has jurisdiction and continues with the proceedings. In such a case the proceedings are still pending in the Small Cause Court and no case has been decided, and the provisions of s. 25 of the Provincial Small Cause Courts Act would consequently be inapplicable. [*ibid.*]

Where in a suit for rent the defendant denies the tenancy set up by the plaintiff and claims ownership of the premises for a third person, no question of title arises between the parties, inasmuch as the defendant does not claim title in himself. The question at issue is one of tenancy only and a Court of Small Causes is capable of deciding that question. [p. 287, cols. 1 & 2.]

A person who has been let into possession of premises as a tenant cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord. Even where the title to the premises rests with a third person if the defendant has been put into possession by the plaintiff the defendant would be estopped from denying the plaintiff's title. [p. 287, col. 2.]

Application for revision against the judgment and decree of the Additional Judge, Small Cause Court, Lucknow, dated the 30th July 1924.

Mr. *Ganesh Prasad*, for the Applicant.
Mr. *Raj Bahadur*, for the Oppsite Party.

JUDGMENT.—This is an application for revision from an exceedingly summary order of the Additional Judge of the Court of Small Causes, Lucknow. The plaintiff sued for rent of a certain period of time from the defendant whom he designated as his tenant. The learned Judge made no enquiry as to whether the defendant was the plaintiff's tenant or not. The note of the Judge is "defendant's Pleader denies tenancy and title of the plaintiff." Prompt action was thereupon taken under s. 23 of the Provincial Small Cause Courts Act and the plaint returned to the plaintiff. It is abundantly clear that without taking any thought in the matter the lower Court refused to exercise jurisdiction which was vested in it.

First objection is made that this Court has no right of revision under s. 25 of the Act because no case has been decided by the lower Court. In support a Bench ruling of the Calcutta High Court: *Subal Ram Dutt* v. *Jagadannada Majumdar* (1) was quoted. The reasoning of that judgment does not appeal to me. It appears that the same Court held to the contrary in a later case: *Umesh Chandra Palodhi* v. *Rakhal Chandra Chatterjee* (2). In my opinion a learned Judge of the Allahabad High Court has considered this question with care in *Makhan Lal Parsottam Das* v. *Chunni Lal Brij Lal* (3). So far as the lower Court is concerned it has disposed of the case by deciding that it has no jurisdiction. In that view a case has been decided by that Court. The matter would have been different if the lower Court had after contest come to the contrary opinion and decided that it had jurisdiction and continued with the proceedings. In such a case proceedings would be pending in the Small Cause Court and no case would have been decided. I hold that the provisions of s. 25 are applicable here.

The question at issue is one of tenancy and not of title. The defendant does not say that he is the owner of the premises. He claims ownership for a third person: his brother. That, however, is not a question of title between the parties. The Court of Small Causes is capable of deciding whether the defendant is the plaintiff's tenant or not. As pointed out by my brother Saiyed Wazir Hasan in *Shams-ud-din Khan* v. *Fateh Shah* (4), a tenant who has been let into possession cannot deny his landlord's title, however, defective it may be, so long as he has not openly restored possession by surrender to his landlord. Even where the title rests with the third person if the defendant had been put into possession by the plaintiff, the defendant would be estopped from denying the plaintiff's title. Under the circumstances the suit is one which does not raise a question of title as between the plaintiff and the defendant. The issue is very simple. Is the defendant the plaintiff's tenant or not and if he is, is any rent due from the defendant. If the defendant is not the plaintiffs' tenant the suit has to be dismissed and if he is, a decree must be passed against the defendant for the balance of rent.

I set aside the order of the lower Court and direct it to proceed with the suit according to the instructions given above. Costs here and heretofore shall abide the result.

Z. K. *Order set aside.*

(1) 1 Ind. Cas. 288; 13. C. W. N. 403.
(2) 10 Ind. Cas. 8; 15 C. W. N. 666; 14 C. L. J. 118.
(3) 47 Ind. Cas. 610; 41; A. 42; 16 A. L. J. 777
(4) 75 Ind. Cas 936; 9 O & A. L. R. 1041.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 201 OF 1923.
January 28, 1925.
Present:—Mr. Justice Walsh and
Mr. Justice Sulaiman.
JHUNNI LAL—DECREE-HOLDER—APPELLANT
versus
NATHA RAM—OBJECTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 2 (2), 47, 151, O. IX, r. 13—Execution of decree—Objection by legal representative of deceased judgment-debtor—Objection allowed ex parte*—Application to set aside* ex parte *order, maintainability of—Inherent power of Court.*

In execution of a mortgage-decree, the legal representative of the judgment-debtor, who had been brought upon the record of the execution proceedings after the death of the judgment-debtor, filed certain objections under s. 47 of the C. P. C. On the date fixed for the hearing of the objections the decree-holder did not appear and the Court passed an *ex parte* order allowing the objections

The decree-holder put in an application for setting aside the *ex parte* order alleging that he had no notice of the date of hearing:

Held, (1) that the objector having set up his own right to the property his objections must be taken to have come under s. 47 of the C. P. C.; [p. 288, col. 2.]

(2) that the order allowing the objections, although an *ex parte* order, amounted to a decree under the provisions contained in sub-cl. (2) of s. 2 of the C. P. C.; [*ibid.*]

(3) that, therefore, O. IX, r. 13 of the Code was applicable to the matter and it was competent to the Court to set aside the *ex parte* order on being satisfied that there were sufficient reasons for the absence of the decree-holder on the date of hearing; [*ibid.*]

(4) that in any case the Court had inherent jurisdiction to review its *ex parte* order provided sufficient cause was shown. [*ibid.*]

First appeal from an order of the Subordinate Judge, Aligarh, dated the 11th July 1923.

Mr. *Panna Lal*, for the Appellant.

Messrs. *Gulzari Lal* and *P. L. Banerji*, for the Respondent.

JUDGMENT.—This is a first appeal from order which has been filed by the decree-holder and arises out of the following circumstances: A mortgage-decree for sale was obtained against Madan Lal who died subsequent to the decree. In his place Onkar Das his brother and Natha Ram his nephew were brought upon the record as his legal representatives and heirs. There were first certain objections filed by Onkar Das with which we are not concerned in this appeal. On the 15th of November 1922 Natha Ram filed certain objections purporting to be made under s. 47 and also under O. XXI, r. 58 of the C. P. C. Notice was issued to the decree-holder, but the report of the process-server was that he refused to accept notice. The Court considered the service sufficient and ordered that *ex parte* proceedings should be taken on the 24th of February 1923 the objector got the objections amended as being exclusively under s. 47, and on that date the Court passed an *ex parte* order allowing the objections.

On the 28th of February 1923 the decree-holder put in an application for setting aside the *ex parte* order, alleging that he had no notice of it, and also stating that the objection under O. XXI, r. 58 was not maintainable. The learned Judge has dismissed this application summarily, holding that O. IX, r. 13 of the C. P. C., does not apply to execution proceedings, and that, therefore, the application is not maintainable.

A preliminary objection is taken that no appeal lies before us. If the original objection had been one under O. XXI, r. 58 and had been allowed, then the objection that no appeal lies could have been entertained. But we have already pointed out that Natha Ram was brought upon the record as a representative of the deceased judgment-debtor. In his objection he set up his own right to the property, and, therefore, his objection must be taken to have come under s. 47. This was clearly held in the case of *Dulla* v. *Shib Lal* (1) by a Bench of which one of us was a member. The objection being under s. 47, the order which was passed on the 24th of February 1923—though an *ex parte* one amounted to a decree. Under s. 2, sub-cl. (2) of the C. P. C., a decree includes the determination of any question within s. 47. It follows, therefore, that O. IX, r. 13, would in terms be applicable. The learned Judge was quite wrong in holding that the application for setting aside the *ex parte* decree was not maintainable. Even if O. IX, r. 13 were not expressly applicable, the Court would have an inherent jurisdiction to review an order which had been passed *ex parte*, provided of course sufficient cause is shown.

The learned Advocate for the respondent contends that a contrary view has been expressed in the case of *Bharat Indu* v. *Asghar Ali Khan* (2) following the case of *Hari Charan Ghose* v. *Manmatha Nath Sen* (3).

We may point out that the case before the Calcutta High Court arose out of proceedings under O. XXI, rr. 100 and 101, which were not execution proceedings. In the case decided by this Court the application for execution had been struck off on the ground that the decree-holder had failed to prosecute it with due diligence. The facts of that case, therefore, are quite different.

In the present case we have already held that the order of the 24th of February 1923 amounted to a decree, and that, therefore, O. IX, r. 13 was clearly applicable.

Instead of sending the case back to the Court below we have thought it convenient to dispose of the question of fact ourselves. On the one hand we have the sworn

(1) 36 Ind. Cas. 281; 39 A. 47; 14 A. L. J. 846.

(2) 73 Ind. Cas. 453; 21 A. L. J. 135; 45 A. 148; (1913) A. I. R. (A.) 460.

(3) 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343.

affidavit of the decree-holder that he had no notice of the date fixed. As against it there is the report and affidavit of the process-server. We find it difficult to believe that if the decree-holder was aware of the date and was actually present in the Court compound as alleged by the opposite party, he would have deliberately allowed the objection to be heard *ex parte*.

We accordingly hold that it is established that the decree-holder was ignorant of the date fixed and that he could not attend the Court on that day, and that sufficient cause has been shown for his non-appearance within the meaning of O. IX, r. 13.

We accordingly allow the appeal and set aside the order of the lower Appellate Court, with the result that the *ex parte* decree dated the 24th of February 1923 is also set aside, and the objections of Natha Ram are restored to the file, and we direct that they should be disposed of according to law. Costs in both Courts will abide the event, including in this Court fees on the higher scale.

Z. K. *Order set aside.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 273 OF 1920.

September 24, 1923.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

KRISHNA ANNAPPA GOREGAONKAR —DEFENDANT—APPELLANT

versus

GANPAT SAKHARAM BHOSLE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Partnership—Two firms—Partner in one firm owner of other—Mutual dealings—Suit by one firm against other, whether maintainable.

When the owner of one firm is a partner in another firm, no suit can be brought by one of them against the other in respect of any dealings between them.

Rustomji v. *Purshotamdas*, 25 B. 606; 3 Bom. L. R. 227, followed.

Appeal from the decision of the First Class Subordinate Judge at Belgaum, in Suit No. 26 of 1919.

Mr. *Bahadurji* (with him Mr. *Nilkanth Atmaram*), for the Appellant.

Mr. *Patwardhan* (with him Mr. *A. G. Desai*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit filed on behalf of the shop by the name of Krishnappa Anna Goregaonkar of Nipani against Krishna Annappa Goregaonkar, Vahiwatdar and proprietor of the shop Anna Satappa Shet Goregaonkar of Poona, for an account of certain dealings which the firm at Nipani had with the shop at Poona. The lower Court has appointed a Commissioner to take accounts, and has further directed that whatever amount is found due may be taken into account in the other suit between the parties. An objection was taken on behalf of the defendant in the Trial Court that the suit could not lie. But that objection was not allowed.

The defendant has appealed from the preliminary decree passed by the Trial Court, and has urged the same objection before us. It is an admitted fact in the case that the plaintiff firm consists of three partners, one of whom is Krishnappa Anna Goregaonkar. It is also an admitted fact that the defendant, Krishnappa Anna Goregaonkar, is the sole proprietor of the shop Anna Satappa Shet Goregaonkar of Poona. It is clear that such a suit is not maintainable. Having regard to the ruling in *Rustomji* v. *Purshotamdas* (1), it seems to us that the suit is bad, and on that ground this suit ought to have been dismissed by the lower Court. It does not really matter to the parties one way or the other, because all that could be determined in this suit will have to be determined in the other suit between the partners wherein accounts of the partnership are to be taken.

We reverse the decree of the lower Court and dismiss the suit. The defendant should get his costs from the plaintiffs, that is, Sakharam and Bala as representing the plaintiff's firm in both the Courts. The cross-objections are dismissed with costs.

In Appeal No. 274 of 1920, which arises out of a suit filed by Krishna Annappa Shet as a partner in the firm of Krishnappa Anna Goregaonkar against the two other partners Sakharam and Bala for dissolution of the partnership and for

(1) 25 B. 606; 3 Bom. L. R. 227.

accounts the issues were framed on that footing in the suit and the lower Court has passed a preliminary decree directing the partnership to be dissolved, appointing a Receiver, and ordering accounts to be made up according to the *karar*, that is according to the terms of the partnership deed, dated 11th March 1918.

The plaintiff has appealed from this preliminary decree, and in support of the appeal it is urged that on a proper construction of cl. 7 of the partnership deed no accounts should be taken at all, that the partnership assets should be handed over to him, and that defendants Nos. 1 and 2 should be declared to have no share in the profits in view of the conduct attributed to them by the plaintiff. It does not appear that this point was raised in time in the lower Court. No doubt, in the *purshis* which was given on behalf of the plaintiff on the 26th March, 1920, that point was put forward before the Court. But the Trial Court proceeded to pass a preliminary decree. The questions that the plaintiff has raised in appeal, are really in the nature of objections to the account. They can be properly raised when the accounts are taken, and if he finds that accounts are not made up according to the *karar*, that is according to the partnership deed, it would be open to him then to put forward the objections now urged on his behalf. It would be open to the Court then to consider whether the defendants should or should not be given any credit for their share in the profits. The objections made in appeal appear to us to be premature. There is no valid objection at this stage to the preliminary decree which has been passed by the Trial Court. We confirm the decree of the lower Court and dismiss the appeal with costs.

As regards costs in the suit, we think that the proper order would be that all costs in the suit should be reserved to be dealt with by the lower Court when accounts are made up.

The cross-objections substantially fail and must be dismissed with costs.

N. H. *Decree reversed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 190 OF 1923.

December 8, 1924.

Present:—Mr. Dalal, J. C., and Mr. Wazir Hasan, A. J. C.

NARAIN—PLAINTIFF—APPELLANT

versus

GAYA DEEN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 10, 11, 47, O. XXXIV, r. 8 -Mortgage—Redemption suit by co-mortgagor—Subsequent suit by another co-mortgagor, whether barred—Res judicata—*Continuation of proceedings by co-mortgagor—Extension of time for payment.*

A suit for redemption by a co-mortgagor must be treated as a representative suit on behalf of all the co-mortgagors and operates as a bar to a subsequent suit for redemption by any of the other co-mortgagors. [p. 291, col. 2.]

Where, however, no proceedings are taken in the previous suit for redemption after the preliminary decree, the suit must be regarded as still pending and a subsequent suit for redemption by another co-mortgagor would be barred not under s. 11 but by virtue of the provisions of s. 10 of the C. P. C. In such a case another co-mortgagor can apply to continue the proceedings and the Court would have power to extend the time for payment under the proviso to r. 8 (4) of O. XXXIV of the C. P. C. [*ibid.*]

Second appeal against the decree of the District Judge, Rai Bareli, dated the 12th March 1923, setting aside that of the Munsif, Rai Bareli, dated the 11th September 1922.

Mr. *H. K. Ghose* for Mr. *A. P. Sen*, for the Appellant.

Mr. *Bisheshwar Nath*, for Respondent No. 1.

JUDGMENT.—This second appeal was heard by a Bench of two Judges on a certificate made out by one of us that it was a fit case for such hearing.

The plaintiff Narayan sued for redemption of a usufructuary mortgage dated 23rd December, 1873, executed by himself when he was a minor, by his mother, one cousin and a widow of another cousin. For practical purposes it may be taken that in 1900 the owners of the equity of redemption were Narayan plaintiff and his brother Ram Prasad. There were executed subsequent transfers of the property by way of further charge one by all the persons who were parties to the document of 1873, another by the widow of the plaintiff's cousin and the third by another cousin of the plaintiff. Those documents are Exs. A-2, A-3 and A-4 on this record.

In 1900 Ram Prasad sued for redemption and obtained a preliminary decree

on 27th November, 1900, which was upheld by the Appellate Court of the District Judge on 14th August 1901. Narayan was a party defendant to the suit but was exempted in the decree. This preliminary decree was not taken any further either by Ram Prasad by depositing money for redemption or by the mortgagee by application for sale as required by proceedings corresponding to the provisions of O. XXXIV, r. 8, C. P. C.

On 18th April, 1922, the plaintiff brought the present suit for redemption on the grounds that the mortgage had not yet been redeemed and that the suit was brought within the period of 60 years from the date of the mortgage. The lower Appellate Court set aside the decree passed in the plaintiff's favour by the Trial Court and dismissed the plaintiff's suit on the ground that a second suit for redemption was barred. The plaintiff has come here in second appeal in consequence.

There is conflict of opinion between the Madras and Bombay High Courts on this subject. In *Vedapuratti* v. *Vallabha Valiya Raja* (1) a Full Bench consisting of five Judges including the Chief Justice held unanimously that where a suit for redemption has been instituted and a decree for redemption has been passed therein but not executed a subsequent suit is not maintainable for the redemption of the same mortgage. This view was reiterated by that Court in *Ranga Aiyangar* v. *Narayana Chariar* (2) by a Bench of two Judges. The Bombay High Court in *Ramji Bapuji Patil* v. *Pandhari Nath Ravji* (3) held by a majority of 2 to 1 that such a second suit did lie. The Bombay High Court specifically dissented from the view expressed in *Vedapuratti* v. *Vallabha Valiya Raja* (1) while the Madras High Court in the case reported as *Ranga Aiyangar* v. *Narayana Chariar* (2) dissented from the Bombay ruling. We are of opinion that the Madras ruling has better reasons on its side and we are also impressed by the reasons given by the dissenting Judge Mr. Justice Shah in the Bombay case. As pointed out by that learned Judge at page 364* of the report, it is difficult to see how the bar of *res judicata* can be avoided as to the second suit. Under the provisions applicable to a decree for redemption under the Transfer of Property Act there would be a further objection that a suit was barred under the provisions of s. 244 of the former Code corresponding to s. 47 of the present Code. That bar is now removed by the proceedings between the preliminary and final decree being turned into those in a suit under O. XXXIV of the present Code.

Under s. 11 no Court shall try a suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties. Explanation VI enacts that where persons litigate *bona fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. It is clear to us that when Ram Prasad brought his suit he brought it in his representative capacity for himself and his brother Narayan the plaintiff to the present suit. It was pointed out that Narayan was exempted from the decree. To us this procedure appears to emphasize the representative character of Ram Prasad's suit. The Court at the time was of opinion that Ram Prasad represented both himself and Narayan and there was no necessity to keep Narayan's name on the record. Narayan consented to Ram Prasad's desire to redeem the entire property and thereby admitted the representative nature of Ram Prasad's suit. We have quoted s. 11, C. P. C., in bar of the present suit. Possibly s. 10 would be better applicable as the former suit has not been taken to a conclusion and is still pending. Our observations, however, will equally apply to the provisions of s. 10 of the C. P. C.

There is a single Judge ruling of this Court: *Bhairon Bakhsh Singh* v. *Raghubansa Kunwar* (4) in which a second suit for redemption was held to be maintainable. The learned Judge, however, took care to mention in his judgment that the plaintiff in the former suit was not maintaining the suit on behalf of the co-mortgagors. We are not concerned whether that decision on facts was sound or not. When such was the finding on facts it would naturally follow that the second suit

(1) 25 M. 300; 12 M. L. J. 128.
(2) 32 Ind. Cas. 30; 39 M. 896; 30 M. L. J. 13; 18 M. L. T. 596.
(3) 49 Ind. Cas. 894; 43 B. 334; 21 Bom. L. R. 56.

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(4) 45 Ind. Cas. 300; O. L. J.

would not be barred under Explanation VI of s. 11 C. P. C. Possibly if we had been deciding that case on the merits we would not have arrived at the conclusion at which the learned Judge did as to the want of representative character of the plaintiff in the first suit. The analogy of a suit brought by a reversioner may be applied here. In *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (5) their Lordships of the Privy Council applied the principle that when a reversionery heir obtains a decision in respect of an alienation by a Hindu widow he does so in his representative character and the estate passes unimpaired to those entitled to the reversion on the death of the widow. They considered there the danger of a feigned issue in a suit brought in a representative capacity and observed. "But this danger is mainly serious where the failure of the first suit has been brought about by fraud or collusion where, of course further and different considerations would arise." When the suit of a reversioner is taken to be one in his representative character there is all the more reason for considering a suit by a co-mortgagor to be of a similar character.

We agree, therefore, with the lower Appellate Court that the plaintiff's suit was barred.

The matter, however, does not end here. The suit brought by Ram Prasad is still pending and as Ram Prasad sued in a representative capacity the plaintiff of this suit Narayan can proceed with the previous suit where it was left off by Ram Prasad. As already pointed out no final decree has been passed in that suit because the defendant made no application for the passing of a decree that the mortgaged property or a sufficient part thereof be sold and the proceeds applied in payment of what may be found due to the defendant. The Court has power under the proviso to r. 8 (4) of O. XXXIV to postpone from time to time the date fixed for payment of money by the mortgagor. We set aside the decrees of the two subordinate Courts and treat the plaint of Narayan as an application for deposit of money and postpone the day of payment in Court to six months from to-day's date. Under the preliminary decree of the suit of which Ram Prasad was plaintiff all the deeds Exs. A-2, A-3, and A-4 were made payable at the time of redemption of the mortgage of 1873. We direct that an account shall be prepared, counting interest on Exs. A-2, A-3 and A-4, for whole years : in the case of A-2 up to 2nd September, 1924, in the case of A-3 up to 8th February, 1925 and in the case of A-4 up to 2nd November, 1924. This will save trouble to the office and do substantial justice between the parties. The papers shall immediately be sent down to the Trial Court which is directed to declare within two months of to-day's date what that amount is, including the amount of the usufructuary mortgage of 1873. Narayan will then have four months within which to deposit the sum declared by the Trial Court. On such deposit being made action shall be taken under rule 8 (1), otherwise it will be open to the defendant mortgagee to apply for sale.

We also direct that parties shall bear their own costs in all the Courts in the proceedings subsequent to Narayan's plaint as the question of law was a doubtful one.

(5) 82 Ind. Cas. 962; 1 O. W. N. 640; (1924) A. I. R. (P. C.) 247; 10 O. & A. L. R. 1105; 40 C. L. J. 461; 47 M. L. J. 824; 51 I. A. 381; 46 A. 831; 23 A. L. J. 168; 27 Bom. L. R. 130; 21 L. W. 295; L. R. 6 A. (P.C.) 1; 29 C. W. N. 606 (P. C.).

Dalal, J. C.—The Registrar's attention shall be drawn to this file and efforts shall be made to send it down to the Trial Court within one month of to-day's date.

Z. K. *Order accordingly.*

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

March 13, 1925.

Present:—Lord Shaw, Lord Carson, Sir John Edge and Mr. Ameer Ali.

GAJADHAR MAHTON—APPELLANT

versus

AMBIKA PRASAD TEWARI AND OTHERS —RESPONDENTS.

Hindu Law—Joint family—Mortgage by manager—Mortgage-suit—Necessity, absence of—Prayer for personal decree made at late stage, whether can be entertained—Privy Council appeal—Respondent lodging case but failing to appear at hearing—Costs—Practice.

In a suit to enforce a mortgage executed by the manager of a joint Hindu family it was found that the money had not been borrowed for legal necessity and the suit was dismissed. In an appeal before the Privy Council it was contended that the manager who had executed the mortgage was liable on the personal covenant for the debt contracted by him and it was prayed that a simple money decree may be passed against him :

Held, that having regard to the fact that no such claim had been made in the Courts below the claim for a simple money decree against the manager could not be entertained, as the entertainment of any such

claim would require an amendment of the plaint, and the case was not such in which their Lordships were prepared to exercise their discretion to allow an amendment.

In a Privy Council appeal, where the respondent lodges a case, but does not appear at the hearing, and the appeal is dismissed, the respondent is entitled to costs up to the lodging of the case.

Appeal from a decree of the Allahabad High Court, dated the 15th February 1922, reversing that of the Subordinate Judge, Basti, dated the 9th April 1919.

Messrs. *L. DeGruyther*, *K. C.*, and *J. M. Parikh*, for the Appellant.

JUDGMENT.

Mr. Ameer Ali.—This is an appeal from a judgment and decree of the High Court of Allahabad dismissing a suit brought by the appellant for the enforcement of a mortgage executed in his favour by one Jai Gobind Tewari on the 28th of August 1907. Jai Gobind Tewari was a member of a joint Hindu family subject to the Mitakshara and apparently managed the family business.

The suit was brought before the Subordinate Judge of Basti against all the members of the joint family; and some transferees of part of the property were joined as defendants.

The plaintiff who is a money-lender alleges that Jai Gobind Tewari had borrowed from him two sums of money which in the aggregate amount to Rs. 2,715 on two bonds, for legal family necessity, and for this amount he passed the mortgage bond in suit.

The defendants Nos. 3 to 6, who alone contested the suit, urged, it was not for legal necessity or family benefit as the plaintiff alleged.

The Subordinate Judge decreed the plaintiff's claim for sale of the mortgaged property under r. 4, O. XXXIV, of the C. P. C.

The High Court on appeal came to the conclusion that the onus was on the plaintiff to establish legal necessity in order to bind the joint family by the acts of Jai Gobind and that he had failed to prove such necessity. They accordingly dismissed the claim. The plaintiff has appealed to His Majesty in Council from this order of dismissal.

Their Lordships have heard learned Counsel for the appellant at considerable length and they find themselves in agreement with the High Court in holding that no legal necessity is established. The principle applicable to a case where it is sought to bind the joint family by the acts of the managing member has been clearly enunciated by Lord Justice Knight Bruce in the case of *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (1).

Their Lordships think that the decree of the High Court is right and that the appeal should be dismissed.

But it has been contended that even if the joint family is not bound by the mortgage created by Jai Gobind Tewari, he is liable on the personal covenant for the debt contracted by him. No such case was made in the plaint or urged before the High Court, nor is any such case made in the grounds of appeal before their Lordships or in the case as originally lodged by the appellant. The claim was for a mortgage decree. According to Counsel's statement it was only when the appeal came into his hands that the idea of a decree on the personal covenant occurred to the plaintiff's advisers. Their Lordships are of opinion that having regard to the circumstances of the case the claim for a simple money decree against Jai Govind urged before the Board cannot be entertained. No such decree could be made without an amendment of the plaint; and although it is in their Lordships' discretion to allow an amendment even at the last stage, they do not think that this is a case in which that discretion should be exercised.

As regard the respondents' costs they appear to have lodged a case but did not appear at the hearing. They are clearly entitled to their costs up to that stage. The rule in such circumstances is stated in Mr. Norman Bentwich's Practice of the Privy Council in Judicial Matters on page 337 as follows:

"When respondents lodged a case, but did not appear at the hearing, the appeal was dismissed with costs to be paid to respondents down to the lodging of the case, and ordered to be paid out of the deposit placed in the registry as security."

Their Lordships will humbly advise his Majesty to dismiss the appeal with costs to the respondents up to the lodging of the case.

Z. K. & N. H. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *Pyke, Franklin* and *Gould.*

Solicitor for the Respondents:—Mr. *H. S. L. Polak.*

(1) 6 M. I. A. 393; 78 W. R. 81n; Sevestre 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 200 OF 1923.

January 28, 1925.

Present:—Mr. Justice Walsh and Mr. Justice Sulaiman.

SARJU PRASAD ROUT—DEFENDANT—APPELLANT

versus

MANGAL SINGH—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Alienation by co-parcener, whether can be challenged by successors-in-interest—Widow, decree obtained against, whether binding on reversioners—Collusion—Burden of proof.

A Hindu co-parcener has no absolute right to transfer family property without legal necessity. A transfer of family property by a co-parcener which is not supported by legal necessity is not binding on the estate and is liable to be challenged by the other co-parceners or by the successors-in-interest of the alienor. [p. 295, col. 1.]

Muhammad Muzamil-ullah Khan v. *Mithu Lal*, 11 Ind. Cas. 220; 8 A. L. J. 901; 33 A. 783, relied on.

A Hindu widow represents the estate for the time being though her rights are to a certain extent qualified. If she fights a case against a third party, she represents the estate and fights the case in a representative character on behalf of all the subsequent reversioners. A decree fairly and properly obtained against her in the absence of any fraud or collusion would be binding on the reversionary heirs. It is only when the decree relates to a matter personal to her, that it would not be so binding. It is immaterial, however, that the decree is an *ex parte* decree, unless there is anything special which would suggest that it was not fairly and properly obtained. In the absence of any such evidence an *ex parte* decree obtained against the widow would be binding on the reversioners. [p. 295, col. 2.]

Risal Singh v. *Balwant Singh*, 30 Ind. Cas. 657; 37 A. 496; 13 A. L. J. 594, *Risal Singh* v. *Balwant Singh*, 48 Ind. Cas. 553; 40 A. 593; 28 A. L. J. 549; 24 M. L. J. 361; 9 L. W. 52; 23 C. W. N. 326; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511; 45 I. A. 168 (P. C.), followed.

A Hindu executed a simple mortgage of certain property. After his death the mortgagee obtained an *ex parte* decree on the mortgage against the widow of the deceased. Plaintiff, who was the next reversioner to the estate of the deceased, brought a suit for a declaration that the mortgage was without necessity and that the decree was not binding on him:

Held, that in order to succeed the plaintiff must prove not only that there was no legal necessity for the mortgage, but also that the *ex parte* decree obtained against the widow was not binding on him owing to collusion or some other circumstance which would take away its binding character. [*ibid.*]

First appeal from an order of the Additional Subordinate Judge, Basti, dated the 17th May 1923.

Mr. *Harnandan Prasad*, for the Appellant.

Mr. *Shiva Prasad Sinha*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for a declaration that the mortgage-deed, and a decree on the basis of it obtained by the contesting defendants, were collusive, null and void, and not binding on the plaintiff. The plaintiff is a separated brother of Kalap Nath Singh deceased. On Kalap Nath Singh's death his son Harbans Singh survived him. On the death of Harbans, Kalap Nath Singh's widow, *Musammat* Acharja, succeeded to the estate as a Hindu mother. Kalap Nath in his life time had executed a simple mortgage-deed on the 13th of May 1914 when his son Harbans was alive. After the death of Kalap Nath and Harbans, the defendant mortgagee instituted a suit on the basis of the deed, and obtained an *ex parte* decree on the 4th of November 1920, against *Musammat* Acharja.

The plaintiff, as the next reversioner, has instituted a suit alleging that the original mortgage-deed was without any legal necessity, and was, therefore, not binding on the joint Hindu family estate, and further that the decree obtained by the contesting defendants against the widow *Musammat* Acharja, was a collusive one.

The Court of first instance came to the conclusion that it had not been established that the decree was either fraudulent or collusive. It did not go into the question of the mortgage having been for legal necessity, but it dismissed the suit on the ground that the plaintiff as reversioner had no right to challenge an alienation made by Kalap Nath. In the opinion of the Munsif the only person who could have challenged it was Harbans the other co-parcener. On appeal to the lower Appellate Court the learned Judge has come to the conclusion that the plaintiff has a right to call upon the mortgagee to prove legal necessity for the mortgage. He has not recorded any express finding as to whether the decree obtained against *Musammat* Acharja was or was not a collusive one. He has also omitted to decide himself whether the mortgage had been for legal necessity but has remanded the case for the disposal of the question of legal necessity.

In our opinion the view of the learned Judge that the plaintiff has a right to challenge the alienation in case the decree is not in his way, was quite correct. A

co-parcener has no absolute right to transfer the family property without legal necessity. The transfer by Kalap Nath, if it was without legal necessity, was, therefore, not binding on the estate, and was liable to be challenged by Harbans. A Full Bench of this Court in the case of *Muhammad Muzamil-ullah Khan* v. *Mithu Lal* (1) has laid down that the right to challenge an alienation is not only confined to the members of the family, but can also be availed of by subsequent transferees. It seems to us that, that right must also be availed of by successors-at-law. If an alienation is made by one member of a joint Hindu family, which is really not binding on the estate, and afterwards that member dies, and also the surviving members die, the reversioners would have the right to challenge the alienation. We are, therefore, of opinion that if the decree passed against *Musammat* Acharja was not in the plaintiff's way, he would be entitled to challenge the alienation.

It is contended on behalf of the respondent that the decree against *Musammat* Acharja cannot bind the plaintiff reversioner, because he has not claimed through her. This contention cannot be accepted. A Hindu widow represents the estate for the time being though her rights are to a certain extent qualified. If she fights a case against a third party, she is representing the estate and is fighting the case in a representative character on behalf of all the subsequent reversioners. A decree fairly and properly obtained against her in the absence of any fraud or collusion, would be binding on the reversionary heirs. It is only when the decree relates to a matter personal to her, that it would not be binding. This was the view clearly expressed by Banerji, J., in the Full Bench case of *Risal Singh* v. *Balwant Singh* (2), and that view has been approved of by their Lordships of the Privy Council in the case of *Risal Singh* v. *Balwant Singh* (3).

It is next contended on behalf of the respondent that inasmuch as the decree against *Musammat* Acharja was an *ex parte* decree, there was not a proper and fair fight. It is urged that this Court has held that a compromise decree between a Hindu widow and a third party would not necessarily bind a reversioner. A compromise decree is merely an embodiment of a private contract entered into by a widow and private persons. There is clearly in such a case no adjudication by the Court. An *ex parte* decree, however, stands on a different footing. There is no confession of judgment by her, and the plaintiff has to prove by evidence and satisfy the Court that he has got a good case. We, therefore, think that an *ex parte* decree, unless there be anything special which would suggest that it was not fairly and properly obtained, would be binding on the reversioners.

We are, therefore, of opinion that before the suit can be finally disposed of, it is not only necessary to find whether there was or was no legal necessity, but it is also necessary to determine whether the *ex parte* decree against *Musammat* Acharja had been fairly and properly obtained, and whether it was without any fraud or collusion.

As the Court of first instance has recorded a finding on the absence of fraud or collusion, it will be necessary for the Appellate Court to decide that question itself. Under the circumstances a remand to the First Court with regard to the question of legal necessity was inconvenient. Both the issues should be disposed of by the lower Appellate Court.

We accordingly set aside the order of the lower Court, and remand this case to the lower Appellate Court with the direction to re-admit it to its original number and to dispose of it according to law. Costs in the Court below and in this Court will abide the event, including in this Court fees on the higer scale.

Z. K. *Order set aside.*

(1) 11 Ind. Cas. 220; 8 A. L. J. 901; 33 A. 783.
(2) 30 Ind. Cas. 657; 37 A. 496; 13 A. L. J. 594.
(3) 48 Ind. Cas. 553; 40 A. 593; 28 A. L. J. 549; 24 M. L. J. 361; 9 L. W. 52; 23 C. W. N. 326; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511; 45 I. A. 168 (P. C.).

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

February 19, 1925.

Present:—Lord Shaw, Lord Carson, Sir John Edge and Mr. Ameer Ali.

Lal RAJINDRA NARAIN SINGH *alias* LALLU SAHIB—APPELLANT

versus

Musammat SUNDER BIBI—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60 (n)—

Execution of decree—Maintenance, right of, whether liable to attachment and sale—Procedure—Receiver, appointment of.

A right of maintenance is not liable to attachment and sale in execution of a decree by virtue of the provision contained in cl. (*n*) of s. 60 of the C. P. C.

The proper remedy of a decree-holder, however, lies, in a fitting case, in the appointment of a Receiver for realising the rents and profits of the property, paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor and his family, and applying the balance, if any, to the liquidation of the judgment-creditor's debt.

Appeal from a decree of the Allahabad High Court, (Mr. Justice Walsh and Mr. Justice Wallach) in Execution First Appeal No. 296 of 1920, dated the 2nd May 1921, and printed as 63 Ind. Cas. 181, reversing that of the Subordinate Judge, Jaunpur, dated the 10th August 1920.

Messrs. *L. De Gruyther, K. C.*, and *E. B. Raikes*, for the Appellant.

Mr. *K. V. L. Narasimham*, for the Respondent.

JUDGMENT.

Lord Shaw.—The Board is of opinion that the conclusion reached by the High Court by their judgment of 2nd May, 1921, was correct. It is to be regretted that the High Court did not itself, in the exercise of its powers, appoint a Receiver of this property which the judgment-creditor seeks to attach and bring to sale.

Their Lordships do not agree with the High Court on the subject of the actual legal position of the right of maintenance conferred upon the judgment-debtor. That right of maintenance arose under a compromise which was made between the judgment-debtor and his brother. The compromise agreement is not produced, but its terms are said by the parties to be recorded in a decree pronounced by the Subordinate Judge of Jaunpur on 20th May, 1915. The substance of this agreement is that the judgment-debtor one of the two brothers, parties to the compromise, was declared to have a right of maintenance in certain villages enumerated, the right being conferred expressly "without power of transfer."

In the present case the Subordinate Judge in his judgment of 10th August, 1920, correctly limits the issue between the parties to this maintenance question. No other point was brought before the Board. Speaking of the plaintiff, the Judge says:—"He now wants to execute that decree against the property in 16 villages, which the judgment-debtor has got from his younger brother, Raja Lal Bahadur Singh, for his maintenance. His prayer is that this right of maintenance be proceeded against and a Receiver appointed to realise rents and profits of the above named 16 villages and the decretal amount be paid out of the said realisation as far as possible. To this the judgment-debtor objects on the ground that the right of maintenance is not attachable under s. 60 of the C. P. C."

Their Lordships are of opinion that the right of maintenance is in point of law not attachable and not saleable. They think that s. 60 of the C. P. C. Head N, precludes an application for that purpose.

The proper remedy lies, in a fitting case, in the appointment of a Receiver for realising the rents and profits of the property paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor and his family, and applying the balance, if any, to the liquidation of the judgment-creditor's debt. The High Court point out in their judgment "the appropriate remedy is what is known as equitable execution or indirect execution, namely, by the appointment of a Receiver who takes the place of the debtor and acts as an officer subject to the directions of the Execution Court in collecting and disbursing the debtor's income in accordance with the directions of the Execution Court towards the discharge of the claim of the decree-holder." These views appear to the Board to be sound.

Their Lordships think that the judgment of the High Court should be modified in the sense described, and that the case should be remitted to the High Court to make the appointment of the Receiver on the terms just quoted.

In the circumstances their Lordships think that there should be no costs of this appeal; and they will humbly advise His Majesty accordingly.

Z. K. *Decree modified.*

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondent:—Mr. *H. S. L. Polak.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 39 OF 1923.

September 22, 1924.

Present:—Mr. Justice Madhavan Nair and Mr. Justice Jackson.

VELU THEVAN (DEAD) AND OTHERS—DEFENDANT No. 9—JUDGMENT-DEBTOR AND HIS LEGAL REPRESENTATIVE—APPELLANTS

versus

KRISHNASWAMI REDDI (DEAD) AND OTHERS—PLAINTIFFS—DECREE-HOLDER AND HIS LEGAL REPRESENTATIVE—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 2—Execution of decree—Agreement prior to decree not to execute decree against particular judgment-debtor, effect of.

Section 47 of the C. P. C. is wide enough to permit any valid objection to be taken by a judgment-debtor to the execution of a decree by the decree-holder or his legal representative. [p. 298, col. 2.]

Any pre-decretal agreement between parties to a suit, by the terms of which the passing of the decree is not to be objected to but execution of the decree is not to be taken out against a particular judgment-debtor, can be pleaded and given effect to in execution proceedings and O. XXI, r. 2, C. P. C., is no bar to the entertainment of an objection based on such an agreement. [p. 298, col. 1.]

Chidambaram Chettiar v. *Krishna Vathiyar*, 37 Ind. Cas. 836; 40 M. 233; 21 M. L. T. 24; 5 L. W. 132; (1917) M. W. N. 44; 32 M. L. T. 13; *Doraisami Moopan* v. *Subbalakshmi Palayee Ammal*, 46 Ind. Cas. 880; 8 L. W. 205; (1918) M. W. N. 547, *Sambasiva Aiyar* v. *Thirumalai Ramanujathathchariar*, 54 Ind. Cas. 137; 37 M. L. J. 356 and *Arunachela Goundan* v. *Swaminatha Aiyar*, 77 Ind. Cas. 547; 19 L. W. 27; (1924) M. W. N. 144; 46 M. L. J. 240; (1924) A. I. R. (M.) 611, relied on.

Arumugam Pillay v. *Krishnaswami Naidu*, 56 Ind. Cas. 976; 43 M. 725; 12 L. W. 41; 39 M. L. J. 222 and *Koonamneni Mallaya* v. *Kanneganti Chinna Kotaya*, 64 Ind. Cas. 148; 14 L. W. 317; (1921) M. W. N. 382, referred to.

Appeal against the decree of the Court of the Subordinate Judge, Dindigul, in Appeal Suit No. 49 of 1922, preferred against the order of the Court of the District Munsif, Periyakulam, dated the 29th April 1922, in E. P. No. 156 of 1922, in O. S. No. 448 of 1913.

Mr. *K. V. Sesha Iyangar*, for the Appellants.

Mr. *C. Veera Ragava Iyer*, for the Respondent.

JUDGMENT.—The 9th defendant, the judgment-debtor is the appellant. A decree was passed on the 11th of November 1913 against defendants Nos. 1 and 9 and the family properties of defendants Nos 2 to 5, 10 and 12 for Rs. 1,453-12, subsequent interest and costs. Various ineffective applications were made to execute the decree. E. P. No. 156 of 1922 was filed for attachment and sale of the 9th defendant's properties. When the properties were attached, he filed a petition objecting to the execution of the decree on the ground that the plaintiff undertook not to proceed against him and to exonerate him and executed an agreement to that effect on the 5th of November 1913, namely before, the date of the decree. The agreement relied by the appellant is in these terms ".....As I have taken a promissory-note for Rs. 1,000 from you and from Narayanaswami Naicken, son of Tirumalai Naicken of Sankarapuram and as I paid the Rs. 1,000 to Narayanaswami Naicken only and as you have signed in the promissory-note only as *joint* for Narayanaswami Naicken I shall recover the whole amount from Narayanaswami Naicken only. If instead of that, I recover the amount from you I alone shall be responsible to you for the amount of (loss) sustained by you".

The lower Courts without admitting the agreement in evidence held on the authority of *Arumugam Pillay* v. *Krishnaswami Naidu* (1), that such an agreement cannot be pleaded as a bar and allowed execution to proceed.

The question for consideration in this Civil Miscellaneous Second Appeal is whether the agreement relied upon by the appellant, made prior to the passing of the decree in the suit, can be pleaded as a defence to the execution of the decree. In *Chidambaram Chettiar* v. *Krishna Vathiyar* (2) it was held by a Full Bench of this Court that such an agreement can be pleaded in proceedings taken in execution of the decree. In the course of his judgment in that case the Officiating Chief Justice pointed out. "The powers of the Court executing a decree are laid down in s. 47, the terms of which are extremely wide" and stated, "By a long course of decisions in this Presidency it has been held that an agreement made before the passing of the decree by which the decree, was not to be executed for a certain time, is a matter to be enquired into and decided by the Executing Court." The decision was based upon the "very comprehensive terms of s. 47" and upon the prior decisions of this Court. In *Doraiswami Moopan* v. *Subbalakshmi Palayee Ammal* (3) this decision was accepted as

(1) 56 Ind. Cas. 976; 43 M. 725; 12 L. W. 41; 39 M. L. J. 222.

(2) 37 Ind. Cas. 836; 40 M. 233; 21 M. L. T. 24; 5 L. W. 132; (1917) M. W. N. 44; 32 M. L. J. 13.

(3) 46 Ind. Cas. 880; 8 L. W. 205; (1918) M. W. N. 547.

stating the correct law by Sadasiva Aiyer and Napier, JJ., though they distinguished in that particular case the Full Bench decision. The learned Judges point out "The agreement in question was not to further prosecute the suit, that is, not to obtain a decree in the suit. The decision in *Chidambaram Chettiar* v. *Krishna Vathiyar* (2) does not apply, as the agreement before decree in that case was to the effect that a decree was to be passed but the decree so obtained was not to be executed" It is to be noticed that the learned Judges do not in any way limit the scope of that decision. The Full Bench decision was followed in *Sambasiva Aiyar* v. *Thirumalia Ramanuja Tathachariar* (4) but it was not applied as in that case the adjustment pleaded though subsequent to the preliminary decree was prior to the final decree. It was urged by the learned Advocate-General in *Sambasiva Aiyar* v. *Thirumalai Ramanuja Tathachariar* (4) that the Full Bench ruling required reconsideration or, at any rate, that it should be confined to the facts of the case before the Full Bench. With reference to this argument the learned Judges Ayling and Krishnan made the following observations, ".....we are not justified in cutting down the effect of the Full Bench in the manner suggested. We think the Full Bench decided that any pre-decree agreement between parties to a suit, by the terms of which the passing of the decee is not to be objected to but the execution is to be stayed in whole or in part either temporarily or for all time, can be pleaded and given effect to in execution proceedings and O. XXI, r. 2 is no bar to it. Though the arguments of the Advocate-General against the view of the Full Bench and in favour of the Calcutta view to the contrary as stated in *Benode Lal Pakrashi* v. *Brajendra Kumar Saha* (5) and *Hassan Ali* v. *Gauri Ali* (6), are not without force, we consider we are bound by that ruling. It is eminently desirable that on a question of procedure there should be certainty and finality" The Full Bench decision has been followed again in a very recent decision reported in *Arunachala Goundan* v. *Swaminatha Aiyar* (7). It is pointed out by the learned Judges Spencer and Devadoss that "The District Judge's refusal to allow the appellant to set up in these execution proceedings, any agreement prior to decree, and his direction to the appellant to seek his remedy in a separate suit cannot, however, be supported. Section 47 of the C. P. C. is wide enough to permit any valid objection to be taken by a judgment-debtor to the execution of a decree by the decree-holder or the decree-holder's legal representative", and the learned Judges refer to the Full Bench decision. The decisions in *Arumugam Pillay* v. *Krishnaswami Naidu* (1) and in *Koonameni Mallaya* v. *Kanneganti China Kotaya* (8) no doubt try to limit the scope of the application of the Full Bench decision. But in the latest decision in *Arunachala Goundan* v. *Swaminatha Aiyar* (7), as has been already pointed out by us, the Full Bench decision is given full effect and the decision is based upon the very wide terms of s. 47 of the C. P. C.

In our opinion the Full Bench decision applies to this case and the agreement relied upon by the judgment-debtor should be considered by the lower Court on its merits. We, therefore, set aside the order appealed against and remand the case to the lower Court for disposal according to law. The appellant will have his costs here and in the lower Appellate Court.

V. N. V. *Order set aside;*
Z. K. *Case remanded.*

(4) 54 Ind. Cas. 137; 37 M. L. J. 356.
(5) 29 C. 810; 6 C. W. N. 838.
(6) 31 C. 179.
(7) 77 Ind. Cas. 547; 19 L. W. 27; (1924) M. W. N. 144; 46 M. L. J. 240; (1924) A. I. R. (M.) 611.
(8) 64 Ind. Cas. 148; 14 L. W. 317; (1921) M. W. N. 382.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 356 OF 1921.
January 23, 1925.
Present:—Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.
Rai Bahadur Babu ABHAINANDAN PRASAD—VENDEE—DEFENDANT—APPELLANT
versus
PASHPAT NATH PANDE—PLAINTIFF AND *Musammat* PARMAVATI BIBI—VENDOR—DEFENDANT—RESPONDENTS.

*Custom—Pre-emption—Proof of custom—*Wajib-ul-araiz, *successive, entries in, value of—Presumption—Burden of proof—Period during which proof of custom necessary—Later entries, amplifying categories of*

pre-emptors, effect of—Partition, effect of—Suit brought at instigation of strangers, whether liable to be dismissed—Houses and buildings, whether appertain to zemindari.

A period of one hundred years, and even of fifty five years, is not necessarily too short for the growth of a custom of pre-emption in the United Provinces, where such a custom is well-known to be very common. [p. 301, col. 1.]

A village was owned by a single proprietor between the years 1818 and 1820. The *Wajib-ul-arz* of 1833, however, contained an entry recognizing the existence of the custom of pre-emption in the village. The entry was repeated with fuller details in the *Wajib-ul-arz* of 1860 and again in the *Wajib-ul-arz* of 1885. The *Wajib-ul-arz* of 1833 recognized only one category of pre-emptors, but that of 1860 recognized three categories including the one mentioned in the earlier *wajib-ul-arz*, and the *Wajib-ul-arz* of 1885 recognized four categories, also including the one mentioned in the *Wajib-ul-arz* of 1833. In a suit for pre-emption brought by a person who belonged to the category of pre-emptors which was recognized in all the three *wajib-ul-araiz* as against a stranger:

Held, (1) that in order to prove the existence of a custom of pre-emption the plaintiff was entitled to rely on the entry in the *wajib-ul-arz* of the last Settlement of 1885, which raised a *prima facie* presumption that there was a custom of pre-emption existing in the village, and could supplement this evidence by the entries in the earlier *Wajib-ul-araiz* of 1860 and 1833 as corroborative evidence; [p. 301, col. 1.]

(2) that as the entries in these *wajib-ul-araiz* raised a *prima facie* presumption in favour of the plaintiff the burden lay on the defendant to show the contrary by producing evidence to rebut that presumption; [*ibid.*]

(3) that the mere fact that more than one hundred years prior to the suit and about fifty five years prior to the last Settlement the village was owned by a single proprietor was not sufficient to rebut the presumption arising from the entries in the successive *wajib-ul-araiz*; [*ibid.*]

(4) that the preferential right of the plaintiff having been recognized in all the *wajib-ul-araiz*, the addition of new categories of pre-emptors in the *Wajib-ul-araiz* of 1860 and 1885 did not negative the existence of a custom of pre-emption in favour of a person belonging to the category recognized in all the *wajib-ul-araiz*. [p. 301, col. 2.]

The mere fact that an entry with regard to pre-emption in later *wajib-ul-araiz* is fuller than an earlier one does not raise a presumption that the *wajib-ul-araiz* do not constitute a record of custom, for the later *wajib-ul-araiz* may very well be mere amplifications of the previous *wajib-ul-arz*. The case may, however, be different where the entries in the later *wajib-ul-araiz* absolutely contradict the entries in the previous *wajib-ul-araiz* and cannot be reconciled with them. [p. 302, col. 1.]

An entry in the *wajib-ul-arz* of an exclusively Hindu village situate within the Gorakhpur District made in the Settlement of 1885, with regard to the existence of a custom of pre-emption, is entitled to special weight and the Court is entitled to presume that the Settlement Officer, before making the entry, was fully satisfied of a custom of pre-emption having existed in the village. [p. 301, col. 2.]

Where a fresh *wajib-ul-arz* is not prepared at a partition, it does not necessarily follow as a matter of law or principle that the custom or contract in force before the partition is no longer to have effect or operation. In the absence of a contract to the contrary the old custom would continue even after the partition. The partition, however would have the effect of confining the right to the new physical units created at the time of the partition. Under the pre-existing custom persons who were jointly liable for payment of Government revenue would have had a right of pre-emption as against a stranger. After the partition those proprietors whose shares are situated in another *mahal* are no longer under any joint liability to pay such a revenue. Owners of one *mahal* can, therefore, in no sense be called co-sharers of a vendor *qua* the share sold in another *mahal*. In order, therefore, to establish that a right of pre-emption exists in such a case it is not sufficient for a plaintiff to show merely that previous to the partition a custom of pre-emption existed in the village. It is necessary for him to show, either on the construction of the *wajib-ul-arz* or by other evidence, that the custom of pre-emption which obtained in the unpartitioned *mauza* had survived on partition of that *mauza* into separate *mahals* so as to give a sharer in one of the new *mahals* a right to pre-empt property in another of those *mahals*, in which he was not a sharer at the date of the sale. [p. 302, cols. 1 & 2.]

The mere fact that a plaintiff has instituted a suit for pre-emption at the instigation of other persons would not by itself disentitle him from getting a decree. If the plaintiff has a legal right to pre-empt, it is unnecessary for the Court to consider from what source he is going to procure the pre-emption money. If after obtaining a decree he allows any stranger to come in or attempts to transfer the property to such stranger it would be open to the co-sharers of the village to bring a suit for pre-emption. [p. 304, col. 1.]

In the absence of evidence to the contrary houses or buildings situate within the area of a *zemindari* appertain to the *zemindari* and are included in and pass with it. [p. 304, col. 2.]

(Case-law referred to.)

First appeal from a decree of the Additional Subordinate Judge, Gorakhpur, dated the 30th of July 1921.

Dr. Sir *Tej Bahadur Sapru*, Messrs. *Sankar Saran* and *Iswar Saran*, for the Appellant.

Mr. *G. Agarwala*, for the Respondents.

JUDGMENT.—[*May* 29, 1924.]—This is a defendant's appeal arising out of a suit for pre-emption. Under a sale-deed dated the 31st of August 1919 *Musammat* Padmavati defendant No. 2 transferred to Rai Bahadur Babu Abhainandan Prasad defendant No. 1 a 7-anna and odd share in holding No. 6 *mahal* No. 3 of village Magadiha and a 12-anna share in *mahal* No. 2 *patti* No. 1 of the same village for Rs. 25,000. The plaintiff claimed that under a custom prevailing in this village he was entitled to pre-empt this sale inasmuch as it had been effected without any offer being made to him in the first instance. He also alleged that the sale consideration mentioned in the deed was inflated, the true consideration being only Rs. 19,243-2-0.

The defendant-vendee *inter alia* denied the existence of this alleged custom and also pleaded that in consequence of a subsequent partition the custom even if it had existed before ceased to exist. It was also pleaded that the plaintiff was not a co-sharer in *mahal* No. 2, and it was also a part of the defence that the defendant himself was a near relation of the vendor and, therefore, the plaintiff had no preference over him. The allegation of the plaintiff that the sale consideration mentioned in the deed was not correct was denied, and it was further pleaded that the present suit was not a *bona fide* one but had been instituted in collusion with one Babu Jugul Kishore who was a stranger to this village. There was a further plea that the sale-deed covered two houses which were not liable to pre-emption.

The learned Subordinate Judge has held that there is a custom of pre-emption prevailing in both the *mahals* of this village, and that even if the plaintiff is not a co-sharer in *mahal* No. 2 he is entitled to pre-empt the share sold in that *mahal* inasmuch as he is a proprietor in the village. He has also held that the evidence adduced by the defendant that there had been a refusal before the sale, was not sufficient to establish the plea. He has further held that the mere fact that the suit was brought at the instance of some other person is no ground for its dismissal. As to the consideration he has held that there is nothing to show that the sale consideration entered in the deed was exaggerated.

The defendant vendee has come up in appeal to this Court and on his behalf some of the findings of the learned Subordinate Judge are challenged. The plaintiff has, however, submitted to this decree and does not challenge the finding as to the sale consideration.

Five main grounds have been urged before us.

First, that no custom has been established to exist in this village and that in any case if such a custom existed it has ceased to exist in consequence of the partition.

Secondly, that the defendant is a *rishtedar qaribi* (near relation) of the vendor and that, therefore, the plaintiff has no preference over him.

Thirdly, that the plaintiff had in fact refused to purchase the property before the sale was made to the defendant.

Fourthly, that the suit is not a *bona fide* suit and is liable to be dismissed, and

Fifthly, that the plaintiff has no right to claim pre-emption in respect of the houses in question.

In support of the alleged custom the plaintiff relied on entries in the *Wajib-ul-arziz* of 1833, 1860 and 1885. He also relied on a judgment in the case of the year 1901 and a judgment of the year 1907, and also on a reference in those judgments to an earlier pre-emption decree of 1880. On the other hand it has been contended on behalf of the defendant that having regard to the previous history of this village, the variations in the three *wajib-ul-arziz*, and the partition which has since been effected, there is really no custom in this village. In order to show the previous history of this village reliance is placed on two documents called, '*kaifiyat mahtawi*' and '*kaifiyat sarishtai nizamat*' of 1833 and 1860 respectively. These documents show that soon after the district of Gorakhpur had been acquired by the British Government from the Nawab Wazir of Oudh the village was farmed out to one Sheikh Farhat from 1210 to 1212 *Fasli*. From 1213 to 1215 *Fasli* the village was in possession of certain mortgagees Mirza Hasan Ali Beg and Assubut Ali. From 1216 to 1219 *Fasli* it was farmed out to three persons Ganesh Dat, Balgobind and Dat Ram. From 1220 to 1224 *Fasli* Ganesh Dat and Dat Ram were in possession. On the 29th of February 1818, however, the whole village appears to have been sold and the name of Gobind Singh, auction-purchaser, was recorded exclusively. Subsequent to this and about 1820 Gobind Singh sold this village to three persons, Sheo Nath, Nandlal and Balgobind. At the time of the Regular Settlement of 1833 a four-anna share was recorded in the names of Uma Dat and Sheo Nath, an eight-anna share in the names of Nandlal and Balgobind and the remaining four-anna share in the names of Bisheshar Dat, Mahesh Dat and Sankar Dat. It is not disputed that from the year 1820 onwards there have always been more than one co-sharer in this village. It is strongly contended that inasmuch as the village was owned by a single proprietor from the year 1818 to 1820 there

could possibly have been no occasion for the growth of a custom of pre-emption and that, therefore, the entry in the *Wajib-ul-arz* of 1833 must be taken to be a record of contract. It is then urged that the subsequent entries in the *Wajib-ul-araiz* of 1860 and 1885 must, therefore, also be presumed to have been records of contract. We are, of opinion, that this is not a correct way of approaching the question. The plaintiff is entitled to rely on the entry in the *wajib-ul-arz* of the last Settlement of 1885. That entry raises a *prima facie* presumption that there is a custom of pre-emption existing in this village. The plaintiff can further supplement this evidence by the entries in the earlier *Wajib-ul-araiz* of 1860 and 1833 as corroborative evidence. If these *wajib-ul-araiz* raise a *prima facie* presumption that a custom of pre-emption exists in the village the burden would lie on the defendant-vendee to show the contrary by producing evidence to rebut that presumption. All that is established in this case is that about the year 1820, that is to say, more than 100 years ago (and about 55 years prior to the Last Settlement) there was a single proprietor in this village. In our opinion this circumstance by itself is not sufficient to rebut the presumption arising from the entries in the successive *wajib-ul-araiz*. A period of 100 years and even of 55 years is not necessarily too short for the growth of a custom of pre-emption in these provinces where such a custom is well-known to be very common. It is not essential to show that such a custom is immemorial, [*vide Kuar Singh* v. *Mamman* (1) and *Lakhraj Bharthi* v. *Anrudh Tewari* (2)].

The next point urged is that inasmuch as there are variations in the three *wajib-ul-araiz* the presumption is negatived. It is pointed out that under the *wajib-ul-arz* of 1833 a right was given to mere co-sharers in the village, whereas in the *Wajib-ul-arz* of 1860 a right was given to near co-sharers (*hissedar qaribi*), then to co-sharers in the *thok* and then to the other co-sharers in the village, and in the *Wajib-ul-arz* of 1885 a right was given to own brothers, then to near relations, then to co-sharers in the *patti* and then to co-sharers in the village. It is apparent, therefore, that in the year 1833 there was only one category of pre-emptors, in 1860 there were three categories, and in 1885 there were four categories.

We must, however, note that so far as the right to pre-empt the property in favour of a co-sharer as against a stranger is concerned this was recognized in all the three *wajib-ul-araiz*. The plaintiff is not claiming a preference against the defendant on the ground that he is either an own brother or a near relation of the vendor. He claims the right of pre-emption on the ground that he is a co-sharer while the defendant-vendee is a perfect stranger. The addition of the new categories in the *Wajib-ul-arz* of 1885, therefore, does not necessarily negative the existence of a custom of pre-emption in favour of a co-sharer as against a stranger.

We may point out that the entry made at the Settlement of 1885 is of particular importance. According to the Gazetteer of Gorakhpur (pp. 151-2) the Settlement operations commenced soon after 1883 and lasted till 1890. Gorakhpur proper was inspected in 1886-87 or after. The Settlement was sanctioned from 1889 to 1919. Now under the Circular of the Board of Revenue dated the 24th of August 1886 which was issued for the guidance of officers conducting the Settlement operations in Gorakhpur district it was provided that the Settlement Officer should make a note of custom or constitution peculiar to a *mahal* and it was further provided that as regards *mahals* which belonged to proprietors other than Muhammadans the Settlement Officer was to record a right of pre-emption only when the proprietors expressly demanded that it be noted and *proved conclusively* that the custom existed. In the year 1886 this village was an exclusively Hindu village and we are entitled to presume that at that time the Settlement Officer before making this entry was fully satisfied that a custom did exist in the village. We have had occasions to refer to the Circular in several cases. [*vide* the cases of *Nandan Singh* v. *Guptar Singh* (3) and *Babban Pande* v. *Lachhman Chaudhri* (4).]

As a special significance attaches to the entry in the last *wajib-ul-arz* we are entitled to draw a very strong presumption from it,

(1) 17 A. 87; A. W. N. (1895) 10; 8 Ind. Dec. (N. S.) 381.

(2) 28 A. 434; A. W. N. (1906) 80.

(3) 79 Ind. Cas. 630; 22 A. L. J. 7; (1924) A. I. R. (A.) 124.

(4) 79 Ind. Cas. 584; 22 A. L. J. 62; 46 A. 205; (1924) A. I. R. (A.) 371; L. R. 5 A. 33 Civ.

specially as it purports to record a custom of pre-emption and not only an agreement as to such a right.

It may also be noted that it is possible that when a more thorough enquiry was made in 1885 complete details of the custom were recorded which were not forthcoming at the time when the *Wajib-ul-arz* of 1860 or of 1833 was prepared. It was held in the case of *Returaji Dubain* v. *Pahlwan Bhagat* (5) that the mere fact that subsequent *wajib-ul-araiz* are fuller raises no presumption that they were not records of a custom, for the latter *wajib-ul-araiz* may very well be mere amplifications of the previous *wajib-ul-araiz*. The case may be different when they absolutely contradict the entries in the previous *wajib-ul-araiz* and cannot be reconciled with them.

We have already noted that in addition to the entries in these *wajib-ul-araiz* the plaintiff has produced the judgments of 1901 and 1907. The judgment of 1901 also contained a reference to a pre-emption decree of 1880. We, therefore, find that the custom did exist.

We are also of opinion that the effect of the partition of 1897 which was subsequent to the year 1885, when the last *wajib-ul-arz* was prepared, cannot be deemed to extinguish the custom. No new *wajib-ul-araiz* were framed at the partition of 1897 and there is nothing on the record to show that the co-sharers intended that the old custom should be abrogated. It was held in the Full Bench case of *Dalganjan Singh* v. *Kalka Singh* (6) that such a partition had not necessarily the effect of extinguishing the previously existing custom. In the recent case of *Digambar Singh* v. *Ahmed Sayeed Khan* (7) their Lordships of the Privy Council quoted with approval the view of Mr. Justice Banerji that "where a fresh *wajib-ul-arz* has not been prepared at partition, it does not necessarily follow as a matter of law or principle, that the custom or contract in force before partition is no longer to have effect or operation.

The view that in the absence of evidence to the contrary the old custom would continue even after the partition has been consistently followed by this Court, [*vide* the cases of *Jokhan Singh* v. *Sabhajeet Singh* (8) and *Deokinandan* v. *Mehtab Rai* (9)]. We, therefore, think that the mere fact that there has been a partition of this village would not necessarily extinguish the right. The partition, however, would have the effect of confining the right to the new fiscal units. Under the pre-existing custom the persons who were jointly liable for payment of Government revenue had a right of pre-emption as against a stranger. After the partition those proprietors whose shares are situated in another *mahal* are no longer under any joint liability to pay such revenue. Owners of one *mahal* can, therefore, in no sense be called co-sharers (*hissadaran*) of the vendor *qua* the share sold in another *mahal*. In order, therefore, to establish that the plaintiff has a right of pre-emption in this *mahal* it is not sufficient for him to show merely that previous to the partition a custom of pre-emption existed in this village. In the Privy Council case of *Digambar Singh* v. *Ahmad Sayeed Khan* (7) their Lordships at page 141* pointed out that a mere proof that prior to the partition of the village the custom of pre-emption existed would not be sufficient to entitle the appellant to a decree. It would be necessary for him to show either on the construction of the *wajib-ul-arz* or by other evidence that the custom of pre-emption which obtained in the unpartitioned *mauza* would survive on partition of that *mauza* into separate *mahals* so as to give a sharer in one of the new *mahals* a right to pre-empt property in another of those *mahals* in which he was not a sharer at the date of the sale.

The plaintiff is not a co-sharer in *mahal* No. 2. He is a proprietor in the village. There is nothing to show that at the time of the partition the right of the proprietors in the village to pre-empt shares sold in *mahals* other than their own was preserved. In the absence of any such evidence the plaintiff is not entitled to a decree for pre-emption of the share sold in *mahal* No. 2. The learned Vakil for the respondent has relied on the judgments of 1901 and 1907 to show that they are evidence of a right of pre-emption having been exercised in favour of a co-sharer in another *mahal*. This view is expressed by the learned Subordinate Judge also. We are, however, unable to

(5) 7 Ind. Cas. 680; 33 A. 196; 7 A. L. J. 1040.

(6) 22 A. 1; A. W. N. (1899) 111; 9 Ind. Dec. (N. S.) 1035 (F. B.).

(7) 28 Ind. Cas. 34; 37 A. 129; 13 A. L. J. 236; 19 C. W. N. 393; 17 M. L. J. 193; 2 L. W. 303; 21 C. L. J. 237; 23 M. L. J. 556; 17 Bom. L. R. 393; (1915) M. W. N. 581; 42 I. A. 10 (P. C.).

(8) 65 Ind. Cas. 832; 20 A. L. J. 223; (1922) A. I. R. (A.) 182.

(9) 50 Ind. Cas. 200; 41 A. 426; 17 A. L. J. 467.

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accept that this was so. A perusal of the judgment of the year 1901 makes it quite clear that the learned Subordinate Judge came to the conclusion that it had not been established in that case that the plaintiff was a co-sharer of another *mahal* and not of the same *mahal* in which the share sold was situated whereas the judgment of 1901 which unfortunately has not been printed shows that the claim was decreed not on the ground that the plaintiff was a co-sharer in another *mahal* but on the ground that he was a near relation of the vendor.

The defendant vendee says that he is a *rishtedar qaribi* of the vendor and, therefore, claims that he comes under the first category of the entry in the *Wajib-ul-arz* of 1885. There is a pedigree attached to the written statement filed by the defendant which shows that the defendant was the nephew of Babu Sham Lal who was the maternal grandfather of the husband of the vendor *Musammat* Padmavati. He is not related in the direct paternal line but is related through a female and he is related really to the vendor's deceased husband and not to the vendor herself. Furthermore the several links in the pedigree show that he is not a near relation (*hissedar qaribi*) though he may be called a distant relation (*hissedar baidi*) of the vendor's husband. We are, therefore, not satisfied that the defendant-vendee can bring himself within the second category mentioned in the *Wajib-ul-arz* of 1885, namely, the category of near relation so as to have a preference over the plaintiff.

The defendant in support of his plea of refusal produced considerable oral evidence. The story told on his behalf was that prior to the execution of the sale-deed and after the contract had been settled Sham Sunder Lal, the *mukhtar-am* of the defendant, went to the village Magadiha and took with him Narain Lal, *karinda* of the vendor. Narain Lal then summoned all the co-sharers and proprietors of the village and they were asked in a meeting as to whether they would take the property. They all refused saying that they were themselves, indebted and could not afford to purchase it. It is said that the plaintiff Pashpat Nath Pande was also present there and definitely refused to purchase the property. In support of this story four witnesses have been examined. Narain Lal is dead and could not be produced, but Sham Sunder Lal, *mukhtar-am* supports the defendant. As however, he is under the control and influence of the defendant it is not possible to place implicit reliance on his statement. The second witness is Bansidhar. As to this witness Sham Sunder Lal had stated that he was a *karinda* of Babu Abhainandan Prasad, but the witness himself was not questioned on this point in cross-examination. Bansidhar is not a person of such a status that his evidence must necessarily be accepted. The third witness is Har Sewak. He is also a man of not very high status and admits that he is indebted to the defendant-vendee (*Mukhtar Saheb*). The fourth witness Kali Charan is a tenant of the defendant. All these four witnesses were examined before the learned Subordinate Judge who had a full opportunity of hearing them and marking their demeanour and after having heard their evidence he was not satisfied that they should be believed. We may also note that the defendant's story is not a probable one. According to the *khewat* there are a very large number of co-sharers in this village. It is also in evidence that the plaintiff lives sometimes in village Charpani and sometimes in village Magdiha. It is difficult to believe that it could be imagined beforehand that on the date proposed all the co-sharers would be available or could be persuaded to come and attend the meeting. The defendant is a member of the legal profession and one would expect that he would have taken every precaution to get refusals from the persons who were likely to pre-empt. It is not suggested that registered notices were issued to the co-sharers or their signatures obtained on any paper. The recital contained in the sale-deed also shows that the vendor's husband had acquired the property under a pre-emption decree and the vendee was, therefore, aware of the right of pre-emption. Under the circumstances it was to be expected that the defendant-vendee would have taken greater precaution of procuring proof of a direct refusal. The plaintiff has gone into the witness-box and denied that any offer was made to him or that he refused to purchase. No doubt the oral evidence on the side of the defendant is more voluminous, but in the face of the above mentioned circumstances we find it impossible to differ from the view taken by the Court below that that evidence should not be accepted. We must, therefore, hold that it

has not been established that the plaintiff had refused to purchase the property before the sale was effected.

The next point urged is that the plaintiff is himself highly indebted to various persons and, therefore, is not in a position to pre-empt this property. It is suggested that the suit is really brought at the instance of Jugul Kishore who himself is a stranger. Two witnesses Hari Shankar and Kali Prasad were produced to prove an admission of the plaintiff that he was fighting this case in the interest of Jugul Kishore with whom he had entered into some secret arrangement. We find it difficult to believe that even if that was so the plaintiff would have been advertising the fact to witnesses like Hari Shankar and Kali Prasad. It is true that the plaintiff is heavily indebted and it is unlikely that without raising money from some source or other he would be able to pre-empt this property. All the same it is difficult to record a finding that it has been established that the plaiutiff is fighting the case not on his own behalf. Furthermore, we are of opinion that even if it had been established that the plaintiff had instituted the suit at the instigation of other persons that would not by itself have disentitled the plaintiff from getting a decree. If the plaintiff has a legal right to pre-empt it is unnecessary for the Court to consider from what source he is going to procure the pre-emption money. If subsequent to this litigation he allows any stranger to come in or attempts to transfer the property to such stranger it would be open to the co-sharers of the village to bring a suit for pre-emption. It was held in the case of *Athar Husain* v. *Idu Shah* (10) by the Oudh Court of which one of us was a party that the mere fact that the suit was instituted at the expense of another person and that the person claiming pre-emption was merely a nominal plaintiff acting on his behalf was immaterial so long as the plaintiff had the legal right to pre-empt. This view has been followed by this Court in the case of *Makhan* v. *Shyam Lal* (S. A. No. 1444 of 1922 decided on the 25th of January, 1924).

The last point to consider is as to whether the plaintiff is entitled to pre-empt the two houses situated in *mahal* No. 2 which have been transferred under the sale-deed. In this *mahal* the entire *patti* No. 6 has been transferred, and it is not disputed that these houses stand on the land so transferred. Ordinarily these houses would be deemed to be appurtenant to the *zemindari* property unless there was evidence to show that they were treated separately and stood on a distinct and separate footing. Reliance is placed strongly on behalf of the defendant on the circumstances that in the sale deed these houses are separately mentioned and their boundaries are separately given. In every village, however, *zemindars* have their collection houses which are appurtenant to the *zemindari*. Our attention has not been drawn to any specific evidence which would indicate that these houses were held and occupied separately and independently of the *zemindari*. It was held in the case of *Abu Hsuain* v. *Ramzan Ali* (11) that in the absence of evidence to the contrary the houses or buildings situate within the *zemindari* area were included in and passed with the *zemindari*. [See also *Banke Lal* v. *Jagat Narain* (12).] We may also note that in the sale-deed no separate valuation of these houses has been entered.

The result, therefore, is that this appeal succeeds as regards *mahal* No. 2 and fails as regards *mahal* No. 3 in which we find that the plaintiff is entitled to a preferential right. The sale in this case was effected for a consideration of Rs. 25,000 the correctness of which is no longer challenged here but there are no materials on the record to enable us to determine what portion of that consideration was paid on account of the share sold in *mahal* No. 2 and what part of it was paid on account of the portion sold in *mahal* No. 3 including the materials of the houses standing therein which are comprised in the sale. We accordingly direct the lower Court to determine after taking such additional evidence as the parties may adduce.

What portion of the sale consideration should be paid by the plaintiff for the portion of the property in dispute which is situated in *mahal* No. 3 including the materials of the houses in question as a condition precedent to the enforcement of the pre-emptive right?

Two months' time will be allowed for the return of the finding and ten days will be allowed from the date of receipt of the finding for filing objections.

(10) 56 Ind. Cas. 691; 7 O. L. J. 271; 23 O. C. 85; 2 U. P. L. R. (O.) 105.

(11) 1 A. 381; 2 Ind. Dec. (N. S.) 997.

(12) 22 A. 168; A. W. N. (1900) 31; 9 Ind. Dec. (N. S.) 1143.

The case came on after the finding for final hearing and the Court delivered the following

JUDGMENT.—The facts of this case are fully set forth in our remand order dated the 29th of May 1924. An issue was sent down to the Court below for a finding as to what portion of the sale consideration should be paid by the plaintiff for the portion of the property in dispute which is situated in *mahal* No. 3 including the materials of the houses in question as a condition precedent to the enforcement of the pre emptive right. The finding of the Court below is that Rs. 23,076 would be the total price payable by the plaintiff on account of the property which can be pre-empted. The question to be decided in the Court below was one of fact. The plaintiff was altogether absent and his Vakil stated in the Court below that he had no instructions. Certain objections have been filed to the finding returned by the Court below. But there is no evidence in support of those objections. The finding must, therefore, be accepted. We accordingly allow this appeal and modify the decree of the Court below to this extent that we decree the plaintiff's claim for the portion of the property in dispute which is situated in *mahal* No. 3 including the materials of the houses in question on payment by the plaintiff within two months from this date a sum of Rs. 23,076. In the event of payment the parties shall pay and receive costs in both Courts in proportion to their failure and success including in this Court-fees on the higher scale. In case the amount mentioned above is not deposited in Court within the time fixed the suit shall stand dismissed with costs in all Courts including in this Court fees on the higher scale.

Z K. *Appeal allowed.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

April 28, 1925.

Present:—Lord Shaw, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

PRAMATHA NATH MULLICK—

PLAINTIFF—APPELLANT

versus

PRADYUMNA KUMAR MULLICK AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Idol, nature of—Legal status—Shebait, *position and powers of*—Shebaitship, *devolution of*—*Removal of idol, whether permissible.*

A Hindu idol is a "juristic entity." It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager, with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. [p. 306, col. 2.]

A person founding a deity and becoming responsible for the duties attached to its worship is *de facto* and in common parlance called *shebait.* This responsibility is discharged by a pious Hindu, either by the personal performance of the religious rites or by the employment of a *Brahmin* priest to do so on his behalf. The founder or his successor may confer the office of *shebait* on another. [p. 307, col. 1.]

Under the Hindu Law when the worship of a Thakur has been founded, the *shebaitship* is invested in the heirs of the founder, in default of evidence that he has disposed of it otherwise or that there has been some usage, course of dealing, or some circumstances to show a different mode of devolution. [p. 310, col. 1.]

There may be difficulties in adjusting the legal status of an idol to the circumstances and requirements of its protection and location and there may also be a variety of other contacts of such a "*persona*" with mundane ideas, but a family idol cannot be reduced to the position of a mere moveable chattel. [p. 309, col. 1.]

The Will of an idol in regard to its location must be respected. If in the course of a proper and unassailable administration of the worship of the idol by the *shebait,* it be thought that a family idol should change its location, the Will of the idol itself, expressed through his guardian must be given effect to. It is open to an idol acting through his guardian, the *shebait,* to conduct its worship in its own way, at its own place, always on the assumption that the acts of the *shebait* expressing the Will of the idol are not inconsistent with the reverent and proper conduct of its worship by those members of the family who render service and pay homage to it. [p. 310, col. 2; p. 311, col. 1.]

Appeal from the judgment and decree of the Calcutta High Court (Sir Lancelot Sanderson, Kt., Chief Justice and Justice Sir Thomas Richardson. Kt.,) dated the 10th April 1923, in Appeal from Original Civil Jurisdiction No. 92 of 1922, reported as 77 Ind. Cas. 833, reversing the judgment of Mr. Justice Greaves, dated the 1st June 1922, reported as 76 Ind. Cas. 985.

Messrs. *A. M. Dunne, K. C.,* and *S. Hyam,* for the Appellant.

Messrs. *L. De Gruyther, K. C.,* and *J. M. Parikh,* for the Respondents.

JUDGMENT.

Lord Shaw.—The questions raised by this appeal are of a wide and general importance. They have reference to the control and worship of a Hindu family idol. It may be explained that although one idol is referred to, called, of course, the Thakur, there were two others, the Thakurani, a female idol referred to in some of the papers as the consort of the Thakur, and there was also a third, a sacred or deified stone called the *Salgram Sila,*

These three idols became the objects of the pious worship of the family of the founder, Mutty Lal Mullick, who originally installed them. But the points in the case can be more simply treated by referring to the one, namely, the principal idol the Thakur.

The appeal is from a decree dated the 10th April, 1923, made by the High Court in Calcutta in its Civil Appellate Jurisdiction reversing a decree dated the 1st June, 1922, made by the same Court in its Original Civil Jurisdiction.

The case was argued at great length, and a large mass of authorities was cited.

Before entering upon the legal questions which were debated, their Lordships think it not inadvisable to state the family history, in so far as it concerns the installation of this idol. It was established and consecrated many years ago by a wealthy Hindu inhabitant of Calcutta, Babu Mutty Lal Mullick, in his family dwelling house, in a Thakur Ghar, or room therein, set apart for worship.

Mutty Lal Mullick died in 1846 leaving a widow, Ranganmoni, and an adopted son, Jadulal, then two years of age. He left a Will dated 17th August, 1846 (shortly before his death). He had for some time prior to his death set up and established and consecrated the idol, and no doubt is thrown upon the fact that the idol so installed became unquestionably the object of worship by himself and the family. The Will provided that his widow should be the *malik* or proprietor and attorney, for the protection and care of the whole of his estate until his adopted son Jadulal attained the age of 20, and the enumeration included the Sri Iswar Thakurs, Thakuranis etc., established by him and ancestorial.

Upon the adopted son attaining 20 the property was to be made over to the son as his heir. There was a power to the widow, in case the adopted son died without issue to adopt another. A gift was made to the widow of one lac of rupees, together with various jewels and silver with right of residence in the family residence. With regard to the maintenance and worship of the idol certain funds, amounting to Rs. 600 a month, were to be drawn by the widow and therewith she was to defray the expenses of the idol's *Sheba* (or worship) and for religious festivals and ceremonies, "in the method that I have paid and defrayed the same hitherto." Upon the adopted son attaining 20 the widow was to "make over the whole of the property to him fully and he will in a like manner protect the whole of the property and effectuate the *kreah karmas*, or religious acts and ceremonies."

It seems accordingly clear that in Mutty Lal Mullick's lifetime the idol was, as already stated, established as a household god; and the pious founder, narrating his own upkeep and maintenance of the deity, gave funds in order that those should be continued; and he prescribed the duty of continuance to the widow during the adopted son's minority and upon the son thereafter during his life.

One of the questions emerging at this point, is as to the nature of such an idol, and the services due thereto. A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of Law, a "juristic entity." It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. It is unnecessary to quote the authorities; for this doctrine, thus simply stated, is firmly established.

A useful narrative of the concrete realities of the position is to be found in the judgment of Mukerji, J. in *Rambrama Chatterjee* v. *Kedar Nath Banerjee* (1).

"We need not describe here in detail the normal type of continued worship of a consecrated image,—the sweeping of the temple, the process of smearing, the removal of the previous day's offerings of flowers, the presentation of fresh flowers, the respectful oblation of rice with flowers and water, and other like practices. It is sufficient to state that the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy; the vivified image is regaled with the necessaries and luxuries of life in due succession, even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest."

The person founding a deity and becoming responsible for these duties is *de facto*

(1) 72 Ind. Cas. 1026; 36 C. L. J. 478 at p. 483; (1923) A. I. R. (C.) 60.

and in common parlance called *shebait*. This responsibility is, of course, maintained by a pious Hindu, either by the personal performance of the religious rites or—as in the case of *Sudras*, to which caste the parties belonged—by the employment of a *Brahmin* priest to do so on his behalf. Or the founder, any time before his death or his successor likewise, may confer the office of *shebait* on another.

Under the Will of Mutty Lal Mullick he did not adopt the latter course, but he acted as *shebait* with the *Brahmin* assistance referred to. After his death his widow officiated similarly as the ministrant of the worship, and she used, as directed, the endowed funds specially destined for the upkeep and worship of the deity. After the adopted son Jadulal reached the age of 20 he then became *de facto* the person, charged with the same duties, to be performed as fully as his adoptive father and mother had performed them.

It must be remembered in regard to this branch of the law that the duties of piety from the time of the consecration of the idol are duties to something existing which, though symbolising the Divinity, has in the eye of the law a status as a separate *persona*. The position and rights of the deity must, in order to work this out both in regard to its preservation, its maintenance and the services to be performed, be in the charge of a human being. Accordingly he is the *shebait* custodian of the idol and manager of its estate. And so, paying proper respect to the religious proprieties of the case, the father, mother and adopted son were successively and *de facto* ministrants and custodians of this idol

The period during which this state of matters existed was in the narrative from anterior to 1846 till the year 1864. The widow's charge of the affairs of the idol had come to an end; and Jadulal the son's period of administration, he having reached the age of 20, had begun. Jadulal died in the year 1894. What had happened during his period of administration was this: that in 1881 he enlarged the old family dwelling-house, containing the Thakurbari in which the household gods had hitherto resided and were worshipped. He had erected a *puja dalan* for the worship of all the family Thakurs, including the three referred to, that is to say, instead of one house with its Thakurbari for the family, two houses were erected on adjoining plots of ground and between these the *puja dalan* was erected, having a private entrance from each of the private dwellings so that the family worship was conducted with due decorum and propriety in what was practically an annexe to either house.

Two other events occurred which are important during this period of Jadulal's regime. In 1888 he executed a deed of trust providing particular premises for the location and worship of the deities in the *puja dalan* aforesaid. The terms of this deed are the centre of the contentions raised by the parties in the appeal and will be more particularly hereinafter referred to. The other fact affecting this period was that in the year 1891 Ranganmoni, the widow of Mutty Lal Mullick, died. She made a very large endowment in favour of the family idol, amounting to about one lac of rupees. By her will she appointed Jadulal her executor and trustee and she made a disposition of her property in these terms:—

"I give and devise my tenanted land, No. 129, Bowbazar Street in Calcutta, to my said trustee, his heirs and representatives to be held by him and them upon trust, to apply the rents and income thereof, after providing for the payment of taxes and other outgoings, in the performance of the daily and periodical worship of the idol, consecrated by my late husband, called Radha-Shamsunder, such worship to be performed by my said son and his descendants."

Jadulal died in 1894, leaving issue, three sons and four daughters. The estates were large, and a suit for partition among the three sons ensued. Questions of importance were raised as to:—

(1) The provisions of Jadulal's Will; and

(2) The endowment by Ranganmoni.

On the former head the disputes and differences were submitted to the arbitration of the late Mr. W. C. Bonnerjee, who delivered an award in 1899. That award was made a rule of Court. In the partition proceedings, Mr. Bonnerjee declared that the three sons, as Jadulal's heirs, were entitled to the residue of the father's estate in three equal shares. He allotted one of the two houses to the first son, another to the third son, and, in regard to the second son, the present appellant, he was, so to speak, paid out in money in order that he might erect a desirable residence for himself. Among other trusts

declared in Jadulal's Will was the following, namely:—

The trust for the worship of the said Jadulal Mullick's hereditary Goddess Sri Sri Singhabahini Debi and other family deities during his turn or *pala* of worship.

It is to be observed that, although the turn or *pala* of worship as amongst the three sons was recognized in that part of the award the idols in question in this case were not named.

In a subsequent part of the award various turns of worship were given to the sons in order. As to the Thakurbari, or *puja dalan* plans were referred to, and it was declared to be the joint property of the three sons. Prohibition was made against the two sons vested in the adjoining properties raising any structure or building of any kind which might interfere with the joint property. The situation created by this deed accordingly was that, while the deities were not named, the joint property of the three sons in the house dedicated to the idol was declared and the system of worship by turn or *pala* was established.

With regard to Ranganmoni's estate and endowment, a suit was brought in 1904, and in June, 1905, it was decreed that a scheme should be framed for carrying on the varied trusts of the lady's Will and, subject to provision being made therefor, her estate should be divided into three equal shares among the plaintiff and defendants in this suit. A commission was accordingly issued to Babu Bhupendra Nath Basu to frame a scheme of worship and to partition the residue. This was done by return to the commission, which appointed the worship of Thakur Sri Sri Radha Shamsunderji, the idols in question in this suit, in the following terms:—

"I direct that the *sheba* and worship of the Thakur Sri Sri Radha Shamsunderji and of the Thakur located at Mahesh and Brindaban and the *Ekodistha sradh* will be preformed by the parties and their heirs by turns of one year each, the first turn commencing from the 1st day of *Baisakh* in the *Bengali* year 1317 and such first turn shall devolve on the said Pradyumna Kumar Mullick and his heirs, the second turn commencing from first day of the month of *Baisakh* 1318 shall devolve on the said Pramatha Nath Mullick and his heirs, and the third turn commencing from the first day of the month of *Baisakh* 1319 shall devolve on the said Manmatha Nath Mullick and his heirs, and so on by rotation. On the demise of any one of the parties, his heirs will become entitled to his turn of worship, and the party having the turn of worship will perform such worship without any interference by any of the other parties."

The family very sensibly acted in accordance with the rules set down in these proceedings. The practical result was that the parties, now judicially separated, continued the worship of the idols. The idol was, of course, not removed by the parties during their period of worship of *pala* because in the building as constructed the idols were located as mentioned in a building adjoining their respective houses.

In the year 1910-11 the second son's establishment was set up. The idol was removed to his house in connection with certain festivals considered suitable for the occasion and, after these were concluded in February, 1911, was brought back to the *puja dalan*. In May, 1911, the second son's year of *pala*, or turn of worship, came round and the family idol was removed to the Thakurbari of his house and family worship continued there for one year. In 1914 the same thing occurred, the first respondent being still an infant. It is not suggested in any part of the case that these temporary transfers of the location of the family idol (such temporary transfers on occasions of festivals are familiar in the community) were not conducted with complete reverence and propriety and without interruption of the ordinary daily services tendered to the idol or any of the rights connected with its worship. In short, the results of the partition suit, the interpretation of the Wills of Jadulal and Ranganmoni, and the award made therein, were so far worked out without defect or friction.

When the appellant's *pala*, however, again came round, namely, in 1917, the transfer of the idol by him as before to his Thakurbari was objected to by the first respondent, who had now attained majority (with whose objection the third son concurs); and the broad question in this appeal is whether that objection is well-founded in law.

In substance the objection is founded upon the deed executed in 1888 by Jadulal.

The argument in the Appellate Court is thus recorded by Richardson, J.—

The learned Standing Counsel, Mr. B. L. Mitter, founding on Mutty Lal's Will, argued that the testator treated the idols or images which he had set up as his personal property and left them absolutely to Jadulal. When pushed, Mr. Mitter said that Jadulal might, if he had so pleased, have thrown them into the river.

The Appellate Court rejected that proposition. And this Board can give no countenance to it. As is added in the judgment referred to :—

The inclusion of the idols, however, among items of property, moveable and immoveable, does not show that the testator regarded his interest in them in the same light as his interest in his secular property. The careful directions given later in the Will show that the testator intended the worship of the ancestral deities and the deities he had established to be a charge upon his estate.

There may be, in the nature of things, difficulties in adjusting the legal status of the idol to the circumstances and requirements of its protection and location and there may, no doubt, also be a variety of other contacts of such a *persona* with mundane ideas. But an argument which would reduce a family idol to the position of a mere moveable chattel is one to which the Board can give no support. They think that such an argument is neither in accord with a true conception of the authorities, nor with principle. The Board does not find itself at variance with the views upon this subject taken in the Appellate Court or with the analysis of the authorities there contained.

The Appellate Court, it is true, felt itself constrained by the terms of the deed of 1888 to arrive at a conclusion adverse to the case of the appellant ; but upon the main points in argument, both as to the contention that the household god was mere property, and as to Jadulal's right being absolute therein, this appeal was argued before the Board by the Counsel for the respondents here on the footing that if the Appellate Court's decree depended on the reasons given, it could not be defended. The Board is, on the contrary, of the opinion that, upon the two points they discussed, the reasoning and view of the High Court are sound.

Their Lordships would only add, on the subject of property, that the argument is said to be supported by the judgment of Banerjee, J. in *Khetter Chunder Ghose* v. *Hari Das Bundopadhya* (2). In that case the facts were that the household idol was made over to relatives, owing to the family, whose idol it was, being unable to carry on the worship on account of the paucity of profits of the endowed lands, and it was held that the transfer was justified in the interests of the idol. It was a proper and a pious act. The *shebait*, being charged fundamentally with the duty of seeing to the worship being carried on, and, having the concurrence of the entire family to the transaction, did have power to carry through the transaction "for the purpose of performing its worship regularly through generation to generation." The members of the family were thereby deprived of no right of worship. The interests of worshippers and idol were conserved. Their Lordships do not think that such cases form any ground for the proposition that Hindu family idols are property in the crude sense maintained, or that their destruction, degradation or injury are within the power of their custodian for the time being. Such ideas appear to be in violation of the sanctity attached to the idol, whose legal entity and rights as such the law of India has long recognized.

The argument as to property being thus displaced, their Lordships have now to consider the position of Jadulal, the grantor of the deed of 1888.

Was he *shebait* of this idol in the narrower sense as the appellant contends or did he succeed by virtue of Mutty Lal's Will to the rights and privileges possessed by the testator ? In the deed of 1888, Jadulal declares as follows :—"Whereas the said Babu Mutti Lal Mullick, the father of the said Jadulal Mullick, established and consecrated the Thakur called Radha Shamsunderji." As has been seen, during, his life Mutty Lal Mullick had *de facto* performed piously and regularly all the duties which the law would charge upon the custodians of the idol. It stands without question that Jadulal himself was fully performing similar duties and functions. As was said by Lord Hobhouse in

(1) 17 C. 557; 8 Ind. Dec. (N. S.) 911.

Gossamee Sri Gridhariji v. *Romanlalji Gossami* (3).

"According to Hindu Law, when the worship of a Thakur has been founded, the *shebaitship* is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution."

A similar principle appears also to have been implied in the judgments of *Jagannath Prasad Gupta* v. *Runjit Singh* (4), *Sheoratan Kunwari* v. *Ram Pargash* (5) and *Jai Bansi Kunwar* v. *Chattar Dhari Singh* (6).

To apply this law to the present case, Jadulal was the sole heir of his father and, by the general law of India, he thus stood vested with the right of custody of, and management of the trust for the family idol which his father had consecrated and set up. So far as the legal status and rights of Jadulal as grantor of the deed of 1888, the deed proceeds to narrate :—

"Whereas the said Jadulal Mullick is now desirous of dedicating the said premises to the said Thakur in the manner hereinafter expressed."

This is perfectly correct language in acknowledgment of the fact that the Thakur existed and was the capable recipient in law of the property dedicated to it. The deed then proceeds to declare that certain premises, described in the schedule, "shall be for ever held by the said Jadulal Mullick his heirs, executors, administrators and representatives to and for the use of the said Thakur Radha Shamsunderji to the intent that the said Thakur may be located and worshipped in the said premises and to and for no other use or intent whatsoever. Provided always that if at any time hereafter it shall appear expedient to the said Jadulal Mullick his heirs, executors, administrators or representatives so to do it shall be lawful for him or them upon his or their providing and dedicating for the location and worship of the said Thakur another suitable Thakurbari of the same or greater value than the premises hereby dedicated to revoke the trusts hereinbefore contained and it is hereby declared that unless and until another Thakurbari is provided and dedicated as aforesaid the said Thakur shall not on any account be removed from the said premises and in the event of another Thakurbari being provided and dedicated as aforesaid the said Thakur shall be located therein but shall not similarly be removed therefrom on any account whatsoever."

This passage has been quoted in full so as to make clear the three propositions which seem to follow, namely, first, the recognition as mentioned of the idol as the dedicatee second, the conveyance in no respect whatever appears to be a conveyance of the idol, but is a conveyance of the premises described in the schedule to and for the use of the idol and for no other use; third, this use is not to be interfered with by Jadulal's heirs, executors, administrators or representatives except upon providing for the dedicatee another Thakurbari of the same or a larger value. When that is done Jadulal's heirs, etc., could revoke the trusts of the premises affecting the present *puja dalan*, and unless and until that is done the idol is not to be removed therefrom.

It is this last proposition which raises the real difficulty in the case and their Lordships express no surprise that the High Court should have felt it. Upon a full consideration their Lordships have come to the conclusion that this was not a dedication, in any sense of the word, of the idol as property, nor of the idol at all. It was a dedication of real estate in trust for the idol, recognized as a legal entity, to which such dedication might be made.

The true view of this is that the Will of the idol in regard to location must be respected. If, in the course of a proper and unassailable administration of the worship of the idol by the *shebait*, it be thought that a family idol should change its location, the Will of the idol itself, expressed through his guardian, must be given effect to. This is in accordance with what would appear to be the sound principle of the position and it is further in accord with the authority on the subject. In the case already referred to so far did the decision go that it was expressly said by Lord Hobhouse in *Gossammi Sri Gridhariji* v. *Romanlalji Gossammi* (3)

(3) 16 I. A. 137 at p. 144; 17 C. 3; 13 Ind. Jur. 211; 5 Sar. P. C. J. 350; 8 Ind. Dec (N. S.) 541 (P. C.).
(4) 25 C. 354; 13 Ind. Dec. (N. S.) 237.
(5) 18 A. 227; A. M. W. (1896) 37; 8 Ind Dec. (N. S.) 858.
(6) 5 B. L. R. 181; 13 W. R. 396.

"The Thakur Dowjee, or those who speak for him on earth, need not take advantage of this gift."

A fortiori it is open to an idol acting through his guardian the *shebait* to conduct its worship in its own way at its own place always on the assumption that the acts of the *shebait* expressing its Will are not inconsistent with the reverent and proper conduct of its worship by those members of the family who render service and pay homage to it.

A question was raised whether the right of worship of an idol can be made the subject of partition. Their Lordships have already referred to this point when dealing with the arbitration proceedings.

In 14 Bengal L. R., page 166, the point aros especially in the case of *Mitta Kanth Audhikaree* v. *Nirunjun Audhlkaree* (7). The head-note is as follows:—

"The reasons for which one of several joint owners is entitled to a partition of the joint property, apply also to the case of a joint right of performing the worship of an idol. The joint owners of such a right are entitled to perform their worship by turns."

And, in Sir Richard Couch's judgment, the following rule of law is referred to:—

"The suit is founded upon the right, of the plaintiff,...as property, to a partition. No doubt the plaintiff is entitled to that; and the decree of the First Court was right in awarding it. But that decree has not made provision for the term that each of the three persons, the plaintiff and the two defendants, should have, and does not state whether the plaintiff is to have his turn first, or second, or third. We must, therefore, direct the Extra Assistant Commissioner to determine by lot in what order the plaintiff and the two defendants shall exercise the right to worship the idol: and having determined that he should insert in his decree, so that it will be settled in what order they are to exercise the right of worship."

The sole objection made in these proceedings to the removal by one of the *shebaits* during his *pala* or turn of worship to his residence is founded upon the deed of 1888 already analysed. In para. 13 of the defence "this defendant admits that the plaintiff's turn of worship commenced on and from..... the 14th April, 1917. On the 2nd April, 1917, this defendant, who had attained majority on or about 20th November, 1914,...objected." In the evidence of the first respondent, he deposed as follows:—

"Babu Bhupendra Nath Basu divided the turn of worship of six Thakurs, and each of us have one year:.....my only objection is based on the deed of dedication; apart from the deed there would be objection to the removal because the Thakur has its own house where arrangements are made for *sheba*. I have said that my only objection is on the deed of dedication."

While, however, this is the only objection actually made by the objecting defendant, it has to be pointed out that the idol is not otherwise represented in the proceedings, though the result might conceivably vitally affect its interests. In that sense the contest has related to the establishment of individual rights as between contesting *shebaits*. The interests of the female members of the family, especially in view of the fact that they are excluded from the managership of the idols, might need special protection. They are entitled to participate in the worship established by Mutty Lal Mullick without obstruction or inconvenience.

Their Lordships are accordingly of opinion that it would be in the interests of all concerned that the idol should appear by a disinterested next friend appointed by the Court. The female members of the family should also be joined, and a scheme should be framed, for the regulation of the worship of the idols.

Their Lordships will, therefore, humbly advise His Majesty that the case should be remitted to the High Court to be dealt with in accordance with this report. It will be necessary in these circumstances to set aside the decrees of both the Courts below. The parties must bear their own costs in the Courts of India and before this Board; any costs paid under either of the decrees of the Courts below will be re-paid.

Z. K. *Case remitted to High Court.*

Solicitors for the Appellant.—Messrs. *Sanderson, Lee & Co.*

Solicitors for the Respondents.—Messrs. *J. J. Edwards & Co.*

(7) 14 B. L. R. 166; 22 W. R. 437.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 1485 OF 1919.

March 27, 1923.

Present:—Mr. Justice Mulla.

NATHA GULAB & Co.—PLAINTIFFS

versus

W. C. SHALLER AND G. I. P. RAILWAY COMPANY—DEFENDANTS.

Transfer of Property Act (IV of 1882), s. 123—Retiring gratuity, nature of—Gift, when complete—Sending amount to Bankers, whether constitutes delivery—Imperfect gift—Construction.

A retiring gratuity is in the nature of a gift and must be completed either by a registered document or by actual payment as required by s. 123 of the Transfer of Property Act. [p. 312, col. 2.]

Where, therefore, a Railway Company sanctions a gratuity to any one of their employees on his retirement, the mere fact of sending the amount to their Bankers is not equivalent to delivery, even though it is coupled with a request to remit it to their office at London where actual payment is to be made. [*ibid.*]

Janki Das v. *East Indian Railway Company*, 6 A. 634; A. W. N. (1884) 210; 4 Ind. Dec. (N. S.) 247, followed.

A transfer intended to operate as a gift, but invalid as such, will not constitute the donor a trustee of the property for the intended donee; in other words, an imperfect gift will not be construed as a declaration of trust. [p. 313, col. 1.]

FACTS.—The defendant was in the employ of the G. I. P. Railway Company and retired from service in June 1922. The Board of Directors, in their discretion sanctioned a gratuity to the defendant in recognition of his efficient and faithful service and the Secretary to the Agent requested the Acting Chief Auditor and Accountant of the Company by letter dated July 11, 1922, to arrange to pay the defendant's Company to his account with Messrs. Thomas Cook & Sons, Bombay. On July 13th the Acting Chief Auditor wrote to the defendant that a gratuity of Rs. 7,700 had been sanctioned to him and could be paid on hearing from him, and on October 17, 1922, that officer requested the Mercantile Bank of India to arrange to send Rs. 7,700 by cable to the Secretary of the Company in London; and on a receipt of a cable from the defendant demanding payment, a cheque for the amount was sent to the Mercantile Bank, Bombay on the 18th October. On the same day a warrant of attachment was served on the Company and the intended remittance of Rs. 7,700 was stopped. The question arose whether this sum was liable to attachment in execution of a decree. The Company contended *inter alia* that although it was the intention of the Railway Company to pay to the defendant the sum of Rs. 7,700 no payment had actually been made to him at the time of the service of the warrant. Further the contemplated gift was and still is incomplete, it being entirely at the discretion of the Railway Company to complete or not to complete it. Again the Railway Company did not and does not hold the said sum in trust for the defendant. It was never carried to the credit of any account of the defendant. Even had the intended remittance been made there would have been no obligation upon the Railway Company in London to make any payment to the defendant. The said sum was and is not the property of the defendant nor had he nor has he any disposing power over the same.

Mr. *B. J. Desai*, for the Plaintiffs.

Sir *Thomas Strangman*, for the Defendant.

JUDGMENT.—[After stating the facts of the case His Lordship proceeded:—]

It was argued on behalf of the plaintiff that there was either a completed gift, or if there was no completed gift there was at least a trust created for the defendant in respect of the said sum of Rs. 7,700.

As regards a retiring gratuity there does not seem to be any doubt that it is in the nature of the gift. There is no obligation whatever upon the Board to grant any such gratuity. The gratuity being in the nature of a gift, it must be completed either by a registered document or by actual payment as required by s. 123 of the Transfer of Property Act, 1882. The delivery of the cheque by the Railway Company to the Mercantile Bank though coupled with the request to send the amount to their London Office was not equivalent to delivery to the defendant. The London Office was not the defendant's agent, but the agent of the Railway Company. Until payment to the defendant the Railway Company could have countermanded the order for payment. The result is that the contemplated gift to the defendant was not completed on the date of attachment. I hold, therefore, that there was no completed gift of Rs. 7,700 or any part thereof to the defendant on the date of the attachment and that the said sum could not be attached as property belonging to the defendant. In this respect the present case is on all

fours with *Janki Das* v. *East Indian Railway Company* (1).

As regards the contention that the moneys were held by the Railway Company on trust for the defendant I do not think that there is any substance in it. It is now well-established that a transfer intended to operate as a gift, but invalid as such, will not constitute the donor a trustee of the property for the intended donee, in other words, an imperfect gift will not be construed as a declaration of trust. For an intention to create a trust is essential to the creation of one, and when a man purports to make a gift, he cannot reasonably be supposed to have intended to declare himself a trustee—a character which assumes that he *retains* the property: *Milroy* v. *Lord* (2) and *Richards* v. *Delbridge* (3). The principle of these decisions was followed by the High Court of Bombay in *Sir Jamsetji Jijibhai* v. *Sonabai* (4) and *Ashabai* v. *Haji Tyeb Haji* (5). In *Ashabai's case* (5) Sir Charles Sargent said:—

"Now the principle to be drawn from the authorities—at any rate the more recent authorities—is that, in order that the owner of a fund may constitute himself a trustee of it, he must either expressly declare himself to be a trustee, or must use language which, taken in connection with his acts, shows a clear intention on his part to divest himself of all beneficial interest in it, and to exercise dominion and control over it, exclusively in the character of a trustee."

It was not suggested in the present case that the Railway Company expressly declared itself to be a trustee. But it was said that the language used in the correspondence was such that taken in connection with its acts, namely, the sending of the cheque to the Mercantile Bank with instructions to the Bank to remit the amount to the Railway Company's London Office, showed an intention on the part of the Railway Company to divest itself of all beneficial interest in it, and to exercise dominion and control over it exclusively in the character of a trustee. I do not think any such intention can be gathered from the correspondence and from the acts of the Company. The directions that were given by the Company to the Bank were as an intending donor, and not as a trustee. The Company did not at any time prior to the attachment assume the position of a trustee. It certainly meant to make a gift, but the gift was not completed when the fund was attached. It is unthinkable that the Company had an intention to create a trust. All that it intended to do was to make a gift. The gift was incomplete when the attachment was levied. The notice, therefore, is discharged with costs. Counsel certified.

K. S. D. *Order accordingly.*

(1) 6 A. 634; A. W. N. (1884) 210; 4 Ind. Dec. (N. S.) 247.

(2) (1862) 4 De. G. F. & J. 264; 31 L. J. Ch. 798; 8 Jur. (N. S.) 806; 7 L. T. 178; 45 E. R. 1185; 135 R. R. 135.

(3) (1874) 18 Eq. 11; 43 L. J. Ch. 459; 22 W. R. 584.

(4) 2 B. H. C. R. 133.

(5) 9 B. 115 at p. 122; 5 Ind. Dec. (N. S.) 77.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

March 30, 1925.

Present:—Lord Atkinson, Lord Carson, Sir John Edge and Mr. Ameer Ali.

SEVAK JERANCHOD BHOGILAL AND OTHERS—APPELLANTS

versus

THE DAKORE TEMPLE COMMITTEE AND OTHERS—RESPONDENTS.

Jurisdiction—Consent, whether can confer jurisdiction—Religious endowment—Scheme framed by Privy Council—Temple Committee, appointment of—Power to make rules—Power conferred upon High Court to modify rules—Appeal, whether lies—Civil Procedure Code (Act V of 1908), s. 47.

A scheme for the management of a Hindu temple was sanctioned by His Majesty in Council and it provided amongst other things for the appointment of a Temple Committee which was empowered to take the temple property into their custody and to make rules for the guidance of their business and for the management of the temple and for other purposes. It was further provided that the rules when sanctioned by the District Court should have the same force as if they were part of the scheme. One of the clauses of the scheme was as follows :—" The provisions of this scheme may be altered, modified or added to by an application to His Majesty's High Court of Judicature at Bombay." The Temple Committee having been duly appointed framed a body of rules which were, with certain alterations, sanctioned by the District Court. Certain persons who were interested in the management of the temple made an application to the High Court for modification of the rules sanctioned by the District Court under the clause which empowered the High Court to modify the rules. An appeal was also preferred to the High Court against the rules on the ground that the order of the District Court sanctioning the rules fell within the purview of s. 47 of the C. P. C. The High Court did

not pass any orders on the application made under the clause of the scheme above referred to, but considered the appeal and passed orders thereon holding that the appeal was competent as no objection was taken thereto. On appeal to His Majesty in Council:

Held, (1) that the High Court had a power conferred upon it by the scheme, upon an application made to it with that object, to alter, modify or add to the rules sanctioned by the District Judge but that it had no other power in the matter; [p. 315, col. 1.]

(2) that the High Court not having purported to act in the exercise of its power under the scheme and there being no jurisdiction in it to entertain an appeal from the order of the District Court, the appeal should have been rejected; [*ibid.*]

(3) that there was no right of appeal to His Majesty in Council except on the ground that the judgment of the High Court was incompetent and should be set aside; [*ibid.*]

(4) that the power given to the High Court under the scheme could, however, still be exercised by it upon an application properly made to it. [*ibid.*]

Parties cannot by acquiescence or consent confer upon a Court a jurisdiction which it does not possess. [*ibid.*]

Appeal from an order of the High Court of Bombay.

Messrs. *L. De Gruyther*, *K. C.*, and *J. M. Parikh*, for the Appellants.

Messrs. *A. M. Dunne*, *K. C.*, *W. Wallach*, Sir *G. R. Lowndes*, *K. C.*, and Mr. *E. B. Raikes*, for the Respondents.

JUDGMENT.

Sir John Edge.—This case has come before their Lordships in the form of an appeal to His Majesty in Council from an order of the High Court of Bombay. On the 31st March 1920, the High Court certified that the appeal involved a substantial question of law and was otherwise a fit one for appeal to His Majesty in Council, and on the 26th July, 1920, the High Court admitted the appeal and ordered notice to be given to the respondents. The question which their Lordships have to consider is whether the appeal lay. For that purpose it is necessary to refer as briefly as possible to the history of the case to see if any appeal in this case to His Majesty in Council arose or was admissible.

The case relates to the management of a public Hindu temple at the village of Dakore which is within the jurisdiction of the Court of the District Judge of Ahmedabad. In the temple is installed the idol of Shri Ranchhod Raiji, which is much revered by Hindus. Disputes arose as to the management of the temple and at least two suits were brought in respect of the management, one of which came on appeal to His Majesty in Council as to a scheme for the management which had been sanctioned by the High Court of Bombay. On the 14th May, 1912, the Board, having made some alterations in the scheme and having advised that the scheme, as altered should be affirmed, His Majesty with the advice of his Privy Council, confirmed the scheme, as altered by the Board, and made an order in Council accordingly.

The Dakore Temple scheme so confirmed by His Majesty's order in Council of the 14th May, 1912, provided, amongst other things, for the appointment of the Dakore Temple Committee to consist of five members who should be Hindus professing faith in Shri Ranchhod Raiji, and empowered the Committee to take the temple property into their custody and to make rules for the guidance of their business and for the management of the temple and for other purposes. The purposes for which such rules might be made were specified in cl. 12 of the scheme, and it was provided that the rules, when sanctioned by the District Court of Ahmedabad, should have the same force as if they were part of the scheme.

Clause 20 of the scheme, as confirmed by His Majesty's order in Council, is as follows:—

"20. The provisions of this scheme may be altered, modified or added to by an application to His Majesty's High Court at Judicature at Bombay."

The Temple Committee, having been duly appointed, framed a body of rules, as the Committee was empowered to do, and those rules came before Mr. B. C. Kennedy, as the District Judge of Ahmedabad, for the sanction of his Court, and he, on the 5th December, 1914, made certain alterations in the rules, and, as altered by him sanctioned the rules. On the 23rd March, 1915, certain members of the Trawadi Mewada Brahmin caste, who had exercised certain rights in the temple or were otherwise interested in the management of the temple, presented to the High Court of Judicature at Bombay an "Application under cl. 20 of the scheme for modification of the rules sanctioned by the District Judge." To that application the managing member of the Temple Committee and another were made respondents. The sanction given by the District Judge to the rules was apparently considered in the High Court, although erroneously, to be an order made under s. 47 of the C.P.

C., 1908, and appeals from it were presented to the High Court at Bombay. The appeals, and the application, came before a learned Judge of the High Court for disposal, and he, obviously doubting that the appeals lay, said in his judgment of the 22nd September, 1919, as follows:—

"These appeals and applications relate to the rules which have been framed under cl. 12 of this scheme and sanctioned in 1914 by Mr. Kennedy, the District Judge of Ahmedabad. The appeals have been filed as appeals from orders in execution passed under cl. 12 (7) of the scheme by the District Judge of Ahmedabad. We think we ought to deal with them as such as no objection has been taken. No orders need, therefore, be passed on the applications filed *ex majore cautela* as applications under cl. 20 of the scheme reserving general power of interference to the High Court."

Thereupon the learned Judge wrote and delivered a judgment in which he expressed his views as to the rules which had been sanctioned by the District Judge. The appeals to the High Court did not lie and should have been rejected.

The learned Judge should have remembered that parties cannot by acquiescence or consent confer upon a Court a jurisdiction which it has not got. The High Court at Bombay had power conferred upon it by cl. 20 of the scheme confirmed by His Majesty's order in Council upon an application made to it with that object to alter, modify or add to the rules sanctioned by the District Judge, but it had no other power, and that power it did not exercise; it may, however, still be exercised upon application properly made to it.

There was no right of appeal to His Majesty in Council from the judgments of the High Court of the 11th April, 1919, and 22nd September, 1919, or from any decrees which were drawn up, except on the sole ground that the judgments or decrees were incompetent. The term "judgment" in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense. This appeal to His Majesty in Council should not have been admitted.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the judgments or decrees be set aside, as these judgments appealed from were incompetent. There will be no costs of this appeal.

Z. K. *Appeal allowed.*

Solicitors for the Appellants.—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents.—Messrs. *E. Dalgado and Downer & Johnson.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 347 of 1923.

February 12, 1925.

Present:—Mr. Justice Ryves and Mr. Justice Mukerji.

ANANTOO AND ANOTHER—DEFENDANTS-APPELLANTS

versus

RAM RUP TIWARI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 6, 8—Suit for possession—Minor entitled to sue, death of—Representative of minor, suit by—Period of limitation available—Hindu Law—Widow, alienation by—Legal necessity—Consent of reversioner, effect of—Appeal, second—Finding of fact.

The effect of ss. 6 and 8 of the Limitation Act is that in the case of a suit for possession, where a minor dies before attaining majority, his representative would have either the total period of twelve years from the date of the accrual of the cause of action or three years from the date of the minor's death, whichever is the longer period. He is not entitled to claim the same period of limitation to which the minor would have been entitled if he had lived. Where, however, the representative is, at the date of the death of the minor, himself affected by any disability the rules contained in sub-ss. (1) and (2) of s. 6 must apply. [p. 316, col. 2; p. 317, col. 1.]

Where a finding of lower Appellate Court with regard to the existence of legal necessity for an alienation made by a Hindu widow is based on a consideration of the evidence, coupled with the fact that the alienation was assented to by one of the reversioners, the finding cannot be challenged in second appeal. [p. 317, col. 2.]

Hari Kishen Bhagat v. *Kashi Parshad Singh*, 27 Ind. Cas. 674; 13 A. L. J. 223; 17 M. L. T. 115; 19 C. W. N. 370; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M. W. N. 511; 42 C. 876; 42 I. A. 64 (P. C.), referred to.

Second appeal from a decree of the District Judge, Benaras, dated the 30th November 1922.

Mr. *Ram Nama Prasad*, for the Appellants.

Messrs. *Kumuda Prasad* and *Gadadhar Prasad*, for the Respondents.

JUDGMENT.—To understand the points raised in this appeal it will be necessary to examine the pedigree to be found

at page 11 of the printed paper-book. The Court of first instance found that the brothers Jageswar and Mohar were joint and Ganesh, the son of Jageshwar, was the last surviving male member of the family consisting of the two brothers and a son and nephew Ganesh. It appears that three sale-deeds were executed by two ladies. *Musammat* Bhagirathi, widow of Mohar, executed sale-deed No 1 on the 4th of January 1909 for a sum of Rs. 399. On the 20th of September 1910, *Musammat* Upman, the widow of Jageshwar, and *Musammat* Bhagirathi executed the second sale-deed for the sum of Rs. 1,250 and on the 17th of June 1918 the same two ladies executed the third sale-deed for the sum of Rs. 299.

The first four plaintiffs are the sons respectively of Jagat and Sahdeo. Ganesh died in February 1910 and his mother *Musammat* Upman died about two years before the institution of the suit. The plaintiffs Nos. 1 and 2 have transferred a portion of their interest in the property to the plaintiffs Nos. 5 and 6. Thus all the six plaintiffs instituted the suit, out of which this appeal has arisen, for recovery of possession of the property sold under the three deeds of sale. Their case, so far as *Musammat* Bhagirathi's sale-deed was concerned, was that *Musammat* Bhagirathi executed the sale-deed without any title.

The defence was that so far as the sale-deed by *Musammat* Bhagirathi was concerned the suit was time-barred. The defendants further pleaded that the sales were supported by legal necessity and the plaintiffs were also estopped from maintaining the suit.

The Court of first instance decreed the suit on condition of payment of those portions of the sale considerations which it found to have been supported by legal necessity. In appeal the learned District Judge dismissed the suit with respect to the second sale-deed, he having held that it was supported by legal necessity.

The defendants have appealed with respect to the first and third sale-deeds while the plaintiffs have filed a cross-objection with respect to the second sale-deed.

The first point that has been urged is the question of limitation and relates to the sale-deed executed by *Musammat* Bhagirathi.

It will be noticed that the suit was filed on the 21st of April 1921, that is to say, more than 12 years after the execution of the sale-deed by *Musammat* Bhagirathi, it being the finding of the Court of first instance a finding which was not challenged in the Court of first appeal—that the brothers Jageshwar and Mohar were joint and Mohar predeceased Ganesh. It is clear that *Musammat* Bhagirathi had no title whatsoever to the property. On the execution of the sale-deed by her the transferees obtained possession over the property sold. The transferees, therefore, had already been in possession of the property sold by *Musammat* Bhagirathi for more than 12 years at the date of the institution of the suit. The defendants' contention in this Court is, as it was in the Courts below, that they had completed a title for themselves by 12 years' adverse possession and the suit ought to have been dismissed.

The lower Appellate Court has not discussed the question of limitation, but the Court of first instance has. It got over the plea of limitation by coming to the conclusion that the plaintiffs could bring their suit within the same period of limitation as would have been allowed to Ganesh if he had been alive.

The correctness of this conclusion has been challenged in this Court.

It appears to us, that the correct conclusion has to be arrived at on a correct reading of ss. 6 and 8 of the Limitation Act. Section 6 (1) allows, in the case of a minor an extended period of limitation, and lays down that the same period of limitation as would ordinarily be allowed to an adult would be allowed to a minor from the date on which he ceases to be a minor. By s. 8 it is, however, laid down that in no case the extended period would be more than three years. Clause (3) of s. 6 deals with the case like the one before us. It lays down that where a person afflicted with a disability dies, his representative will have the same period of limitation as is allowed for ordinary suits from the date of death of the person suffering from disability. Again s. 8 comes in and limits the extended period to three years. By reading the two sections together the conclusion is that in a suit for possession, where a minor dies before attaining majority his representative would have either the total period of 12 years from the date of accrual of the cause of action or three years from the date of the minor's death whichever is greater. The point is clearly illustrated in illustration (*c*) under s. 8 of the

Limitation Act. The illustration runs thus:—

"A right to sue as landlord to recover possession from a tenant accrues to *A*, who is an idiot. *A* dies three years after the accruer, his idiocy continuing up to the date of his death. *A*'s representative-in-interest has, under the ordinary law, nine years from the date of *A*'s death within which to bring a suit. Section 6 read with this section does not extend that time except where the respresentative is himself under disability when the representation devolves upon him."

It will be noticed that in this illustration *A* is an idiot. He dies three years after the accrual of the cause of action. After his death nine years remained to his legal representative to file the suit. The latter must bring his suit within those nine years and he does not get any extension because, in any case, he could not get more than three years' time under s. 8, after the death of his predecessor-in-title, *A*. He has got 9 years and this is deemed to be sufficient.

Applying this rule of law, therefore, to the case before us Ganesh died in 1910. The cause of action accrued on the 4th of January 1909 and 12 years' period from this date expired on the 4th of January 1921. This period between 1910 and 4th January 1921 being more than three years, the legal representative would not have a day beyond the 4th of January 1921.

It is clear, therefore, that in the case of every one of the plaintiffs reversioners who was more than 21 at the date of the suit, the suit must be regarded as time-barred.

It is, however, pointed out that the plaintiff Lalji was 12 at the date of the institution of the suit. He was, therefore, a minor when Ganesh died. Under sub-s. 4, s. 6 of the Limitation Act where a representative is at the date of the death affected by disability the rules contained in subss. (1) and (2) shall apply. Such being the case Lalji's suit must be regarded as within time.

The result is that as regards 1/4th share in the property dealt with by the sale-deed No. 1 the suit of Lalji alone is within time and the rest of the suit is barred by limitation.

Now we come to the third sale-deed. We think that the finding of the Court below is conclusive on the point. The learned Judge has discussed the evidence and has shown that the sale-deed is supported to the extent of the sum of Rs. 144-9-6 only by legal necessity.

Coming to the question of estoppel, we do not think that any case has been made out. It appears that the plaintiffs obtained a lease from the vendees of a portion of the property sold. The lease has ceased to exist and possession has been recovered from the vendees by the plaintiffs. In respect of the third sale-deed the appeal must be dismissed.

Coming to the question of the second sale-deed—the learned Counsel for the respondents has relied on the Privy Council case of *Hari Kishen Bhagat* v. *Kashi Parshad Singh* (1). It appears that the learned District Judge has taken into consideration the fact that the second sale-deed executed by the two ladies was attested by Sahdeo, the next reversioner living at the time. Taking this fact into consideration and taking all the evidence on the point the learned Judge came to the conclusion that he was entitled to draw from the fact that Sahdeo had attested the sale-deed that the sale-deed itself was supported by legal necessity. The Privy Council lays down simply this that mere attestation of a sale-deed by a reversioner is not by itself conclusive of the fact that he was aware of the nature of the transaction or that he was a consenting party to it. Their Lordships say:—

"Such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony, such as appears to have been relied in this case."

In our opinion the learned District Judge was entitled to consider the fact that two ladies of the house were entering into a transaction and their close and very close relation Sahdeo was present at the transaction. Coupled with this circumstance the learned Judge was entitled to examine the remaining evidence and to draw his own inference. We are not prepared to say that his inference under the circumstances was wrongly drawn.

The cross-objection, therefore, must fail.

We allow the appeal in part and dismiss the claim of all the plaintiffs except Lalji Tiwari with respect to 3/4th of the property transferred by the sale-deed dated the 4th of January 1909. The rest of the appeal is dismissed. The cross-objection is also

(1) 27 Ind. Cas. 674; 13 A. L. J. 223; 17 M. L. T. 115 19 C. W. N. 370; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M. W. N. 511; 42 C. 876; 42 I. A. 64 (P. C.).

dismissed. Parties to receive and pay costs in proportion to their respective success and failure and in this Court they will be entitled to fees on the higher scale. The condition as to payment of purchase-money will stand and Lalji Tiwari will have to pay a fourth share of the purchase-money found payable.

Z. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

April 3, 1925.

Present:—Lord Shaw, Lord Carson, Sir John Edge and Mr. Ameer Ali.

A. H. FORBES—PLAINTIFF—APPELLANT

versus

SIR L. E. RALLI AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 115—Lease—Representation by lessor that lease conferred permanent rights upon lessee—Erection of buildings by lessee—Ejectment—Estoppel.

Plaintiff granted a lease to the defendant which contained the following clause:—"Whereas land is required by *R.* for the purpose of erecting buildings, putting up presses, etc., for trading, I agree to give a lease of 4 *bighas* of land to the aforesaid *R.* for the above purpose from year to year at an annual rental of Rs. 45 per *bigha* or total annual rental of Rs. 180." Some years afterwards defendant wanted to erect a substantial building on the land leased to him. He approached the plaintiff for the latter's express permission to put up the building. After certain negotiations the plaintiff informed the defendant that the lease granted to the latter was a permanent lease and gave him the right to erect buildings but that it did not entitle him to hold at a fixed rate and that the rent was liable to enhancement after proper legal notice. The defendant paid a *nazarana* for the permission to raise the structure and thereupon the plaintiff issued a "*parwangi*" to the defendant giving his sanction for the erection of the building. This document was in *hindi*, a language which the defendant did not understand, and contained a recital that the rights which were possessed under the lease would remain intact and that no other right would be created under the permit. The defendant put up the structure and the plaintiff subsequently sought to evict the defendant from the land leased on the allegation that the lease was only a lease from year to year:

Held, that the statement contained in the plaintiff's letter to the defendant, that the lease was a permanent one and gave the defendant the right to erect buildings, was a statement of fact and not merely an expression of opinion, and that the plaintiff was consequently estopped from seeking to evict the defendant from his holding, inasmuch as the defendant had been induced by the plaintiff's representation and conduct to believe that he had a fixity of tenure, although not of rent, in the land that had been leased to him. [p. 321, col. 2.]

If a man under a verbal agreement with a landlord for a certain interest in land, or under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such a promise or expectation. [p. 321, col. 2; p. 322, col. 1.]

Ramsden v. *Dyson*, (1866) 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926, *Gregory* v. *Mighell*, (1811) 18 Ves. Jur. 328; 11 R. R. 207: 34 E. R. 341, *Ahmad Yar Khan* v. *Secretary of State for India*, 28 I. A. 211; 28 C. 693; 5 C. W. N. 634; 3 Bom. L. R. 799; 38 P. R. 1902 (P. C.) and *Sarat Chunder Dey* v. *Gopal Chunder Laha*, 19 I. A. 203; 20 C. 296; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. S.) 201 (P. C.), referred to.

Appeal against the judgment and decree of the Patna High Court, (Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.,) dated the 17th May 1922, in Letters Patent Appeal No. 75 of 1921, reported as 67 Ind. Cas. 744.

Messrs. *L. De Gruyther*, *K. C.*, and *K. Brown*, for the Appellant.

Sir *John Simon*, *K. C.*, Messrs. *A. M. Dunne*, *K. C.*, and *S. Hyam*, for the Respondents.

JUDGMENT.

Mr. Ameer Ali.—This appeal arises out of a suit brought by the plaintiff-appellant in the Court of the Munsif at Araria in the District of Purnea to evict the defendants from certain lands he had leased to them in the year 1894.

The suit was dismissed by the Munsif, as will be more particularly mentioned later in the course of this judgment. The Munsif's order was affirmed by the District Judge. The plaintiff preferred an appeal to the High Court, which was heard by a Single Judge, Mr. Justice Ross, who reversed the judgment of the District Judge, and decreed the plaintiff's claim. On the defendants' appeal under the Letters Patent, a Division Bench, consisting of the Chief Justice and Mr. Justice Mullick, reversed the decision of Mr. Justice Ross, and agreeing with the District Judge, dismissed the suit of the plaintiff. He now appeals to His Majesty in Council on the grounds that the High Court misconstrued the terms of the lease under which the defendants were let into possession, and have wrongly applied, under the circumstances of the case, the doctrine of estoppel in respect of his claim.

A brief narration of the facts which have led to this unfortunate litigation will explain the position of the parties.

Mr. Forbes, the plaintiff, owns considerable landed property in the District of Purnea. The defendants are Greek merchants trading largely in country produce in India under the name and designation of Ralli Brothers. On the 22nd June, 1894, the defendants' agent, one Acatos, obtained from the plaintiff a lease of four *bighas* of land "for the purpose of erecting buildings, putting up presses, etc., for trading." The lease (Ex. 5) is in English. Acatos executed a *kabuliyat* which is identical in terms with the lease. As the question for determination turns, in a great measure, on the words of this lease, their Lordships think it desirable to give, so far as is necessary, the actual language of Ex. 5. It is as follows:—

"That whereas land is required by Mr. C. Acatos, Agent of Messrs. Ralli Brothers. Merchants, of Calcutta, for the purpose of erecting buildings, putting up presses, etc., for trading, I. A. T. Ricketts, Manager for A. H. Forbes, Executor to the Estate of the late A. *J*. Forbes, agree to give a lease of 4 *bighas* of land to the aforesaid Mr. C. Acatos for the above purpose from year to year at an annual rental of Rs. 45 per *bigha* or total annual rental of Rs. 180."

Admittedly the defendants took possession of the leased lands for the purposes stated in Ex. 5. In 1903 a gentleman of the name of Carras took the place of Mr. Acatos as the local agent of Ralli Brothers at Purnea. So far as appears from the record, he resided at a place called Forbesganj, which had been established by the plaintiff or his father as the centre of his estate. A railway station had been opened close by, and Forbesganj acquired a certain importance.

About this time circumstances appear to have arisen which necessitated the erection of a *pucca* or masonry building for the residence of Mr. Carras. As the lease, to use the language of the District Judge, was somewhat vaguely phrased, the defendants, Ralli Brothers, considered it expedient to obtain the plaintiff's express permission for the purpose of erecting the structure they proposed for their agent. At this time a Mr. Duff was acting as Mr. Forbes' manager or agent.

After going carefully through the evidence, their Lordships have no doubt that both the Munsif and the District Judge have correctly held that at the interview which took place in consequence of the defendants' applications for permission to raise the structure they proposed, and at which the terms of the lease of 1894 were discussed, Mr. Forbes was personally present. In his evidence in the Munsif's Court the plaintiff states that he does not remember whether he was present or not. Mr. Carras positively swears that he was present and, in fact, took part in the discussion. Mr. Duff, for some reason or other, has not been examined on behalf of the plaintiff. If, as it is said, he was ill at the time and unable to attend, he could have been examined, as the lower Courts point out, on commission.

Their Lordships are thus left face to face with two statements, one by Mr. Forbes saying that he does not remember, the other by Mr. Carras, who positively swears that Mr. Forbes was present.

In their Lordships' opinion, the Courts which were by law vested with the jurisdiction to deal with the facts have properly come to the conclusion that Carras' statement should be accepted. The letter of the 31st December, 1903 (Ex. A), which Duff wrote to Carras, is clear and precise on this point. Mr. Duff, writing as manager of the Sultanpur Estate, namely, the plaintiff's estate, says as follows:—

"My dear Carras.

"Referring to your conversation of this morning with Mr. Forbes and myself, I write (?) at your request to say that the lease executed by Mr. C. Acatos, dated the 22nd June, 1894, is a permanent lease and gives you the right to erect buildings, but it does not entitle you to hold at fixed rate, and the rent is liable to enhancement after proper legal notice. If your firm desires to have a permanent lease at a fixed rate of (torn) will be glad to see the proposed draft of lease and to show it to Mr. Forbes. In the meantime, you can commence the house if you like to do so."

With reference to this letter the plaintiff has raised a number of objections which appear to their Lordships to be feeble and untenable In the first place, he says that it was a private letter. The District Judge held as their Lordships think rightly, that it is an official letter written by Duff in his capacity as manager. It is precise in its language and tells the defendants that the lease of June, 1894, is "a permanent lease and gives you the right to erect buildings, but it does not

entitle you to hold at fixed rate and the rent is liable to enhancement."

The defendants appear to have paid a bonus or *nazarana* for the permission to raise the structure they proposed, and on the 10th January, 1904, a "*parwangi*" was issued from the plaintiff's *zemindari cutchary* in the *hindi* language, the vernacular of the Province, giving the sanction for the erection of the building. The *parwangi*, as it is called, requires some attention. Its translation is as follows:—

"To the Manager.

"Permission granted to Messrs. Ralli Brothers, Goledar of Gola at station Forbesganj, *Pargana* Sultanpur.

"Whereas you prayed through the agent of the said Gola for permission to erect a *pucca* house in your *bandobasti* (settled) Gola. As on enquiry and measurement you wish to erect a house on 2 C. 15 Dhurkis of land on payment of Rs. 21 as *nazarana* per mensem, and the said sum has under a *chalan* been deposited through your agent in the estate. Therefore, permission is granted to you to erect a masonry house on 2 C. 15 Dhurkis of land in your *bandobasti* (settled) Gola. A *nazarana* (bonus) of rupees twenty per *cottah* will be taken in case more land is occupied in constructing the *pucca* house. All rights which you possess in your *bandobasti* (settled) Gola land under the *patta* and *kabuliyat* will remain intact. No other right will be created under this permit. This *parwangi* (sanction) or permission is intended for the said house only. Dated the 10th January 1904 Sultanpur."

Considerable stress was laid by plaintiff's Counsel on the words which appear towards the end of this document—"No other right will be created under this permit;" and it was urged that the intention of the plaintiff was to restrict the rights of the lessee within the limits imposed by the original lease of 1894. Mr. Carras deposes that he does not know the *hindi* language and did not, therefore, know of the terms of this document until some time after, and that he took it to be an acknowledgment of the bonus that he had paid. This statement has been accepted by both the Munsif and the District Judge. In their Lordships' opinion, in whatever way this document may be understood, it does not affect in any degree the effect of what took place at the interview with Mr. Forbes and Mr. Duff, the result of which is embodied in (Ex. A) the letter of the 31st December, 1903.

Acting on the suggestion contained in the letter of Mr. Duff of the 31st December 1903 (Ex. A), *viz.*, that if the defendants desired to have a permanent lease at a fixed rate (of rent), he would be glad to see a proposed draft of lease and to show it to Mr. Forbes, the defendants appear to have instructed their Solicitors, Messrs. Sanderson and Co., to prepare the necessary draft.

From the document, to which reference will be made presently, it appears that Sandersons' applied to Mr. Forbes for the production of a number of papers which they wished to inspect before preparing the draft.

The defendants have put in the reply of Mr. Duff to this application of Messrs. Sanderson and Co., but not the letter Sanderson and Co., wrote to Mr. Forbes.

The plaintiff's advisers appear to have produced in the Munsif's Court a certain paper which, for purposes of identification, appears to have been marked "X." It was alleged that that was the communication in question, but they failed to prove the signature and naturally it was not admitted in evidence.

Another effort was made in the First Court to introduce the paper in question among the exhibits. They again failed to prove it. No question regarding the non-admission of this paper was raised before the District Judge or in the High Court. Although in the appeal to the High Court twenty-three grounds were taken, not one relates to it; nor is there any reference to this rejected letter in the grounds for leave to appeal to His Majesty's Council in the case lodged by the plaintiff before the Registrar.

Their Lordships are of opinion that there is no substance in the present contention relative to what is called "X."

Coming to the letter addressed by Duff to Messrs. Sanderson (Ex. A1), it bears date the 23rd January, 1904, and is in these terms:—

"Sirs,

"With reference to your No. 392 of 13th instant to the address of Mr. A. H. Forbes, I am desired by him to inform you that matters of greater importance than the lease of a few *bighas* of land are constantly transacted in this estate without the production of such papers as you wish to in-

spect. There are no special title-deeds for the plot of land which Messrs. Ralli Brothers have held for the last nine years, and if Mr. Forbes had no title, it follows that Messrs. Ralli Brothers have also had no title for the past. Mr. Forbes, therefore, declines to produce such valuable papers as he holds, and considers that the existing lease, with the addition of the sanction recently given to erect the building, is sufficient for all requirements."

This being the position of the parties, the point for determination resolves itself into a simple question of fact. There can be no question that upon the letter (Ex. A) of the 31st December, 1903, the defendants commenced the building for the residence of their agent and completed it at considerable expense. Mr. Forbes knew of it and frequently visited the place. No question was raised until 1916. In that year the plaintiff's *zemindari cutchary* (estate office) was burnt down. He demanded contributions from his tenants to re-build the *cutchary*. They all agreed to pay except the defendants, who stood on their rights. It was then that the question of their eviction was first mooted. His evidence, long and involved as it seems to their Lordships, appears thoroughly consistent with the view taken by the District Judge.

Both the Munsif and the District Judge, in view of the purpose for which the lease was granted and the surrounding circumstances to which they refer in their judgments, were of opinion that the demise in its inception was of a permanent character, save and except as to the rate of rent; and that the words "from year to year" did not affect the permanent character of the lease, but only gave expression to the provision that the rent was variable from year to year upon proper notice. They also held that the plaintiff was estopped by his acts and representations from questioning the permanency of the tenure.

In the view their Lordships take of the case, they do not think it necessary to determine whether in its inception the lease created a permanent tenure, for they fully agree with the Courts in India that the plaintiff is estopped from interfering with the defendants' right to hold the land.

The doctrine of estoppel which the Courts in India, save and except Mr. Justice Ross, have applied to the claim of the plaintiff is embodied in s. 115 of the Indian Evidence Act of 1872. It is as follows :—

"When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

The Munsif and District Judge have rightly held, in their Lordships' opinion, that the statement in Ex. A is a statement of fact and not an expression of opinion, as is contended by the plaintiff. The plaintiff distinctly represented to the defendants' agent, Carras, that the lease granted in 1894 was a permanent lease, and that under it he was entitled to erect buildings, as the lease distinctly stated; but that there was no fixity of rent. It has been urged on behalf of the plaintiff that it was a yearly tenancy, and to hold that the plaintiff was estopped by his conduct as evinced by the letter of the 31st December, 1903, from enforcing eviction, would be tantamount to creating a new contract. It is said also that the contract of 1894 was a registered document, and no variation or alteration or change can be made in it except by a registered contract. The defendants did not contend that it was a new contract or ask for a new contract; nor have the Courts in India held that estoppel creates a new contract. Estoppel prevents the plaintiff from evicting from their holding the defendants, whom he, the plaintiff, induced by his representation and conduct to believe that they had a fixity of tenure, although not of rent, in the lands that had been leased to them. It gives effect to the representation that induced them to act as they did.

In the case of *Ramsden* v. *Dyson* (1), the principle which governs this class of cases is stated by Lord Kingsdown in the following terms :—

"The rule of law applicable to the case appears to me to be this : If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent

(1) (1866) 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926.

of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation This was the principle of the decision in *Gregory* v. *Mighell* (2) and, as I conceive, is open to no doubt."

This principle has been accepted by this Board in the case of *Ahmad Yar Khan* v. *Secretary of State for India* (3).

The exposition by Lord Shand in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (4) of the rule of equitable estoppel embodied in s. 115 of the Indian Evidence Act has been quoted *in extenso* in the judgment of the learned Chief Justice in the present case, and does not need repetition. Their Lordships desire to record their full concurrence with the principle there laid down.

They do not consider it necessary to refer to all the authorities that have been cited on both sides, as they think that the views expressed by Lord Kingsdown and Lord Shand completely answer the contentions of the appellant. Upon a review of the facts as well as of the authorities, their Lordships have come to the conclusion that the judgment of the High Court is right and that this appeal should be dismissed with costs, and their Lordships will humbly recommend His Majesty accordingly.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant :—Messrs. *Barrow, Rogers & Nevill.*

Solicitors for the Respondents :—Messrs. *Sanderson, Lee & Co.*,

(2) (1811) 18 Ves. Jur. 328; 11 R. R. 207; 34 E. R. 341.

(3) 28 I. A. 211; 28 C. 693; 5 C. W. N. 634; 3 Bom. L. R. 799; 38 P. R. 1902 (P. C.).

(4) 19 I. A. 203; 20 C. 296; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. S.) 201 (P. C.).

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL NO. 153 OF 1922.

February 6, 1925.

Present :—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

Babu RUDRA PRATAB SINGH AND OTHERS—OBJECTORS—APPELLANTS

versus

Raja SARDA MAHESH PRASAD SINGH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XX, r. 12, O. XXII, r. 4—Decree for possession and mesne profits—Death of judgment-debtor—Substitution of legal representatives—Order declaring liability of legal representatives for mesne profits—Appeal, whether lies.

Respondent obtained a decree for possession of certain property which also directed that an account should be taken of the dealings of the judgment-debtor with the disputed property and of the rents and profits arising therefrom and that the judgment-debtor must pay to the decree-holder what may be found due to him on the taking of accounts. The judgment-debtor died and his legal representatives were substituted on the record in his place. The latter objected that they were not liable for mesne profits. The Court went into the matter and made an order declaring that they were liable to render accounts of the mesne profits which the deceased had appropriated and then proceeded to direct the method in which the accounts should be taken. On appeal:

Held, that the preliminary decree which directed the taking of accounts was not capable of execution and the question which had been actually determined by the lower Court was merely a question relating to the substitution of the names of the appellants in the place of the deceased judgment-debtor and their liability to render the accounts directed by the decree as such legal representatives, and that no question relating to the execution, satisfaction or discharge of the decree had been decided and that s. 47 of the C. P. C. had, therefore, no application to the case and the order of the lower Court was not appealable. [p. 323, col. 2.]

An order by which the Court determines the principle whereupon mesne profits are to be assessed and directs their ascertainment by a Commissioner is an interlocutory order in a pending suit and is not appealable as a decree. [p. 324, col. 1.]

Dalgliesh v. *Nandan Misser*, 13 Ind. Cas. 186, followed.

The effect of the change introduced by O. XX, r. 12 of the C. P. C. is that the Court which hears the suit is the Court which is eventually to ascertain the mesne profits and pass a final decree for such profits and that till such final decree is passed there is no decree for mesne profits capable of execution. [*ibid.*]

Mohammed Ishaq Khan v. *Mohammed Rustum Ali Khan*, 44 Ind. Cas. 88; 16 A. L. J. 182; 40 A. 292, relied on.

Execution first appeal from a decree of the Subordinate Judge, Mirzapur, dated the 17th February 1922.

Dr. Sir *T. B. Sapru*, Mr. *H. R. Mukerji* and Dr. *K. N. Katju*, for the Appellants.

Messrs. *Gulzari Lal*, *Iqbal Ahmed*, *Harnandan Prasad* and *Kashi Narain Malaviya*, for the Respondent.

JUDGMENT.—This is an appeal from an order passed by the Subordinate Judge of Mirzapur directing the method in which an account of the mesne profits was to be taken as against the present appellants who were impleaded as the legal representatives of Baij Nath Prasad Singh deceased.

On the 3rd of March 1915 a decree was passed for possession of certain property,

which among other things, directed that an account shall be taken of the dealings of Baij Nath Prasad Singh with the disputed property and of the rents and profits arising therefrom, and that Baijnath Prasad Singh will pay to the plaintiff what may be found due to him on the taking of the said account. That decree was upheld by this Court, except as regards certain moveable property, on the 30th of May 1916. There was a further appeal to His Majesty in Council which was dismissed on the 7th of February 1921. Before the decision of that appeal by the Privy Council Baij Nath Prasad Singh died. It is stated that he died after the hearing had taken place before their Lordships and his legal representatives could not, therefore, have been brought on the record before that appeal was decided. An application for the settlement of accounts in pursuance of that decree was made on the 28th February 1921, which among other things, asked that Rudra Pratab Singh, Jang Bahadur Singh, and Upendra Bahadur Singh, sons of Baijnath Prasad Singh, might be substituted on the record in the place of the deceased. As a matter of fact, Jang Bahadur Singh and Upendra Bahadur Singh, two of the younger sons of Baijnath Prasad Singh, were already on the record of the suit which went up in appeal to the Privy Council. The only new person who was proposed to be added or substituted in the place of Baijnath Prasad Singh was Rudra Pratab Singh, his eldest son. All the same the object of the application was to make Rudra Pratab Singh, Jang Bahadur Singh and Upendra Bahadur Singh liable for the mesne profits claimed by the plaintiff as the legal representatives of Baijnath Prasad Singh deceased.

Various objections were taken by the three sons of Baijnath Prasad Singh to the said application but the main objection with which the Court below first proceeded to deal was to the effect that the sons were not liable for the mesne profits, if any, appropriated by Baijnath Prasad Singh, because he was in possession as a trespasser and the liability for the accounts could not, therefore, be enforced against his sons. The Court below held that the possession of Baijnath Prasad Singh, though illegal, could not be called wrongful and that the sons of Baijnath Prasad Singh could, therefore, be made liable to render the accounts of the mesne profits which their father had appropriated. The Court below then proceeded to direct the method in which the accounts were to be determined. From that order the present appeal has been filed and the preliminary question for consideration is whether such an appeal is maintainable.

The learned Counsel who appears for the appellants contends that the effect of the order of the Court below was to determine the liability of the appellants and that the appeal was consequently maintainable under s. 47 of the C. P. C. It is not contended that the appellants are not the legal representatives of the deceased Baijnath Prasad Singh The decree directed that an account of the mesne profits shall be taken as against Baijnath Prasad Singh. It was in fact a decree passed in terms of O. XX, r. 12 of the C. P. C., cl. (*c*) of which enables the Court to direct an enquiry to be made as to the rents and mesne profits to which the plaintiff may be entitled. Such an enquiry is made in the course of a proceeding which is virtually a proceeding in continuation of the original suit, and under s. 12, cl. (2), a final decree has to be prepared in respect of the mesne profits which may be awarded in accordance with the result of such an enquiry. From such a final decree an appeal is maintainable. The order of the Court below merely directs that the appellants are liable to render accounts as the legal representatives of Baijnath Prasad Singh deceased; and the amount for which they are liable has not yet been determined. In fact no final decree has yet been prepared. Really there is no execution proceeding going on. The preliminary decree which directed the taking of accounts is not capable of execution and the question which has been actually determined by the Court below is merely a question relating to the substitution of the names of the appellants in the place of Baijnath Prasad Singh deceased and their liability to render the accounts directed by the decree as his legal representatives. It is not a question relating to the execution, satisfaction or discharge of a decree; and s. 47, therefore, has no application. It is at best an interlocutory order and no appeal is maintainable. The preliminary objection must, therefore, prevail. It will be open to the appellants to raise the question of their liability in any appeal

that may be filed from the final decree which may be passed in the proceeding.

Under s. 244 of the old C. P. C. an enquiry into mesne profits could have been, it may be noted, made in an execution proceeding, but as pointed out in *Mohammed Ishaq Khan* v. *Mohammed Rustum Ali Khan* (1), the effect of the change introduced by O. XX, r. 12 of the C. P. C. is that the Court which hears the suit is the Court which eventually is to ascertain the mesne profits and pass a final decree for such profits, and that till such final decree is passed, there is no decree for mesne profits capable of execution. In *Dalgliesh* v. *Nandan Missar* (2) it was held that an order by which a Court determines the principle whereupon mesne profits are to be assessed and directs their ascertainment by a Commissioner was an interlocutory order in a pending suit and not appealable as a decree. The appeal is, therefore, dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 44 Ind. Cas. 88; 16 A. L. J. 182; 40 A. 292.
(2) 13 Ind. Cas. 186.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

January 30, 1925.

Present:—Viscount Finlay, Lord Atkinson, Sir John Edge and Sir Lawrence Jenkins.

VENKATADRI APPA RAO BAHADUR AND OTHERS—PLAINTIFFS—APPELLANTS

versus.

PARTHASARATHI APPA RAO BAHADUR VARU AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 123—"Deliverable," "payable," meaning of—Will, construction of—Legacy, suit to recover—Limitation, commencement of.

A share in the property of an intestate does not become "deliverable" within the meaning of Art. 123 of Sch. I to the Limitation Act until the administrator, to whom Letters of Administration have been granted, has in his hands the share to be delivered, and similarly, a legacy or a share in a legacy does not become "payable," within the meaning of the Article, until the executor or other person liable to pay it has in his hands money with which it can be paid. [p. 329, cols. 1 & 2.]

The intention of a testator, when not expressly and unambiguously stated in his Will, may be inferred by a Court from other facts stated or referred to in the Will, that legacies bequeathed by the Will should not be paid until the conclusion of a litigation in which the testator was engaged when he made his Will. [p. 330, col. 2.]

A Hindu lady who had brought a suit contesting a certain adoption and who would be entitled to certain moveable property in the custody of the Court if her suit were successful, made a Will stating that she had spent the greater part of her jewellery and valuables in fighting the suit and directing that certain legacies should be paid out of the property which was in the custody of the Court and to which she was entitled:

Held, that the testatrix intended that the legacies should be payable and be paid after the final determination of the suit which she had brought contesting the adoption and that, therefore, under Art. 123 of Sch. I to the Limitation Act, limitation did not begin to run against the legatees till the final determination of that suit in favour of the testatrix. [p. 330, col. 1.]

Appeal from a decision of the Madras, High Court, (Sir Walter Schwabe, KT., C. J., Mr. Justice Coutts Trotter and Mr. Justice Kumaraswami Sastri) in Letters Patent Appeals Nos. 20, 24 and 26 of 1921 dated April 4, 1922, reversing the decrees of the Division Bench, dated 22nd April 1921 and printed in 70 Ind. Cas. 689.

Messrs. *A. M. Dunne, K. C., S., Swaminadhan, B. Dube* and *K. V. L. Narasimham*, for the Appellants.

Messrs. *L. DeGruyther, K. C., A. C. Clauson, J. M. Parikh* and *P. Chenchiah*, for the Respondents.

JUDGMENT.

Sir John Edge.—These are consolidated appeals from three decrees, dated the 4th April 1922, of the High Court at Madras, which had reversed three decrees, dated the 22nd April, 1921, of a Division Bench of that Court, by which three decrees, dated the 29th November, 1917, of the Subordinate Judge of Bezwada dismissing original suits numbered 30, 87 and 88 of 1916 had been affirmed. The suits had been instituted in the Court of the Subordinate Judge of Bezwada on the following dates: No. 30 of 1916 on the 26th April, 1916; No. 87 of 1916 on the 6th December, 1916; and No. 88 of 1916 on the 9th December, 1916. It was agreed at the hearing of these appeals that in drawing up the decree of the High Court in Original Suit No. 30 of 1916, Letters Patent Appeal No. 20 of 1921, that the words "mesne profits" in para, 3 of the decree should have been "income", and their Lordships amended that decree by substituting in it for the words "mesne profits" the word "income". There was no question of mesne profits in the case.

In Suit No. 30 of 1916 Sri Rajah Parthasarathi Appa Rao Bahadur was the plaintiff and Sri Rajah Venkatadri Appa Rao Bahadur, Sri Rajah Venkataramayya Appa Rao Bahadur and Sri Rajah Sobhanadri Appa Rao Bahadur and the Court of Wards were defendants. By an order of the Court

of the 6th December, 1916, the Court of Wards was discharged from being a defendant, and the second defendant was appointed guardian of the third defendant, who was a minor. The suit was to recover a legacy of Rs. 80,000 bequeathed by Venkayyamma, a widow, by her Will of the 30th January 1899, to her sister-in-law, Inuganti Kasturammah, a legacy of Rs. 40,000 bequeathed by the same Will to another sister-in-law, Inuganti Venkataramanayyamma, and shares of the residue of the testatrix's property which she had bequeathed to her brothers, Chinna Rao and Buchi Thammayya. The plaintiff was the assignee of all the above mentioned legacies, and he claimed them as such assignee. He also claimed interest on those legacies, and other relief.

In Suit No. 87 of 1916, Sri Damera Venkata Rajagopala Seet Rayyamma Rao was the plaintiff, and Sri Rajah Meka Venkatadri Appa Rao Bahadur Garu, Sri Rajah Meka Venkataramayya Appa Rao Garu, and Sri Rajah Sobhanadri Appa Rao Bahadur Garu, by his brother and guardian the second defendant, were the defendants. The plaintiff claimed to recover a legacy Rs. 40,000 bequeathed to him by the same Venkayyamma by her Will, with interest thereon, and other relief.

In Suit No. 88 of 1916, Lakkaraju Bapayya was the plaintiff, and the defendants were the persons who were the defendants in Suit No. 30 of 1916 and in Suit No. 87 of 1916. The plaint in the suit was filed under s. 26 of the C. P. C., 1908, and under O. I, r. 8, and O. VII, r. 1, of that Code. The plaintiff claimed to recover Rs. 2,000 bequeathed to him by Venkayyamma by her Will and interest thereon and a decree and that for such purposes necessary accounts should be taken and that the property of the testatrix should be administered by the Court, and prayed for other relief.

When it may be necessary later in the judgment to refer to any of the parties to this litigation, they will be referred to by their names without any descriptive addition.

Except the Court of Wards, all the original defendants, and the representatives of those, who died, who have been brought on the record, were nearly related to each other and to Venkataramayya Appa Rao, of whom Venkayyamma was the widow.

To understand how these suits arose and the positions of the parties to them, it is necessary to refer briefly to a litigation which began on the 21st October, 1895, and to some other facts.

The suits in which these consolidated appeals have arisen were instituted in 1916 in the Court of the Subordinate Judge of Bezwada to obtain payment of legacies which Venkayyamma, a Hindu widow, had bequeathed by her Will of the 30th January 1899. She died on the 9th March, 1899. The due execution of the Will is admitted, but the suits have been contested by the defendants on several grounds, of which those which are now in the least material are that the testatrix left no property out of which the legacies could be paid; that the Will has been incorrectly construed by the High Court at Madras; that the suits, or one of them, is barred by a previous suit which was brought in 1902; and that the suits were not brought within time. In order to understand those contentions it is necessary to refer at some length to a somewhat complicated history.

Venkayyamma, the testatrix, was the widow of Venkata Ramayya Appa Rao, who had died before 1890. They had one child, a son, Narayya Appa Rao, who died on the 4th August, 1895, while he was a minor. He died unmarried and had not made a Will. When he died he was the last male owner of the Medur estate. The Court of Wards had taken charge of the Medur estate during his minority and continued to be in charge of it until December, 1895, when a Receiver, appointed by a Civil Court having jurisdiction, took possession of it. The estate of Medur continued to be in charge of Receivers, duly appointed, until after 1902. The Receivers acted as officers of the Civil Court, and it was their duty to bring, and to defend, suits affecting the estate, to collect the rents and profits of the estate, to render accounts to the Civil Courts, to invest balances of money which might be in their hands and to pay monies received by them into a local branch of the Bank of Madras after deducting necessary and legal expenses. The monies paid into the Bank by the Receivers and the Government promissory-notes and other securities in which monies derived from the Medur estate were invested were under the control of the Civil Court for the benefit of those who might be entitled to them.

The Medur estate and the Nidadavole estate—with the latter these suits are not concerned—had formed parts of a large *zemindari* in the Province of Madras, and

the families respectively in which they were vested were nearly related. In December, 1890, Rani Papamma Rao, who was childless widow of the last male owner of the Nidadavole estate, went through a ceremony of adopting Narayya Appa Rao as a son to her late husband. As will later be seen, it was held by the Board in 1913 that she had not power to make the adoption and that it was invalid. Until that decision of the Board in 1913 it seems to have been generally considered that the adoption was valid. Shortly after Narayya Appa Rao died in August, 1895, disputes arose between Rani Papamma Rao and Venkayyamma as to the right to the possession of the Medur estate. The former claimed a right to the possession as the mother by adoption of Narayya Appa Rao; the latter, alleging that the adoption was invalid, claimed a right to the possession as his natural mother. The Court of Wards in September or October, 1895, passed a resolution to hand over to Rani Papamma Rao, the possession of the Madur estate unless restrained by an injunction of a competent Court before the 1st December, 1895, and, thereupon, Venkayyamma instituted on the 21st October, 1895, in the Court of the Subordinate Judge of Ellore, a suit against Rani Papamma Rao and the Collector of the Kistna District, who was the local agent of the Court of Wards, in which she claimed a declaration that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid, and also claimed to be placed in possession of the Medur estate with all the savings, appurtenances, etc., of the estate. That suit was Suit No. 35 of 1895 in the Register of the Court at Ellore.

When Venkayyamma died on the 9th March, 1899, her Suit No. 35 of 1895, was still pending in the Court of the Subordinate Judge, and on the 1st May, 1899, on the application of Venkata Narasimha Appa Rao, he and his brother Rangayya Appa Rao were brought on the record of Suit No. 35 of 1895 as plaintiffs, as being the two surviving uncles of Narayya Appa Rao and the legal nearest reversioners to the Medur estate. The Subordinate Judge of Ellore on the 2nd December, 1899, made a decree dismissing the suit, and Venkata Narasimha Appa Rao and Rangayya Appa Rao separately appealed from that decree to the High Court at Madras. To those appeals, Parthasarathi Appa Rao, who was a cousin of Narayya Appa Rao's natural father, and had claimed a third share in the Medur estate, was made a party. He had claimed that third share in a suit, No. 44 of 1899, in the Court of the District Judge of Godavari, in which his claim to a third share in the Medur estate was dismissed by a decree of that District Judge on the 12th December, 1903. From that decree of the District Judge of Godavari, dismissing his claim to a third share, Parthasarathi Appa Rao appealed to the High Court at Madras. The three appeals above mentioned were heard together by the HighCourt at Madras, and on the 20th November 1905, the High Court by a decree dismissed the appeals of Venkata Narasimha Appa Rao and Rangayya Appa Rao, and allowed the claim of Parthasarathi Appa Rao to a third share in the Medur estate. From that decree of the 20th November, 1905, of the High Court at Madras, Venkata Narasimha Appa Rao and Rangayya Appa Rao appealed to His Majesty in Council. Before the appeal came on for consideration by the Board, Rangayya Appa Rao and Venkata-Narasimha Appa Rao had died, and Venkatadri Appa Rao, son of Rangayya Appa Rao, and Venkataramayya Appa Rao and Sobhanadri Appa Rao, sons of Venkata Narasimha Appa Rao, were brought on the record as the appellants.

On the 10th December, 1913, the Board reported to His Majesty, so far as is now material, that it ought to be declared that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid, and that on the death of Venkayyamma Rangayya Appa Rao and Venkata Narasimha Appa Rao became entitled as reversionary heirs to the Medur estate and the lands with mesne profits and moveable properties appertaining thereto, and that the said estate with mesne profits and the moveable properties appertaining thereto ought to be divided into moieties between the appellants Venkatadri Appa Rao as to one such moiety, and Venkataramayya Appa Rao and Sobhanadri Appa Rao, minors, as to the other moiety. His Majesty on the 12th December, 1913, having taken that report into consideration, was pleased, by and with the advice of His Privy Council, to approve thereof and ordered that the same be punctually observed, obeyed and carried into execution.

It will be observed that the claim to a third share in the Medur estate which Parthasarathi Appa Rao had made was not allowed, and that the right of Rangayya Appa

Rao and Venkata Narasimha Appa Rao to the possession of the Medur estate as reversionary heirs did not arise until Venkayyamma had died on the 9th March, 1899.

The result of the appeal to his Majesty in Council established the fact that Venkayyamma had a right to the income received from the Medur estate from the death of her son Narayya Appa Rao on the 4th August, 1895, until she died on 9th March, 1899, less the expenses of collecting it and less such expenses as were necessarily incurred in maintaining the Medur estate. That income included any interest which was paid or payable upon any Government promissory-notes which the Court of Wards may have held in respect of monies received from the Medur estate before the 4th August, 1895, and any interest paid or payable by Banks in respect of such part or parts of her income which during her life the Bank or Banks had received on deposit or otherwise at interest. If Venkayyamma had actually received that income, she might have added it to the Medur estate as an accretion, but she did not, and it remained at her absolute disposal by Will or otherwise, and on her death it was part of her estate which was applicable for the payment of such legacies as she might bequeath by her Will.

Owing to the disputes which have been referred to, and to the necessary action taken by the Civil Court to protect the Medur estate for the benefit of whoever might be entitled to the possession of it, Venkayyamma never obtained actual possession of the income to which she was entitled, but her estate, which would be available for the payment of legacies bequeathed by her, consisted to a great extent of that income to which she had been entitled, and no one who was not her executor or an administrator of her estate appointed by a Court or a legatee under her Will was entitled to receive what represented that estate or any part of it. After the death of Venkayyamma her estate consisted of the income to which at the time of her death she was entitled and to what represented that income which had been invested or deposited in the Government Treasury, or in a Bank or Banks, and of any interest which might become payable in respect of such investment as long as it remained under the control and custody of the Court. If the Court should hand over to any person, not entitled to receive that estate, it or any part of it, such person would be liable to re-pay it to the person entitled to receive it with such interest in respect of it as it had made, or at least as it might have made if it had been deposited at interest with the Bank of Madras or any other similar Indian Bank of position.

On the 30th January, 1899, Venkayyamma made her will which, so far as is material, was as follows:—

"Will executed on the 30th day of January 1899 by Sri Rajah Venkata Rajagopala Venkayyamma Rao Bahadur Garu, widow of late Sri Rajah Venkataramayya Appa Rao Bahadur *zemindar* Varu.

I have been ill for about four months past and now there is much swelling and hard breathing and, therefore, being afraid that I will not survive, I, while in a sound state of consciousness and understanding, make the following arrangements:—

1. Out of the jewels and other valuables belonging to me, I have already sold a major portion and spent that amount as well as the amount borrowed from my brother, Sri Rajah Inuganti Venkata Rajagopala Buchi Thammayya Bahadur Garu and from my younger brother, Chiranjivi Sri Rajah Inuganti Rajagopala Venkatarama Chinna Rao, for the expenses of the Medur estate suit and for our maintenance and other expenses.

2. Out of the minor jewels that are remaining with me at present, the jewels set with diamonds and pearls shall be divided into three shares, and out of those shares, one share shall be given to my elder brother Sri Rajah Inuganti Buchi Thammayya Garu and two shares to my younger brother Sri Rajah Chinna Rao.

3. Further, the remaining gold and silver jewels, utensils, etc., and also cattle, shall be given to my two brothers as specified in para. 2.

4. The two silver maces of *chobdars* and orderlies, which belong to us shall be given to my junior brother-in-law Sri Rajah Venkata Narasimha Appa Rao Bahadur Garu.

5, The Government promissory-notes and cash relating to the Medur estate which have been in the custody of Court till this day, as well as the interest accruing thereon till payment of the amount, shall be divided into four shares, and out of them, one share shall be given to my elder brother Buchi Thammayya Garu, and three shares to my younger brother Chinna Rao.

6. Out of the Government promissory-notes and cash of the Medur estate which are remaining in deposit in Court and the jewels, etc., the amount specified hereunder shall be first expended and only out of the remaining amount, one share shall, as stated in para. 5, be paid to my elder brother and three shares to my younger brother."

[Here followed the amounts of the various legacies.]

Nine persons signed an attestation clause in which they stated that the Will was signed by the testatrix as her Will in their presence, who at the same time at her request, in her presence and in the presence of each other signed their names as witnesses. The Will having been executed was enclosed in a sealed cover which bore the following endorsement:—

"Will executed on the 30th January 1899 by Sri Rajah Venkata Rajagopala Venkayyamma Rao Bahadur *Zamindarini* Garu of Sanivarapeta Garu, to be given effect to after her death."

The Will was presented for deposit on the 2nd February, 1899, at the office of the Registrar of Godavari by the agent whom the testatrix had appointed to deposit it at the Registry. After the testatrix had died the Registrar of Godavari, having satisfied himself that she had died, opened the sealed cover and registered the Will. The sole executor appointed by the Will did not take upon himself the duties of an executor and died shortly after the testatrix.

It was the Will of a Hindu of the Province but not of the town of Madras, and had not been made by her within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature of Madras, and did not relate to immoveable property situate within the local limits of that original civil jurisdiction.

After the death of Venkayyamma, a Sub-Magistrate of Ellore, took possession of certain jewellery and other things which had belonged to her as her *stridhanam*. He handed over the things to the Police, who gave them into the possession of Rangayya Appa Rao and Venkatanarasimha Appa Rao, who had no title to them as reversioners or otherwise, and they took possession of them and claimed them as reversioners. Thereupon the two brothers of Venkayyamma, who are mentioned in the first and second clauses of her Will, brought a suit on the 2nd March, 1902, in the District Court of Gadvari, against Rangayya Appa Rao and Venkatarasimha Appa Rao for possession of that property. The first plaintiff in that suit having died, his son and heir was made a plaintiff. Finally a decree for possession of the property claimed was made in favour of the plaintiffs. It is necessary to refer to that suit as one of the contentions of the appellants in this appeal has been that the suit of 1902 having been brought, these suits were not maintainable. That contention was founded on misconception. The causes of action were not the same. The suit of 1902 was for the wrongful conversion (trover, it used to be called in England) of goods. The present suits are to obtain payment of legacies, and there is no claim in respect of any of the goods to which the Suit of 1902 related.

The other contentions of the appellants in this appeal were that (*a*) Venkayyamma had no disposing power to bequeath the legacies; (*b*) that cls. 5 and 6 of the Will had been wrongly construed by the High Court; and (*c*) that the suit was barred by the law of limitation.

As to the objection that Venkayyamma had no disposing power to bequeath the legacies, that question is involved in the contention that cls. 5 and 6 of the Will have been wrongly construed by the High Court. Their Lordships will consider these two contentions together. On the death of her son, Narayya Appa Rao, on 4th August, 1895, she became entitled to the Medur estate and its income, to hold for her own life, and that income included the interest on investments of all monies received in respect of the Medur estate collected before the death of her son on the 4th August, 1895. To that income she remained entitled until her death on the 9th March, 1899. That income or any part of it she could, while she remained entitled to it, have added as an accretion to the Medur estate if she had wished to do so. There is no evidence to suggest that she had ever added any part of that income as an accretion to the Medur estate. She was consequently entitled to dispose of it by Will or otherwise.

It has been contended on behalf of the appellants that the High Court in the decree of the 4th April, 1922, in Parthasarathi Appa Rao's Letters Patent Appeal must have misconstrued cls. 5 and 6 of Venkayyamma's Will as to those promissory notes in those clauses mentioned which represented monies received by the

Court of Wards before the 4th August, 1895, in Narayya Appa Rao's lifetime and included them in the income of the Medur estate mentioned in the 3rd para. as amended by their Lordships, of that decree. There was no misconstruction of cls. 5 and 6 of the Will. Venkayyamma was, after the death of her son on the 4th August, 1895, entitled to hold during her life, as part of the Medur estate, those promissory-notes or other investments which represented monies received by the Court of Wards in respect of the Medur estate, so that she might receive for her own use, and as part of her income, such interest as might be payable under them; but by her Will she did not bequeath these promissory notes which represented monies, which had been received by the Court of Wards before the 4th August, 1895, she only dealt with the promissory-notes to which she was absolutely entitled as representing monies which had been received after her son's death by the Court of Wards as the Receivers. That is the only reasonable construction of her Will and the High Court in the decree of the 4th April, 1922, passed in Letters Patant Appeal No. 20 of 1921, was under no misconception of Venkayyamma's position or of her rights.

There remains to be considered the question of limitation. The Article of the First Schedule of the Indian Limitation Act, 1908, which applies to the suit in which these consolidated appeals have arisen, is Art. 123, which allows twelve years, calculated from the time "when the legacy or share becomes payable or deliverable," for bringing a suit "For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate." The question as to what the word "payable" means is not without difficulty. It has been contended on the part of the appellants that the legacies sued for became payable at latest twelve months after the death of Venkayyamma, in which case the suits would be barred by limitation. Looking at Art. 123 as one of general application to such suits, it appears to their Lordships that a similar interpretation must be given to the words "payable" and "deliverable" as used in the Article, and that a share in the property of an intestate would not be "deliverable" until the administrator, to whom Letters of Administration had been granted, had in his hands the share to be delivered, and similarly, a legacy or share in a legacy does not become "payable" until the executor or other person liable to pay it has in his hands money with which it could be paid.

In the present case no one could have had in his possession or control any fund representing the income of the Medur estate, which Venkayyamma had had a right to enjoy for her own use but had not received, until it had been finally decided by the Board in 1913 that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid, and there was no other fund. It was suggested on behalf of the appellants that the plaintiffs in these suits might have brought suits for these legacies as soon as Venkayyamma had died, or within twelve months after her death against her heir, whoever he might then have been, and might have obtained decrees against him for the payment of the legacies when he might be in possession of assets with which the legacies might have been payable. Without expressing any opinion as to whether such a suit could or could not have been maintained against a Hindu heir who had received no property belonging to Venkayyamma, their Lordships may quote a passage from the judgment of the Board in *Bassu Kuar* v. *Dhum Singh* (1) as to the effect of Art. 97 of Act XV of 1877. The passage is as follows:—

"Barumal might have sued for his debt, but the utmost benefit that could have come to him from such a suit would have been to have it suspended or retained in Court till after decision of the appeal in the specific performance suit. Dhum Singh's defence would have been that the debt was paid by virtue of the contract, and that defence must have prevailed if the suit were heard while the decree of 1881 still stood unreversed. It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor, who for years has been insisting that his creditor shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the

(1) 15 I. A. 211; 11 A. 47; 5 Sar. P. C. J. 260; 12 Ind. Jur. 450; 6 Ind. Dec. (N. S.) 458 (P. C.).

lapse of time had relieved him from paying at all."

In this case no difficulty of applying Art. 123 of the First Sch. of the Indian Limitation Act, 1908, arises when the Will of Venkayyamma is considered. It was a carefully drawn Will bequeathing legacies of, in the aggregate, a large sum of money. Venkayyamma had already, when she made her Will, commenced her suit which would determine whether she was entitled to any fund out of which any legacies which she might bequeath could be paid. If the adoption of Narayya Appa Rao by Rani Papamma Rao should be finally held to have been valid, Venkayyamma and her advisers must have known that there was and would be no fund out of which the legacies could be paid. They could not be paid unless it should be finally decided that the adoption was invalid. She stated in her Will that she had been very ill for four months and was afraid that she would not survive, and that she had sold the major part of her jewels and other valuables and had spent the amount (obtained by the sale of them) as well as the amount of money which she had borrowed from her two brothers, mentioned in her Will, "for the expenses of the Medur estate suit and for our maintenance and other expenses," and in cl. 5 directed that "the Government promissory-notes and cash relating to the Medur estate which have been in the custody of Court till this day, as well as the interest accruing thereon till payment of the amount, shall be divided" in the manner which she directed. And in cl. 6 she directed that "Out of the Government promissory notes and cash of the Medur estate which are remaining in deposit in Court and the jewels, etc., the amounts specified hereunder shall be first expended and only out of the remaining amount, one share, shall, as stated in para. No. 5, be paid to my elder brother and three shares to my younger brother." And then she set out as expenses to be incurred a full and complete list of the legacies to be paid. The only conclusion which on these facts, their Lordships can arrive at is that the testatrix intended that the legacies should be payable and be paid after the final determination of the suit which she had brought for a declaration that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid and to establish her right to the income of the Medur estate. That litigation was not finally determined until the judgment of the Board was delivered in 1913, and these suits were instituted in 1916 and were within the time allowed by Art. 123 of the First Sch. to the Indian Limitation Act, 1908.

If any authority were necessary to show that the intention of a testatrix, when not expressly and unambiguously stated in her Will, may be inferred by a Court from other facts stated or referred to in her Will, that legacies bequeathed by the Will should not be paid until the conclusion of litigation in which she was engaged when she made her Will, it may be deduced from the judgment of Lord Justice Turner, L. J., in *Lord* v. *Lord* (2).

In *Roddy* v. *Fitzgerald* (3) Lord Wensleydale, in referring to the rules for the construction of Wills, said:

"These rules are perfectly plain and clear. The first duty of the Court expounding the Will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper inquiry is, what is the meaning of that which he has actually written. That which he has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptation of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible, to place the Court in the position of the testator."

And then Lord Wensleydale referred to other rules to be followed by Court in construing Wills.

In *Gordon* v. *Gordon* (4) Lord Cairns, as to the construction of Wills, said:

"I take the law on this subject to have been expressed with much accuracy and felicity by Lord Cranworth, than whom no Judge more consistently adhered to sound and strict principles of construction in the interpretation of Wills. In the case of

(2) (1867) 2 Ch. A. 782 at p. 788.
(3) (1858) 6 H. L. C. 823 at p. 875; 10 E. R. 1518; 108 R. R. 327.
(4) (1871) 5 E. & I. App. 254 at p. 284.

Abbott v. *Middleton* (5) before this House, Lord Cranworth speaks thus: 'Where by acting on one interpretation of the words used we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and unreasonable.' "

The case of *Lord* v. *Lord* (2) was referred to by Sir W. S. Schwabe, C. J., and by Coutts-Trotter and by Kumaraswami Sastri, JJ., in their learned judgments in the Letters Patent Appeals.

It appears from the judgments of the Subordinate Judge of Bezwada of the 29th November, 1917, and from the judgment of Kumaraswami Sastri, J., of the 4th April, 1922, that at different dates between 1903 and 1908 Rangayya Appa Rao, Venkata Narasimha Appa Rao and Parthasarathi Appa Rao each obtained on his own application to the High Court one-third of the amount standing to the credit of Suit No. 35 of 1895. They each gave some security. It also appears that after the order of His Majesty in Council of the 19th December, 1913, had been made, Venkatadri Appa Rao, Venkataramayya Appa Rao and Sobhanadri Appa Rao obtained from Parthasarathi Appa Rao the one-third which he had received. For the amounts received by Rangayya Appa Rao and by Venkata Narasimha Appa Rao their sons, as their heirs and legal representatives, are responsible.

The decrees of the High Court from which these consolidated appeals have been brought, having been amended as to one of them by substituting "income" for the words "mesne profits" were the right decrees to make in the appeals under the Letters Patent, and their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitor for the Appellants.—Mr. *H. S. L. Polak.*

Solicitor for the Respondents.—Mr. *E. Dalgado.*

(5) (1858) 7 H. L. C. 68; 28 L. J. Ch, 110; 5 Jur. (N. S.) 717; 11 E. R. 28; 115 R. R. 38.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 5 OF 1924.

October 14, 1924.

Present:—Mr. Justice Ramesam and Mr. Justice Odgers.

M. K. SHEIK DAWOOD SAHIB—PLAINTIFF—APPELLANT

versus

MOIDEEN BATCHA SAHIB AND OTHERS—DEFENANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 54—"Delivery" and "possession", meaning of—Adverse possession—Usufructuary mortgage—Oral sale of equity of redemption—Possession for 12 years thereafter—Prescriptive title, acquisition of.

A usufructuary mortgagee to whom the mortgaged property is sold without a registered instrument and who holds possession of the property for over 12 years from the date of sale acquires a title to the property by adverse possession, even if the sale is held to be infructuous. [p. 332, cols. 1 & 2.]

Musigadu v. *Maneam Gopalu Reddy*, 63 Ind. Cas. 215; 13 L. W. 400; (1921) M. W. N. 251, *Karnam Kandasami Pillay* v. *Chinnappa*, 62 Ind. Cas. 603; 44 M. 253; 40 M. L. J. 105; (1921) M. W. N. 1; 29 M. L. T. 167; 13 L. W. 423, and *Usman Khan* v. *Nagalla Dasanna*, 16 Ind. Cas. 694; 37 M. 545; 12 M. L. T. 330; (1912) M. W. N. 995; 23 M. L. J. 350, followed.

The principle that possession can be adverse only to a person competent to sue does not apply where the change in the character of the possession is by mutual consent. [p. 332, col. 2.]

A direction by a mortgagor to the mortgagee to keep the property as absolute owner amounts to "delivery" within the meaning of s. 54 of the Transfer of Property Act. [*ibid.*]

The word "delivery" in s. 54 of the Transfer of Property Act means only such delivery as the thing to be delivered is capable of. [*ibid.*]

The word "possession" in s. 54, Transfer of Property Act, cannot be taken to be synonymous with occupation. [*ibid.*]

Sibendrapada Banerjee v. *Secretary of State for India*, 31 C. 207; 5 C. L. J. 390, dissented from.

Bhaskar Gopal v. *Padman Hira Chowdhari*, 33 Ind. Cas. 267; 40 B. 313; 18 Bom. L. R. 8, referred to.

Letters Patent Appeal against the judgment of Mr. Justice Krishnan, in S. A. No. 1711 of 1923, dated the 7th January 1924, presented to the High Court against the decree of the Court of the Second Additional

Subordinate Judge, Coimbatore, in A. S. No. 20 of 1922, preferred against the decree of the District Munsif, Erode, in O. S. No. 1227 of 1920.

Messrs, *T. M. Krishnaswamy Iyer* and *M. Balasubramania Mudaliar*, for the Appellant.

Mr. *L. A. Govindaraghava Iyer*, for the Respondent.

JUDGMENT.—The defendants' father obtained by Ex. A (dated 1st August 1888) an usufructuary mortgage of the suit property as well as a simple mortgage of another property not the subject of the suit. It is now found by the Subordinate Judge—a finding which we must accept—that four or five years after Ex. A, the mortgagor told the mortgagee to take the suit property in lieu of the whole debt of Rs. 75 and, therefore, he enclosed it by a wall.

If there was no delivery within the meaning of s. 54 of the Transfer of Property Act, the case is on all fours with *Usman Khan* v. *Nagalla Dasanna* (1), *Musigadu* v. *Maneam Gopalu Reddy* (2) and *Karnam Kandasami Pillay* v. *Chinnappa* (3). The defendants having been in possession for more than 12 years, the present suit in 1920 by the plaintiff claiming title from the original mortgagor to redeem is barred. But Mr. Krisnaswami Iyer argues that there can be no adverse possession, for he argues that part performance of an agreement to sell, by way of delivery of possession, cannot make the possession adverse and he refers to the Full Bench decisions in *Vizagapatam Sugar Development Co., Ltd.*, v. *Muthuramaridni* (4). This argument of his involves the anomaly that there was no delivery for the purpose of s. 54 but there was some kind of delivery which amounts to part performance.

Apart from this anomaly the facts of this case are different from *Vizagapatam Sugar Development Co., Ltd.* v. *Muthuramareddi* (4) where the delivery was in part performance of an agreement to sell. Here there was an attempt at a sale and the change in the character of possession was in pursuance of such an attempt. Even if there was no difference between the two cases, we do not see any reason why the possession obtained in part performance of an agreement to sell or the possession in its changed character which was the result of an attempted but infructuous sale should not be adverse to the vendor. The principle that possession can be adverse only to a person competent to sue [see *Palaniandi Malaavrayan* v. *Vadamalai Odayan* (5), *Manikkam Pillai* v. *Thanikachalam Pillai* (6) and *Dewasikamani Nataraja* v. *Govinda Rao* (7)] does not apply where the change in the character of the possession was by mutual consent [see *Usman Khan* v. *Nagalla Dasanna* (1), Buswell on Limitations s. 260]. It follows that the defendants perfected a title by prescription. So far we have assumed there is no valid delivery.

But it seems to us that the delivery in this case satisfies the requirement of s. 54 of the Transfer of Property Act. A direction by the vendor to keep the property as absolute owner amounts to delivery. We agree with the decision in *Muthukaruppan Samban* v. *Muthu Samban* (8). There is no reason to think that the word "delivery" in s. 54 is used in a peculiar sense or that the words "places the buyer in possession of the property" in the 4th clause are intended to alter the legal conception of "possession" or of "delivery". Delivery usually means such delivery as the thing to be delivered is capable of. Possession cannot be taken to be synonymous with "occupation" as has been done in *Sibendrapada Banerjee* v. *Secretay of State for India* (9) with which decision we cannot agree. We observe that though the decision has been referred to in *Bhaskar Gopal* v. *Padman Hira Chowdari* (10) the two learned Judges referred to it very guardedly and did not expressly approve of it.

We are of opinion (1) that there has been a valid delivery and (2) if there was no valid delivery the defendants acquired a title by prescription. In either case s. 48 of the Registration Act cannot

(1) 16 Ind. Cas. 694; 37 M. 545; 12 M. L. T. 330; (1912) M. W. N. 995; 23 M. L. J. 360.

(2) 63 Ind. Cas. 215; 13 L. W. 400; (1921) M. W. N. 251.

(3) 62 Ind. Cas. 603; 44 M. 253; 40 M. L. J. 105; (1921) M. W. N. 1; 29 M. L. T. 167; 13 L. W. 423.

(4) 76 Ind. Cas. 886; 46 M. 919; 45 M. L. J. 528; (1924) A. I. R. (M.) 271; 33 M. L. T. 53; (1924) M. W. N. 14.

(5) 28 Ind. Cas. 956; 2 L. W. 723.

(6) 34 Ind. Cas. 945; 4 L. W. 369; (1916) 2 M. W. N. 87.

(7) 72 Ind. Cas. 5; 17 L. W. 344; 44 M. L. J. 318; 32 M. L. T. 174; (1923) M. W. N. 252; (1923) A. I. R. (M.) 461; 46 M. 579.

(8) 25 Ind. Cas. 772; 38 M. 1158; 1 L. W. 754; 16 M. L. T. 344; (1914) M. W. N. 768; 27 M. L. J. 497.

(9) 34 C. 207; 5 C. L. J. 390.

(10) 33 Ind. Cas. 267; 40 B. 313; 18 Bom. L. R. 8.

affect the title of the defendant. The Letters Patent Appeal is dismissed with costs.

V. N. V.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 174 OF 1924.

January 20, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

SHEO BALAK—DEFENDANT—APPLICANT

versus

AMBIKA SAHAI—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 115, 152—Amendment of decree, application for—Decree signed by Pleader of applicant, effect of—Refusal to consider application on merits—Revision.

A judgment-debtor made an application under s 152 of the C. P. C. for amendment of the decree passed against him, by excluding from the amount of the costs allowed to the opposite party, a certain sum which represented expenses incurred in summoning witnesses by the decree-holder, on the ground that none of the witnesses had appeared on behalf of the decree-holder. The Trial Court refused to consider the application on its merits for the reason that the decree as prepared had been signed by the judgment-debtor's Pleader On revision:

Held, that the Trial Court in refusing to consider the application on its merits had failed to exercise the jurisdiction vested in it by law and that its order must be set aside and the case remanded to it for disposal according to law.

Application against an order of the Munsif, Ramsanehighat (at Bara Banki), dated the 1st October 1924.

Mr. *Rameshwari Dayal*, for the Applicant.

Mr. *L. S. Misra*, for the Opposite Party.

JUDGMENT.—This is an application under s. 115 of the C. P. C. against the order of the Munsif of Ramsanehighat, dated the 1st October 1924. The application has arisen in the following circumstances:—

On the 27th August 1924 a decree was passed by the Munsif in favour of the opposite party against the applicant for a sum of Rs. 276-8-0 with costs. On the 23rd September 1924 the applicant judgment-debtor applied to the Munsif that the sum of Rs. 38-8-0, expenses incurred in summoning witnesses, was wrongly included in the decree, because none of the witnesses appeard on behalf of the plaintiff decree-holder. The application purports to have been made under s. 152, C. P. C. The Munsif refused to consider the application on its merits for the reason that the decree as prepared had been signed by the judgment debtor's Pleader.

I am of opinion that the Munsif in passing the order, which he did, has failed to exercise the jurisdiction vested in him by law. His order is, therefore, set aside and the case is remanded to him with directions that the application of the judgment-debtor, dated the 23rd September 1924, be disposed of according to law. No order as to costs.

Z. K. *Case remanded.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

November 20, 1924.

Present:—Lord Sumner, Lord Phillimore, Sir John Edge and Sir Lawrence Jenkins.

PALANI AMMAL—APPELLANT

versus

MUTHUVENKATACHALA MONIAGAR AND OTHERS—RESPONDENTS.

Hindu Law—Mitakshara family—Presumption of jointness—Separation—Agreement between co-parceners—Ascertainment of shares—Separation, whether can be inferred—Revision—Construction of document—Inference as to intention of parties.

A Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated. [p. 335, col. 1.]

The co-parceners in a joint family can by agreement amongst themselves separate and cease to be a joint family, and on separation are entitled to partition the joint family property amongst themselves. [*ibid.*]

Appovier v. *Rama Subba Aiyan*, 11 M. I. A. 75; 8 W. R. P. C. 1; 2 Sar. P. C. J. 218; 1 Suth. P. C. J. 657; 20 E. R. 30 (P. C.), followed.

But the mere fact that the shares of the co-parceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. [*ibid.*]

A member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and the remaining co-parceners, without any special agreement amongst themselves, may continue to be co-parceners and to enjoy as members of a joint family what remained after such a partition of the family property. [*ibid.*]

If a joint Hindu family separates the family or any members of it may agree to re-unite as a joint Hindu family, but such a re-uniting is for obvious reasons, which would apply in many cases under the law of the Mitakshara, of very rare occurrence, and when it

happens it must be strictly proved as any other disputed fact is proved. [*ibid.*]

Balabux Ladhuram v. *Rukhmabai*, 30 C. 735; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470 (P. C.), followed.

The fact that any member of a joint family has separated himself from his co-parceners may be proved by his suing for a partition of the joint family property, and if the suit is decreed the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted. [p. 335, cols. 1 & 2.]

Kedar Nath v. *Ratan Singh*, 7 Ind. Cas. 648; 32 A. 415; 37 I. A. 161; 14 C. W. N. 985; (1910) M. W. N. 311; 8 M. L. T. 193; 12 C. L. J. 225; 12 Bom. L. R. 656; 13 O. C. 332; 20 M. L. J. 900 (P. C.), *Girja Bai* v. *Sadashiv Dhundiraj*, 37 Ind. Cas. 321; 43 C. 1031; 43 I. A. 151; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455 (P. C.), and, *Kaibal Nain* v. *Budh Singh*, 40 Ind. Cas. 286; 39 A. 496; 44 I. A. 159; 15 A. L. J. 581; 2 Pat. L. W. 57; 21 C. W. N. 986; 33 M. L. J. 42; 19 Bom. L. R. 642; 26 C. L. J. 101; (1917) M. W. N. 514; 6 L. W. 330 (P. C.). referred to.

In a suit for partition which proceeds to a decree which is made, the decree for a partition is the evidence to show whether the separation was only a separation of the plaintiff from his co-parceners or was a separation of all the members of the joint family from each other. [p. 335, col. 2.]

In construing documents the Court is entitled to draw all legitimate inferences as to the intention of the parties to them, and the inferences so drawn are findings of facts. [p. 336, col. 1.]

Appeal from a decree of Madras High Court, (Sir John Wallis, Kt., C. J., and Mr. Justice Kumaraswami Sastri) in Civil Appeal No. 216 of 1919, dated the 29th August 1917, and printed as 43 Ind. Cas. 833, affirming that of the District Judge, Madura, dated the 23rd April 1909.

Mr. *B. Dube*, for the Appellant.

Mr. *W. Wallach*, for the Respondents.

JUDGMENT.

Sir John Edge.—This is an appeal by Palani Ammal, a Hindu lady, who is one of several defendants, from a decree, dated the 29th August 1917, of the High Court at Madras, which affirmed a decree for partition of the Vadimitta Estate, dated the 23rd April 1909, of the District Judge of Madura.

The estate in question, which appears to be a large *zemindari*, was purchased by Peraiyar Muthukumaraswami, who died in 1834. He was a Hindu Sudra, who and his descendants were governed by the law of the Mitakshara. His descendants, unless they separated, constituted a Mitakshara joint family, the property of which was in law joint property unless the contrary was proved. For the sake of brevity he will hereafter be referred to as the propositus. The propositus had two wives; by the senior wife he had six sons most of whom married and left male issue, by his junior wife he had one son, who left male issue. It is stated in the judgment of Sastri, J., in this case, and doubtless correctly, that "the property admittedly continued to be in the possession and enjoyment of the descendants of the first son of the propositus." As the family was not an ancient family, the property, which was acquired in quite modern times, was in the possession of the senior son and his descendants as managers of the joint family and not as the senior male member of a joint family.

There are two questions in this suit and in this appeal, upon which there are concurrent findings of the District Judge and the High Court. Those questions are whether the principal parties to the suit are bound by an award which was made by some arbitrators, who have been made defendants to the suit, and if they are not bound by the award, then the question arises, whether the joint family which descended from the propositus ever separated.

The question relating to the award may be disposed of at once. The District Judge and the High Court found, for reasons which their Lordships consider to have fully justified their findings, that the award was not binding upon any of the parties. No argument has been adressed to their Lordships in this appeal in support of the award, and they accept the concurrent findings, that it is not binding, as correct. The sole appellant, Palani Ammal, claimed that some of the estate sought to be partitioned had vested under the award in her. Her claim under the award fails, but as she appears, when suit for partition was brought, to have been in possession of part of the estate, the right of the plaintiffs to a decree for partition must be established, and it is necessary to consider whether the joint family had ever separated.

It is beyond question that the estate, which the propositus had purchased, vested on his death, in 1834, if not on the purchase, in the joint family, and was held jointly by the male members of the joint family as co-parceners. Their Lordships do not know whether the estate was purchased with joint family money or with self-acquired funds of the propositus, but for the purposes of this judgment they will assume that the estate did not vest in the joint family until the death of the propositus.

In coming to a conclusion, that the mem-

bers of a Mitakshara joint family have or have not separated, there are some principles of law which should be borne in mind when the fact of a separation is denied. A Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated. That the coparceners in a joint family can by agreement amongst themselves separate and cease to be a joint family, and on separation are entitled to partition the joint family property amongst themselves, is now well-established law. An authority for that proposition is the judgment of the Board in *Appovier* v. *Rama Subba Aiyan* (1), which applies to joint families such as the joint family which descended from the propositus. But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the co-parceners on a separation would be. It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining co-parceners, without any special agreement amongst themselves, may continue to be co-parceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them. It is also quite clear that if a joint Hindu family separates, the family or any members of it may agree to re-unite as a joint Hindu family, but such a re-uniting is for obvious reasons, which would apply in many cases under the law of the Mitakshara, of very rare occurrence, and when it happens, it must be strictly proved as any other disputed fact is proved. The leading authority for that last proposition is *Balabux Ladhuram* v. *Rukhmabai* (2).

The fact that any member of a joint family has separated himself from his co-parceners may be proved by his suing for a partition of the joint family property, and if the suit is decreed the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted. In *Kedar Nath* v. *Ratan Singh* (3) a member of a joint Hindu family had filed a plaint claiming a partition but afterwards had withdrawn it, and the Board held that no severance of the joint status resulted. Their Lordships see no reason to depart from that view, although such a plaint, even if withdrawn, would, unless explained, afford evidence that an intention to separate had been entertained [see *Girja Bai* v. *Sadashiv Dhundiraj* (4) and *Kawal Nain* v. *Budh Singh* (5).] In a suit for partition which proceeds to a decree which was made, the decree for a partition is the evidence to show whether the separation was only a separation of the plaintiff from his co-parceners or was a separation of all the members of the joint family from each other. It appears to be obvious to their Lordships that in a suit for partition no effective decree can be made for a partition unless all the co-parceners whose addresses are known, are parties to the suit, and that it is the decree alone which can be evidence of what was decreed.

With the observations which their Lordships have already made, they will proceed to consider whether the joint family which descended from the propositus, ever separated. It will be necessary for their Lordships in referring to evidence to refer only to such evidence as they consider is material. In this present case there were concurrent judgments of the District Judge and the High Court that the family descended from the propositus never separated, and that the property sought to be partitioned is partible. The onus of proving that there had been an effective separation was upon the defendants. The Courts below were, as their Lordships are, obliged to construe documents according to their legal

(1) 11 M. I. A. 75; 8 W. R. P. C. 1; 2 Sar. P. C. J. 218; 1 Suth. P. C. J. 657; 20 E. R. 30 (P. C.).

(2) 30 C. 725; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470 (P. C.).

(3) 7 Ind. Cas. 648; 32 A. 415; 37 I. A. 161; 14 C. W. N. 985; (1910) M. W. N. 311; 8 M. L. T. 193; 12 C. L. J. 225; 12 Bom. L. R. 656; 13 O. C. 332; 20 M. L. J. 900 (P. C.).

(4) 37 Ind. Cas. 321; 43 C. 1031; 43 I. A. 151; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455 (P. C.).

(5) 40 Ind. Cas. 286; 39 A. 496; 44 I. A 159; 15 A. L. J. 581; 2 Pat. L. W, 57; 21 C. W. N. 986; 23 M. L. J. 42; 19 Bom. L. R. 642; 26 C. L. J. 101, (1917) M. W. N. 514; 6 L. W. 330 (P. C.).

effect, but the Courts below were, and their Lordships are, entitled to draw all legitimate inferences as to the intentions of the parties to them, and the inferences so drawn are findings of facts.

As was pointed out by Sastri, J, in his judgment in this case, that so far as division or non-division of the estate is concerned, "there has been no formal partition deed between the various members of the family, and it is not alleged that the estate was at any time divided by metes and bounds." The defendants, whose case is that the estate, of which partition is claimed, is not now partible rely upon certain decrees and documents as showing that the estate was divided and partitioned between descendants of the propositus and that the joint family had ceased to remain joint.

In 1842, a suit was filed in the District Court of Tinnevelly by some of the sons of the propositus against his eldest son claiming that the estate should be divided according to his Will. The District Judge in 1846 found rightly that the division made by the propositus was invalid in law, but he made an equally invalid decree declaring that the sons of the first wife were entitled to one half of the estate and the son of the second wife to the other half of the estate. On the 23rd July, 1849, the Suddar Adalat Court in appeal held that all the sons were entitled to equal shares, but held that the Court was not called upon to sub-divide the estate in accordance with the law of inheritance, no such question being before the Court, and decided—"37. It is, therefore, left for the heirs, or for such of them as may be dissatisfied with the management of the joint estate by the head of the family, to adopt such a course of proceeding as they may see fit to obtain the surrender to them of their respective portion or portions of the estate." A *razinama* had been filed in that suit on the 1st June, 1846, by the great-grandfather of the plaintiffs in this suit stating that he no longer wished to press the eldest son for a partition of the family estate.

After the decree of the Suddar Adalat of 1849 a son of the fifth son of the propositus brought a suit in the Zilla Court of Tinnevelly in 1849 against the eldest son of the propositus for a fifth share in the estate, and the defendant in that suit pleaded that the then plaintiff's father had in a previous suit admitted that the estate ought to be held according to the law of primogeniture and had renounced all claim to a division of the estate. The Zilla Court on 22nd January, 1852, holding that the Suddar Adalat in 1849 had held that the estate was divisible, gave the then plaintiff a decree for a one-fifth share in the estate. On the 31st October, 1870, the widow of the plaintiff of the suit in the Zilla Court sold her deceased husband's interest in the estate to the son of the first son of the propositus, who was the father of Ponnusami Moniager, who was the brother, deceased without issue, of the appellant, Palani Ammal.

Their Lordships have in considering the facts in this appeal had the great advantage of the very careful and elaborate judgments which were delivered in the appeal to the High Court by Sir John Wallis, C. J., and Sastri, J., and they agree with their conclusions as to the facts. Their Lordships have no doubt that this joint family never did separate.

Their Lordships think that so far from the members of that joint family intending to separate, their object probably was to establish themselves, if possible, as a joint family with an impartible estate descending according to a rule of lineal primogeniture with rights of maintenance and other privileges for the junior members. Such a joint family could not be established in modern times.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

K. S. D. *Appeal dismissed.*

Solicitors for the Appellants:—Mr. *H. S. L. Polak.*

Solicitors for the Respondents:—Mr. *E. Dalgado.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 1256 AND 1257 OF 1922.

November 28, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

HANGSESWAR KUNDU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SURJYA NARAIN MONDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Ejectment suit, when maintainable—Ouster, proof of.

Ordinarily one tenant-in-common cannot maintain an ejectment against another tenant-in-common, because the possession of one tenant-in-common is the possession of another and to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But where the claimant tenant-in-common has not been in participation of the rents and profits for a considerable length of time and other circumstances concur, it may be presumed that there has been an ouster. [p. 338, col. 2.]

Varada Pillai v. *Jeevarathnammal*, 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274 (P. C.) and *Cully* v. *Doe d. Taylerson*, (1840) 11 A. & E. 1008; 3 P. & D. 539; 9 L. J. Q. B. 288; 113 E. R. 697; 52 R. R. 566, followed.

Hardit Singh v. *Gurmukh Singh*, 47 Ind. Cas. 626; 28 C. L. J. 437; 58 P. W. R. 1918; 64 P. R. 1918; 24 M. L. T. 389; 20 Bom. L. R. 1064; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8 (P. C.) and *Varada Pillai* v. *Jeevarathammal*, 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J 313; 18 A. L J. 272 (P. C.), referred to.

Every case must, however, depend upon its own facts and the Court of fact is entitled to find whether a certain set of facts presented before it does or does not amount to ouster. [p. 338, col. 1.]

Appeals against the decrees of the Subordinate Judge, Bankura, dated the 27th February 1922, affirming those of the Munsif, First Court at that place, dated the 16th July 1921.

Dr. *Dwarka Nath Mitter*, Babus *Santosh Kumar Pal* and *Debendra Nath Mondal*, for the Appellants.

Babus *Bejoy Kumar Bhattacharji* and *Phanindra Nath Das*, for the Respondents.

JUDGMENT.

IN A. No. 1257 OF 1922.

Suhrawardy, J.—The only question that arises for consideration in this case is whether the plaintiffs' suit is barred by limitation, or in other words whether the defendants have acquired exclusive title to the land in suit by virtue of adverse possession. The predecessors of the parties were joint co-owners in respect of several properties consisting of *hashil* land, *patit* lands, jungles and tanks. Bisu, the predecessor of the appellants in the other appeal (S. A. No. 1256 of 1922) brought in 1906 a suit for partition of the *mouza* which belonged to the joint family. The heirs of the other brothers, including Balai (the father of the appellants in this appeal), filed a written statement in that suit in which they alleged that *hashil*, *patit* and other lands were partitioned amongst the co-sharers long ago and some of the tanks and jungles were left unpartitioned. Thereupon Bisu withdrew the suit in 1908. In 1908 the defendants' lessee brought a criminal case against the plaintiffs for catching fish from the tank in suit and the plaintiffs were fined on the 9th June 1908. The present suit was instituted on the 1st June 1920. Both the Courts have found that the plaintiffs' suit is barred by limitation.

It has been argued before us that the case being one between co-parceners of a joint family, the law has been wrongly applied by the lower Courts to the facts of the present case. It is contended that in order to make the Statute of Limitation run against a co-owner in a suit, in respect of property which was at one time held jointly by all the co-owners, there must be a finding as to actual ouster by the plaintiffs' co-owners; and it is further contended that this ouster must be express and it will give sufficient notice to the dispossessed co-owner of the commencement of the act of dispossession by his co-owner. It is not correct to say that in order to make limitation run against a co-parcener by adverse possession of a co-owner, there must be ouster from possession of the other co-owners. It is not necessary to cite authorities in support of this proposition as it is firmly settled by several decisions of the Privy Council as well as of this Court. But the real question that has always come up for consideration is as to what amounts to ouster from possession. The findings in the present case are that the suit was brought by one of the co-owners for partition of properties alleged to be joint in 1906, in which the plaintiffs' predecessors and other co-sharers alleged that some of the properties had long been partitioned, and one of such properties was the disputed tank. In support of the written statement, it is found, the defendants without suit produced a certain *pottah* and a *kabuliyat*, dated the 17th *Ashar* 1299, which were exchanged between defendants Nos. 1 to 7 and their lessee, Tara Chand Kewat in respect of the disputed tank. It is not apparent whether these documents were actually filed; but a list of the documents filed by the defendants in that case has been produced. From these facts the Court of Appeal below has found that there was a partition of the *mouza* between the four original brothers long before the memory of the existing generation. After partition defendants Nos. 1 to 7 or their predecessors were found to

be in exclusive possession of the tank in suit and the plaintiffs and their predecessors not only never asserted any claim to this tank thereafter, but their predecessors admitted that there was a previous partition of a portion of the joint property including the disputed tank. It is further found that the defendants in the suit of 1906 did give notice to their co-sharers of the fact that the tank was claimed exclusively by the predecessors of defendants Nos. 1 to 7 and that they were setting up adverse possession of it against the other co-sharers. The Court below has further accepted the story of defendants Nos. 1 to 7 that they were possessing the tank from a very long time by letting it out to the *kewats* or fishermen. From these circumstances the Court of Appeal below has drawn the following conclusion. "In such circumstances I agree with the learned Trial Court and find that the plaintiffs were not in possession within 12 years before suit, I prefer the evidence of possession on the defendants' side and hold that they hold adverse and exclusive possession of the tank since the partition of the *mouza* between the four original co-sharers which took place long before the memory of the living generation." The learned Judge further proceeds to observe thus:—"Even if it be held that the tank was *ijmali* property but by some arrangement between the co-sharers the defendants Nos. 1 to 7 are holding exclusive possession of it, these suits must fail because such exclusive possession cannot be disturbed unless by a partition suit." It is contended by the learned Advocate for the appellants that these findings are not sufficient to constitute ouster in law and reference has been made in this connection to the decision of the Judicial Committee in the case of *Hardit Singh* v. *Gurmukh Singh* (1) and it is maintained that in order to constitute ouster there must be an express exclusion of the other co-sharers from the property in suit. It is difficult to lay down any definite rule of law as to what constitutes an ouster; but every case must depend upon its own facts and the Court of fact is entitled to find whether certain set of facts presented before it does or does not amount to ouster. The decisions of the Judicial Committee which are based on fact and law are not sure guides in such questions which arise in second appeals. But we are unable to hold that the facts found in the present case do not in law amount to ouster. The latest case on this point, in which all the previous decisions on this question were cited and considered, is the case of *Varadu Pillai* v. *Jevarathnammal* (2). Viscount Cave in delivering the judgment of the Judicial Committee has quoted with approval the doctrine to be found in the case of *Culley* v. *Doe d. Taylerson* (3) which is as follows: "Generally speaking, one tenant-in-common cannot maintain an ejectment against another tenant-in-common, because the possession of one tenant-in-common is the possession of the other, and to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant, tenant-in-common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will ask the Jury to presume that there has been an ouster". We are of opinion that the elements found in this case would in law, in the view of their Lordships in the case last mentioned, amount to an ouster. In this view of the matter it is not necessary to refer to the cases which have all proceeded upon the particular facts found in them.

The learned Subordinate Judge has also held the suit barred by limitation under Art. 142, Limitation Act. The plaintiffs came to Court on the allegation that they were in possession and were dispossessed by the defendants, practically by the findings of the Criminal Court on the 9th June, 1908. The learned Subordinate Judge has found that they were not in possession on that date and as they came to Court on the allegation of possession and dispossession he was of opinion that Art. 142 applied and that the suit was barred by limitation. It is contended by the appellants that this Article is not applicable to the case of co-owners. It is unnecessary in view of our findings on the first point to express any opinion upon this point.

The result is that this appeal fails and is dismissed with costs.

(1) 47 Ind. Cas. 626; 28 C. L. J. 437; 58 P. W. R. 1918; 64 P. R. 1918; 24 M. L. T. 389; 20 Bom. L. R. 1064; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8 (P. C.).

(2) 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 721; 10 L. W. 679; 21 C. W. N. 346; 36 M. L. J. 313; 18 A. L. J. 274 (P. C.).

(3) (1840) 11 A. & E. 1008; 3 P. & D. 539; 9 L. J. Q. B. 288; 113 E. R. 697; 52 R. R. 566.

IN S. A. No. 1256 OF 1922.

The sole appellant is the purchaser of the shares of the sons of Bisu, who are the grandsons of Bansi, one of the four brothers constituting the joint family. The learned Vakil appearing for him has adopted the arguments advanced by the learned Advocate in S. A. No. 1257 of 1922 and has further argued that his client being a mortgagee and purchaser in execution of the mortgage decree, time against him ought to run from July 1914—the date of his purchase and in support of this contention has relied upon the case of *Aimadar Mondal* v. *Makhan Lal Dey* (4). The facts found in that case, however, are that the plaintiffs, mortgagors, were in possession at the time of mortgage and, therefore, the principle established thereon that adverse possession against the mortgagor is not really against the mortgagee does not apply in the present case.

We think that the view taken by the Court below is correct and this appeal is dismissed with costs to the respondents represented by Babu Bejoy Kumar Bhattacharjee.

Cuming, J.—I agree.

Z. K. *Appeals dismissed.*

(4) 10 C. W. N. 904; 33 C. 1015.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 639 OF 1922.

August 26, 1924.

Present:—Justice Sir William Ewart Greaves, KT., and Mr. Justice Chakravarti.

Kumar ARUN CHANDRA SINGHA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF HOOGHLY AND OTHERS—DEFENDANTS—RESPONDENTS.

Public Demands Recovery Act (I B. C. of 1895), s. 7—Bengal Drainage Act (VI of 1880), s. 37—Notice under s. 37, absence of—Certificate proceedings, validity of.

The failure to serve a notice in accordance with the provisions of s. 37 of the Bengal Drainage Act vitiates certificate proceedings under the Bengal Public Demands Recovery Act.

Appeal against a decree of the Additional District Judge, Howrah, in Hooghly, dated the 19th November 1924, reversing that of the Additional Subordinate Judge, Howrah, dated the 28th August 1919.

Babus *Jogesh Chandra Roy* and *Ramani Mohan Chatterji*, for the Appellants.

Babus *Surendra Nath Guha* and *Nuruddin Ahmed*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs against a decision of the Additional District Judge of Hooghly, at Howrah, reversing a decision of the Additional Subordinate Judge of Howrah.

The suit out of which the appeal arises was brought by the plaintiffs for a declaration that a certificate issued under the Public Demands Recovery Act, 1895, to recover certain drainage costs under the Bengal Drainage Act, 1880, was invalid and that the substitution of the plaintiffs' names in place of the original obligee of the instalment bond, given under the provisions of the Bengal Drainage Act, was *ultra vires*.

The Subordinate Judge held that the certificate was issued without jurisdiction and that the substitution was *ultra vires*. The Additional District Judge has reversed this decision and hence this appeal. The facts are as follows: A certain drainage scheme, known as the Rajapur Drainage Scheme, was carried out in the year 1895 and under the provisions of the Bengal Drainage Act part of the costs were charged against *Mouza* Khasmara appertaining to *patni* Wadipur. The plaintiffs or their predecessors-in-interest were the *zemindars* at the date of the scheme and the *patnidars* were Pran Krishna Ghosh and Panchkari Ghosh, each having an 8-annas share.

Pran Krishna sold his share to Asutosh Ghosh and Arunodoy Ghose, and Panchkari's 8-annas share was let out in *darpatni* to four persons.

The *darpatnidars* were held liable for a portion of the drainage costs under s. 30 of the Act and they executed an instalment bond for the costs. In June 1900 the *patni* was sold under Regulation of 1819 and purchased by Asutosh Ghosh.

The liability under the instalment bond being undischarged an attempt was made to make the purchaser of the *patni* liable. This failed as did subsequent attempts.

In May 1915 the present appellants purchased the *patni* under Regulation VIII of 1819 and in March 1916 the Collector issued a notice on the plaintiffs under s. 7

of the Public Demands Recovery Act to recover the sums due under the instalment bond and ultimately directed the substitution of their names and a certificate was issued.

Various points were raised and argued before us on behalf of the appellants but we do not think that it is necessary to refer to them as the appeal we think must succeed on the ground that no notice was served upon the appellants in accordance with the provisions of s. 37 of the Bengal Drainage Act. The First Court has so found and the lower Appellate Court has not reversed this finding but thinks that the service of notice is optional.

We think that this is not so and that the failure to serve the notice on the appellants vitiates the certificate proceedings and that the appeal must succeed for this reason.

We accordingly allow the appeal and reverse the decision of the Additional District Judge and restore the decree of the Additional Subordinate Judge. The appellants will be entitled to their costs in this Court and in the lower Appellate Court against the 1st respondent.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1214 AND 1215 OF 1923.

January 22, 1925.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

DALIP AND OTHERS—DEFENDANTS—APPELLANTS

versus

KHAZAN SINGH—PLAINTIFF—RESPONDENT.

Custom—Pre-emption—Mahal *becoming property of single proprietor—Pre-emption, right of, whether can be enforced.*

The "*dastur dehi*" of a village prepared at a certain settlement provided that if any co-sharer desired to transfer his property he must offer it first to co-sharers who were near relations and then to co-sharers in the *patti*, *mahal* or village, and that if none of these persons were desirous of acquiring the property he was at liberty to transfer to a stranger. At the time when the Settlement took place and for some years afterwards one of the *mahals* of the village was the exclusive property of a single proprietor, but subsequently it became divided among several proprietors. One of these proprietors made a sale in favour of a stranger and some of the other proprietors in the *mahal* brought a suit to pre-empt the sale:

Held, that the mere fact, that at one time the *mahal* was the property of a single owner, did not indicate the disappearance of the entire village community and that under the terms of the "*dastur dehi*" the plaintiffs were entitled to pre-empt the sale. [p. 341, cols. 1 & 2.]

Second appeal from a decree of the First Additional Judge, Aligarh, at Bulandshahr, dated the 20th April 1923.

Mr. *A. P. Dube*, for the Appellants.

Mr. *Shiva Prasad Sinha*, for the Respondent.

JUDGMENT.—Both these appeals have arisen out of two suits for pre-emption and they may be disposed of by one judgment. The cases have been up in appeal here before and were sent back for re-disposal to the Court of the learned District Judge of Bulandshahr.

The question before us is whether a custom of pre-emption, admittedly obtaining in the village of *Mouza* Ganaura Shaikh, applies is respect of the particular property now sought to be pre-empted.

It is to be mentioned here that the property in question is situated in a *mahal* known as *mahal* Alladad.

The plaintiffs are co-sharers with the vendor in *mahal* Alladad. The vendee is admittedly a stranger.

The plaintiffs relied upon what was set out in the document known as the "*dastur dehi*" prepared in the year 1296 *Fasli* at the Settlement of Mr. Stoker. The *dastur dehi* must certainly be taken to be a record of custom, and there can be no doubt that the custom of pre-emption is recorded. The language of the document is as follows:

"In joint *zemindari mahals* and in *pattidaris*, if any co-sharer desires to transfer his property he must offer it first to co-sharers who are near relations descended from the same common ancestor. After them he must offer it to co-sharers in the *patti mahal* or village (*gaon*). If none of these persons desire to acquire the property the vendor is at liberty to transfer to a stranger."

It was said in the Court below, and it was not disputed there, that at the time when the Settlement took place, *mahal* Alladad Khan was the exclusive property of one person, namely, Alladed himself. There is no evidence on the record to the contrary.

On the basis of this fact it has been argued before us by the vendee that, although a custom of pre-emption is recorded

in the *dastur dehi*; nevertheless the plaintiffs are not entitled to take advantage of it because the custom could not apply to any property situated in *mahal* Alladad. The argument is that because the *mahal* in question was at the time of the Settlement, and it seems for some years afterwards, the sole property of Alladad, the custom would not apply. There is evidence on the record to show that the *mahal* continued in the possession of Alladad Khan up till the year 1897. He then sold it to another single proprietor who subsequently sold it to a number of persons who are related to the present vendor and pre-emptors.

We are, however, unable to accept the argument that the plaintiffs are not entitled to exercise a right of pre-emption under this custom. Mr. Dube relied on the case which is reported as *Kamrunnissa* v. *Sughra Bibi* (1). There, dealing with a *mauza* or village which in the year 1881 had become the property of a single owner, the Pre-emption Bench of this Court held that the custom of pre-emption which had undoubtedly existed prior to that time had become dead. The learned Judges differed from the Judge of the Court below who was of opinion, that in the circumstances, the custom was not dead but only in abeyance; in other words, the learned District Judge seemed to think that after the village ceased to be the property of a single owner and came into the possession of several co-owners, the custom would revive. It was laid down distinctly, however, that the custom was dead and that a new custom would have to grow up before any one could assert a right of pre-emption.

It is to be noticed that in this case the Bench was dealing with a *mahal* which was co-extensive with the *mouza*, and at page 481* of the report they say in support of their judgment that custom means a practice prevailing amongst a certain community. If that community has been reduced to a single individual it is impossible that the practice can any longer exist.

That argument, however, cannot be applied to a case like the one now before us. All that is made to appear is that a particular portion of this village of Ganaura Shaikh had at some time or other become a *mahal* in possession of a single owner. That fact, however, would not indicate the disappearance of the village community, and it seems to us perfectly clear that the reasoning which was applied in *Kamrunnissa* v. *Sughra Bibi* (1) cannot hold good in a case like the present. We are satisfied, therefore, that the vendees cannot maintain in this case that the plaintiffs are not entitled to pre-empt the property under the custom recorded in the *dastur dehi* of 1296 *Fasli*. The judgments of the Courts below are correct; both the appeals fail and are dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeals dismissed.*

(1) 40 Ind. Cas. 427; 39 A. 480; 15 A. L. J. 422.

*Page of 39 A.—[*Ed.*]

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 377 OF 1923.

January 29, 1924.

Present:—Mr. Justice Odgers and Mr. Justice Wallace.

RAMANI *alias* VENKATARAMANI AND OTHERS—DEFENDANTS NOS. 3 TO 5—APPELLANTS

versus

M. NARAYANASAMI AIYAR AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 21, 38, 39—Territorial jurisdiction, transfer of—Case decided without objection by either party—Waiver—Appellate Court, whether will entertain objection.

On an application for the appointment of a Receiver in a pending suit before a Judge, arguments were heard and the petition was adjourned for orders to a particular day, and meanwhile the Local Government acting under ss. 10 and 11 of the Civil Courts Act, by notification, transferred the territorial jurisdiction of the area in which the suit properties were situate to another Court. The Judge, however, heard the petition without objection by any party and pronounced his order appointing a Receiver. On an appeal against the order objection was raised that the territorial jurisdiction having been transferred, the order was without jurisdiction:

Held, that s. 21 of the C. P. C. was applicable to all cases of want of territorial jurisdiction, and the appellant not having objected to the Judge passing the order and no failure of justice having been caused, the appellant must be held to have waived all objections on the ground of want of jurisdiction and the order was a good and valid one. [p. 343, cols. 1 & 2.]

Zamindar of Ettiyapuram v. *Chidambaram Chetty*, 58 Ind. Cas. 871; 43 M. 675; 28 M. L. T. 75; (1920) M. W. N. 460; 12 L. W. 217; 39 M. L. J. 203 (F. B.) and *Chokkalinga Pillai* v. *Ramasami Pillai*, 87 Ind. Cas. 152; 47 M. L. J. 448; (1925) A. I. R. (M.) 117, followed.

Vajechand Ramaji v. *Nandram Daluram*, 31 B. 545; 9 Bom. L. R. 1028, *Jyoti Prokash Chatterjee* v. *Bagala*

Kanta Chodhury, 70 Ind. Cas. 602; 36 C. L. J. 140; (1922) A. I. R. (C.) 176; 27 C. W. N. 259 and *R. v. Denton*, (1852) 18 Q. B. 761; Dears C. C. 3; 21 L. J. M. C. 207; 17 Jur. 453; 118 E. R. 287, distinguished.

When a particular local jurisdiction of one Court is transferred to another by notification under ss. 10 and 11 of the Madras Civil Courts Act, such transfer carries with it automatically all pending suits and proceedings of any and every sort arising out of that local jurisdiction, so that the Court in which they were originally filed loses jurisdiction and the Court to which the local jurisdiction is transferred assumes it. [p. 344, col. 1.]

Subbiah Naicker v. *Ramanathan Chettiar*, 22 Ind. Cas. 899; 37 M. 462; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251, *Subbayya* v. *Rachayya*, 26 Ind. Cas. 519; 37 M. 477, *Seeni Nadan* v. *Muthuswamy Pillai*, 53 Ind. Cas. 213; 42 M. 821; 37 M. L. J. 284; 26 M. L. T. 223; (1919) M. W. N. 640; 11 L. W. 63, *Srinivasa Rao Hanumantha Rao*, 65 Ind. Cas. 727; 46 M. 1; 42 M. L. J. 344; 15 L. W. 458; (1922) A. I. R. (M.) 10; (1922) M. W. N. 349; 31 M. L. T. 79, *Mouna Guruswami Naicker* v. *Sheikh Mahommadhu Rowther*, 86 Ind. Cas. 65; 46 M. 83; 16 L. W. 748; (1922) M. W. N. 743; 43 M. L. J. 713; (1923) A. I. R. (M.) 92 and *Manavikraman* v. *Ananthanarayana Aiyar*, 79 Ind. Cas. 806; 19 L. W. 16; (1924) M. W. N. 38; 46 M. L. J. 250; (1924) A. I. R. (M.) 457, relied on.

Appeal against an order of the Court of the Subordinate Judge, Mayavaram, dated the 22nd October 1923, in I. A. No. 228 of 1923, in O. S. No. 98 of 1922.

Mr. *K. S. Sankara Iyer* for Mr. *T. R. Venkatarama Sastri*, for the Appellants.

Messrs. *T. R. Ramachandra Aiyar* and *S. Ramaswamy Dikshit*, for the Respondents.

JUDGMENT.

Odgers, J.—In this case the suit was on a usufructuary mortgage bond executed by the 1st and 2nd defendants to the plaintiff; the 1st defendant being the father of defendants Nos. 2, 3 and 4. The last two are the appellants before us. The 3rd and 4th defendants, who are undivided members of a joint Hindu family, which owns apparently large properties, have brought the suit to set aside the suit mortgage, alleging *inter alia* that the document was only intended to operate if, on taking the accounts between the defendants and the plaintiff, any amount was found due from the latter to the former. The matter before us arises directly out of the petition for the appointment of a Receiver in the Mayavaram Sub-Court in which the suit had been instituted. The suit was numbered 98 of 1922. Argument was heard; on the 19th September, 1923, the petition was adjourned for orders to the 21st September. For various reasons the order was not pronounced till the 2nd October, 1923, when the plaintiff was appointed Receiver. The difficulty arises from the fact that on the 1st October 1923, a notification of Government took effect by which the local limits of the jurisdiction of the Mayavaram, Sub-Court were changed and the Nannilam Munsif, in which the lands in question are situate, was transferred to the Tiruvalur Sub-Court. The first question raised before us in appeal from the order appointing the plaintiff Receiver is that on the 2nd October the learned Subordinate Judge of Mayavaram had no jurisdiction to pronounce the order which is, therefore, void. The notification unfortunately does not say "pending suits," and we had a long argument chiefly based on *Subbiah Naicker* v. *Ramanathan Chettiar* (1) and *Seeni Nadan* v. *Muthuswamy Pillai* (2) on a question whether the Court to which the jurisdiction has been transferred is the only Court which can execute a decree passed by the Court from which the jurisdiction has been transferred. In my opinion, it is quite unnecessary to examine the cases on this subject, for the learned Vakil for the petitioner at a late stage of his argument propounded other authorities to show that the learned Subordinate Judge had no jurisdiction. It may be premised that authority on this question is scanty. We have, however, a Full Bench decision of this Court, the *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (3), which lays down that s. 21, C. P. C. applies to objections with regard to want of territorial jurisdiction. Further, Wallis, C. J., then said. . . . . .

"Section 21 forbids any Appellate or Revisional Court to allow any objection as to the place of suing unless it was taken in the Original Court and even then unless there was a consequent failure of justice. The effect of the section, in my opinion, is that objections which the Appellate or Revisional Court is thereby precluded from allowing must be considered cured for all purposes unless taken before the passing of the decree in the original Court."

Section 21 is inapplicable in terms to the present case because issues have been settled in the mortgage-suit, and the sec-

(1) 22 Ind. Cas. 899; 37 M. 462; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251

(2) 53 Ind. Cas. 213; 42 M. 821 at p. 837; 37 M. L. J. 284; 26 M. L. T. 223; (1919) M. W. N. 640; 11 L. W. 63.

(3) 58 Ind. Cas 871; 43 M. 675; 28 M. L. T. 75; (1920) M. W. N. 460; 12 L. W. 217; 39 M. L. J. 203 (F. B.).

tion provides that any objection should be taken at or before such settlement and that no objection shall be allowed unless there has been consequent failure of justice. It is quite obvious that the objection could not in this case have been taken before or at the settlement of issues, at which date the Mayavaram Sub-Court had full territorial jurisdiction over the subject-matter in dispute. It is objected that, the transfer having been made on the 1st October, when something in the nature of an application in arrest of judgment should have been put in by the appellant on the 1st or 2nd October, before the learned Subordinate Judge delivered his order, and he not having done so, the appellant must be debarred from raising any objection now to the validity of the judgment. With this contention I agree. It has been held in the Full Bench referred to that if no objection to jurisdiction is raised on the passing of a preliminary decree on a mortgage, it cannot be raised afterwards in execution. There the reasons are based on the wording of s. 47, C. P. C., but it seems to me that the principle is that objection should be taken under s. 21 at the earliest possible opportunity, and if it is not then taken, the objector is barred from raising it afterwards. The objection further will be disallowed unless there has been a failure of justice.

The cases of *Jyoti Prokash Chatterjee* v. *Bagala Kanta Choudhury* (4) and *Vajechand Ramaji* v. *Nandram Daluram* (5) and *R.* v. *Denton* (6) were all cases of jurisdiction over subject-matter and, therefore, do not apply to the present case. As pointed out by Mookerjee, J., in the first of these cases, the distinction between territorial jurisdiction and that as to the subject-matter is fundamental.

Moreover, it was held by Phillips and Venkatasubba Rao, JJ., in the *Chokkalinga Pillai* v. *Ramasami Pillai* (7) that the principle underlying s. 21, C. P. C., is that objection to territorial jurisdiction may be waived. So here it may be said that the appellant not having taken objection to the passing of the Sub Judge's order must be held to have waived his objection to his doing so on the ground of want of jurisdiction.

As to this question, the Full Bench thought it unnecessary to deal with it, or whether the words "place of suing" were not wide enough to include objections to the place of prosecuting as well as of instituting suits. Wallis, C. J., however, with whose judgment the other members of the Court agreed, appears to me to have been inclined to the opinion that they were. This really concludes the point under discussion.

I am, therefore, of opinion that this objection ought to have been taken before the judgment was pronounced, and that no objection having been taken, the appellant must be taken to have waived all objections to the pronouncement, by the Subordinate Judge, of this order. In any case, the question is entirely technical as regards the circumstances of the present appeal and I am, for the reasons given, of opinion that the objection to the appeal under s. 21, C. P. C., must be upheld.

Moreover, I am of opinion that no failure of justice has taken place. It is, therefore, necessary to shortly consider the merits which have been argued before us at great length. The appellant argued that there was no case made out for a Receiver. I am not prepared, on a consideration of the whole of the documents filed, to come to a conclusion against that of the Subordinate Judge in this matter. The plaintiff and defendants, or at least the 1st defendant's father, have been close friends for a number of years and the friendship was apparently only broken when the question of settlement of accounts occurred between them. The defendants are rich men. The plaintiff was in management of the properties, it is said, by the defendants' consent. The plaintiff is also said to have been trusted by the 1st defendant as a man of business to look after the properties as his agent. For a number of years, the plaintiff appears to have occupied a position of trust with regard to the 1st defendant, but it is said by the latter that at the end of 1921 the plaintiff was removed from his position. If that is so, it is rather significant that the plaintiff in January 1922, appears to have paid the *kist* on the plaint land. The allegation for the plaintiff is, of course, that he was never a manager but that he was in possession in his own right. The

(4) 70 Ind. Cas. 822; 33 C. L. J. 124; (1922) A. I. R. (C.) 274.
(5) 31 B. 545; 9 Bom. L. R. 1028.
(6) (1852) 18 Q. B. 761; Dears C. C. 3; 21 L. J. M. C. 207; 17 Jur. 453; 118 E. R. 287.
(7) 87 Ind. Cas 152; 47 M. L. J. 448; (1925) A. I. R. (M.) 117.

plaintiff is not in possession of the mortgage bond on which he sues, but that is apparently in the possession of defendants' agent who was also the *Kariasthan*. The Subordinate Judge has come to the conclusion that the plaintiff ought to remain in possession until the decision of the suit. I am not prepared to say that he has exercised his discretion wrongly. I refuse to interfere with his appointment of the plaintiff as Receiver and dismiss the Civil Miscellaneous Appeal with costs.

Wallace, J.—There is no need to restate the facts of this case. The first point for decision is whether any want of jurisdiction exists. This depends on the answer to the question whether, when a particular local jurisdiction of one Court is transferred to another by notification under s. 10 or s. 11 of the Madras Civil Courts Act, such transfer carries with it automatically all pending suits and proceedings of any and every sort arising out of that local jurisdiction, so that the Court in which they were originally filed loses jurisdiction and the Court to which the local jurisdiction is transferred assumes it. This seems to be a point not free from difficulty and I can find no direct authority on it. If a Court having a particular local jurisdiction is abolished and another Court takes over that jurisdiction, it seems to me that the latter takes over all pending proceedings in the former. The principle is that only the Court, in whose local jurisdiction the suit arises, can deal with all proceedings of a civil nature in that jurisdiction, whether previously pending in other Courts or not, so if any fresh application had to be put in in a suit arising in a local jurisdiction, since transferred to another Court, the applicant would have to be guided as to the forum for his application by considering not whether the suit had been instituted in a particular Court but which Court has local jurisdiction within the local limits from which his application arises. It is difficult to see why a Court having local jurisdiction should not have jurisdiction to receive such an application, and, if it has such jurisdiction, the other Court cannot have that jurisdiction also.

As regards the cases cited before us, that of *Subbiah Naicker* v. *Ramanathan Chettiar* (1) is at least authority for the proposition that when, after an order for sale in execution was passed by one Court, the local limits of the jurisdiction of that Court were so altered that the property fell within the local limits of another Court's jurisdiction, the former Court loses its control over the execution proceedings which pass automatically to the latter Court. The case of *Subbayya* v. *Rachayya* (8) also favours the view that the Original Court, in which a suit on contract was first instituted, ceased to have jurisdiction when the place, where the contract was made, was taken away from its limits. I do not find that the Full Bench case in *Seeni Nadan* v. *Muthuswami Pillai* (2) in any way overrules this general proposition. It proceeded on the general bearing of ss. 37 and 38 of the C. P. C., which allow a decree-holder to apply for execution to the Court which passed the decree as well as to the Court having local jurisdiction, if that is a different Court. There is in that report no expression of any doubt as to the proposition that, generally and apart from the provisions of ss. 37 and 38 of the C. P. C., when the local jurisdiction has been transferred from one Court to another, pending civil proceedings in the former Court are automatically transferred to the latter; and Sadasiva Aiyar, J., held to his former view in *Subbiah Naicker* v. *Ramanathan Chettiar* (1), see his remarks in *Seeni Nadan* v. *Muthuswamy Pillai* (2):

"The fact that at a particular time the Court was competent to pass a decree for sale cannot mean that its jurisdiction to proceed further could be retained for ever."

The cases in *Srinivasa Rao* v. *Hanumantha Rao* (9) and *Mouna Guruswami Naicker* v. *Sheik Mahommadhu Rowther* (10) also support the general proposition advanced above; and also all the cases in which the power of a Court, which passed the decree, to execute it after its local jurisdiction has been transferred have been considered, for example, *Manavikraman* v. *Ananthanarayana Aiyar* (11), all of which cases assume that with the transfer of local jurisdiction the power to execute follows automatically. See also *Rajana Venkoba Rao* v. *Sastha Aiyar* (12). It is

(8) 26 Ind. Cas. 519; 37 M. 477.

(9) 65 Ind. Cas. 727; 46 M. 1; 42 M. L. J. 344; 15 L. W. 458; (1922) A. I. R. (M.) 10; (1922) M. W. N. 349; 31 M. L. T. 79.

(10) 86 Ind. Cas. 65; 46 M. 83; 16 L. W. 748; (1922) M. W. N. 743; 43 M. L. J. 713; (1923) A. I. R. (M.) 92.

(11) 79 Ind. Cas. 806; (1924) M. W. N. 38; 19 L. W. 16; 46 M. L. J. 250; (1924) A. I. R. (M.) 457.

(12) 28 Ind. Cas. 269; 2 L. W. 255; 17 M. L. T. 190.

difficult; therefore, to say that the view, that a Court must have territorial jurisdiction all through the trial of a suit before it, is an unsound one, and I am inclined, as at present advised, to the view that the transfer of local jurisdiction does automatically effect the transfer of all pending suits and proceedings arising originally from that local jurisdiction. In the present case, then, the Sub-Court, Mayavaram, lost jurisdiction over this suit and all proceedings therein on the 1st of October and had, therefore, no jurisdiction to deliver the order under revision.

The next question is whether the petitioner is estopped by force of s. 21 of the C. P. C., from raising in this Court the plea of want of jurisdiction in the Mayavaram Sub-Court. He is met by the other side by the argument that, as he did not, on the 2nd October on which date the Sub-Court passed the order in this case, object to the Sub-Court so pronouncing its order, he is precluded by s. 21 of the C. P. C., from now raising that contention. Again there is some lack of authority to guide us on this point. The nearest case on the point which I am able to trace in the Full Bench case is *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (3), where it was held, first, that s. 21 governs all cases of lack of territorial jurisdiction, secondly that it applies to execution proceedings, that is, to proceedings after the decree in a suit, and thirdly that a party cannot plead in execution that the decree under execution was passed without jurisdiction. The third point is not applicable to the present case. The answer to the second does not appear to be of much help in deciding as to the validity of applying s. 21 to proceedings in suits after issues have been framed and before decree is passed. The answer of the Full Bench was given on the narrow ground that the want of jurisdiction to pass a decree is ordinarily not open as a ground of attack on appeal or revision, and that s. 21 forbids such attack unless it was made in the Original Court and unless the want of jurisdiction led to a failure of justice. The reasoning set out at page 686 * seems to suggest that s. 21 forbids any objection as to want of territorial jurisdiction being raised on appeal or revision unless it was raised in the Original Court, that again being based on an interpretation of the phrase 'objection as to the place of suing' in the section, which was held to mean objection to the institution of the suit on the ground that the Court in which it was instituted had no jurisdiction over the property which was the subject-matter of the suit. I am not sure that the Court further held that the phrase 'institution of the suit' covered all proceedings in the suit after the institution. That the Court felt this difficulty is plain from the passage in page 687 *—

"it is unnecessary to consider whether those particular words may not be read as applying only to cases where it is possible to take the objection at or before the settlement of issues, and whether the words 'place of suing' are not wide enough to include objections to the place of prosecuting as well as of instituting suits," and the case was finally decided on the assumption that, even if s. 21 did not apply, the jurisdiction of the Court which passed the decree could not be questioned in execution, for which proposition there was direct authority. So, I find no clear guidance in this ruling as to whether s. 21 applies when, during the pendency of a suit and after the framing of issues, the local jurisdiction from which the suit arose has been transferred to another Court, and whether all proceedings in that suit after the transfer, if taken in the Original Court, would be void.

On this point I find myself most in agreement with the referring judgment of Seshagiri Aiyar, J., who points out that to hold that the phrase 'place of suing' is synonymous with territorial jurisdiction is to hold that jurisdiction may be conferred by consent or at least by silence and by refraining from objecting to it.

I consider, however, that I must follow the Full Bench ruling in so far as it lays down that s. 21 governs all cases of want of territorial jurisdiction. In that case, this plea of want of jurisdiction shall, under the section, not be entertained, unless, *inter alia*, there has been a consequent failure of justice. On the merits, I agree with my learned brother, for the reasons given by him, that the petitioner has not made out any case of failure of justice consequent on this want of jurisdiction, and I, therefore, agree that the Civil Miscellaneous Appeal must fail and be dismissed with costs.

V. N. V. *Appeal dismissed.*
N. H.

*Pages of 43 M.—[*Ed.*]

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 193 OF 1924.

February 5, 1925.

Present:—Mr. Daniels, J. C.

LALTA PRASAD—DEFENDANT—APPLICANT

versus

MAHRAJ BAHADUR—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (a) (ii)—*Suit to recover value of property misappropria d by defendant—Small Cause Court, jurisdiction of. te*

Plaintiff alleged that he gave a certain quantity of silver to the defendant to be made into bangles and that when the bangles were delivered to him he found that base metal had been substituted for silver. On the basis of this allegation he sued the defendant to recover a certain sum from him as the amount of which he had been defrauded by the defendant:

Held, that the allegations in the plaint amounted to an offence of criminal breach of trust and that the suit fell within the purview of Art. 35 (*a*) (*ii*) of Sch. II to the Provincial Small Cause Courts Act, and was, consequently, excluded from the cognizance of the Small Cause Court.

Application against the judgment and decree of the Sub-Judge, Rai Bareli, dated the 29th November 1924.

Mr. *Ali Mohammad*, for the Applicant.

Mr. *B. N. Khanna*, for the Opposite Party.

ORDER.—This revision is based on a ground which does not seem to have occurred to anybody when the case was before the Small Cause Court and which is that the allegations in the plaint amount to an offence of criminal breach of trust under Ch. XVII of the Indian Penal Code and, therefore, the jurisdiction of Small Cause Court is ousted by Art. 35 (*a*) (*ii*) of the Second Schedule to the Provincial Small Cause Courts Act. This provision was inserted in the Act by the Legislature in 1914, and is constant source of difficulty to the Courts, as it is often most difficult to say whether the allegations in the plaint do amount to a criminal offence or not. In the present case, however, the matter is clear. The plaintiff says that he gave silver to the weight of Rs. 70 to the defendant to make some bangles. When the bangles were delivered it was found that base metal had been substituted for silver, and the plaintiff in para. 6 of his plaint claims Rs. 50 as damages as the amount of which he has been defrauded by the defendant. On these allegations I must hold that the case comes within Art. 35 (*a*) (*ii*). I, therefore, set aside the decree of the Court below and direct the learned Judge of the Court below to return the plaint under O. VII, r. 10 for presentation on the regular side. As the objection is taken at a very late stage I make no order as to costs.

Z. K. *Decree set aside.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 1754 OF 1924.

July 28, 1924.

Present:—Mr. Justice Ramesam and Mr. Justice Reilly.

M. VIRUPAKSHA RAO NAIDU—PETITIONER

versus

M. RANGANAYAKI AMMAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 129, O. XLI, r. 10—Madras High Court Original Side Rules, rule 354—Original Side appeal—Security for costs.

The effect of s. 129 of the C. P. C. is that if the Rules of the High Court on the Original Side and the rules contained in the Code are inconsistent, the Rules of the High Court prevail.

Order XL, r. 10 of the C. P. C. may be read along with r. 354 of the Rules of the Madras High Court, Original Side. The effect of the two rules is that the manner of applying on the Original Side must be by notice of motion and to that extent the Original Side Rules modify the provisions in the Code. As to what the Court should do on such application, the Original Side Rules are silent.

The proviso to O. XLI, r. 10 of the C. P. C. applies to Original Side appeals.

Behram Jung v. *Haji Sultanali Shustry*, 17 Ind. Cas. 739; 37 B. 572; 14 Bom. L. R. 1106 and *Ratanchand* v. *Damji*, 73 Ind. Cas. 474; 25 Bom. L. R. 468; (1923) A. I. R. (B.) 399, distinguished.

Petition praying that, in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to direct the appellant (respondent herein) to furnish security for costs of the petitioner herein in the sum of Rs. 3,500 being the approximate amount of costs already incurred in O. S. No. 431 of 1919 and also to be incurred hereafter in O. S. A. No. 18 of 1924, preferred against the judgment of Mr. Justice Phillips, passed in the exercise of its Ordinary Original Civil Jurisdiction, in C. S. No. 431 of 1919.

Mr. *V. Radhakrishnayya*, for the Petitioner.

Mr. *K. Rajah Aiyar*, for the Respondent.

ORDER.—Section 117 of the C. P. C., provides that the provisions of the Code apply to the Original Side except when expressly excluded. Order XLI, r. 10 was not excluded in O. XLIX, r. 3. Section 129 of the Code gives the High Court the power to make rules regulating the procedure of the Original Side and nothing in the Code will *affect* such rules. The effect is that if the Rules of the High Court, Original Side, and the Code are inconsistent, the Rules prevail. Now O. XLI, r. 10 can be read along with r. 354 of the Rules of the High Court, Original Side. The manner of applying is by notice of motion and to that extent it may modify the provision in the Code, that it shall be by petition. As to what the Court should do, the Original Side Rule is silent.

We do not think that the decisions in *Behram Jung* v. *Haji Sultanali Shustry* (1) and *Ratanchand* v. *Damji* (2) help us. In Bombay there is a special rule providing for a deposit of Rs. 500 along with the appeal and it was held that the rule was inconsistent with the Code. The second decision holds that an additional security in appeal may be demanded. This can be only under the Code.

We are of opinion that the proviso to O. XLI, r. 10 applies to Original Side appeals. The amount demanded, *i.e.*, Rs. 3,500 is reasonable.

The appellant will give security for that amount within two months from this date, to the satisfaction of the Deputy Registrar, Original Side.

Costs of this petition will be costs in the cause.

V. N. V.

Z. K. *Security ordered to be furnished.*

(1) 17 Ind. Cas. 739; 37 B. 572; 14 Bom. L. R. 1106.

(2) 73 Ind. Cas. 474; 25 Bom. L. R. 468; (1923) I.A. R. (B.) 399.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 312 OF 1923.

November 28, 1924.

Present:—Mr. Dalal, J. C.

HAR BUX SINGH—PLAINTIFF—APPELLANT

versus

RAM AUTAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Sale or lease—Nature of transaction—Fraud.

Where in a suit for pre-emption the question arises as to the nature of the transaction sought to be pre-empted, the true nature of which has been mis-described, the question must be decided on the particular circumstances of the case. [p. 348, col. 1.]

A transaction is determined by the right which it confers on the transferee and not by the name with which it is labelled by the parties for a fraudulent object. [*ibid.*]

Fraud would be presumed where on the face of the document it appears that a transfer was miscalled a lease when it in reality was a sale of under-proprietary rights. [*ibid.*]

A transfer was described as a perpetual lease and the consideration for the transfer was described as *nazrana*. The transferee was, however, given the power of transfer, and indulgence was granted to him so far that he was to have his name entered in the list of under-proprietors in the village record. In a suit for pre-emption:

Held, that the transaction was really a sale of under-proprietary rights and not a lease and was consequently liable to pre-emption. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Sultanpur, dated the 30th July 1923, reversing that of the Munsif, Amethi, District Sultanpur, dated the 29th March 1923.

Mr. *Niamat Ullah*, for the Appellant.

Mr. *Radha Krishna*, for Respondent No. 1.

JUDGMENT.—The plaintiff's suit for pre-emption was decreed by the Trial Court, but on appeal by the defendant it was dismissed by the lower Appellate Court. The learned Judge of the lower Appellate Court has decided the appeal on a preliminary ground that the transaction on which the plaintiff's right is claimed is not one of sale but of a perpetual lease. Though no reference is made to any case-law it appears that the lower Court has proceeded on the reasoning of the case of *Saheb Bakhsh Singh* v. *Thakur Din Singh* (1). A Bench of this Court has subsequently set the difference of opinion at rest by the decision in the case of *Sant Bakhsh Singh* v. *Bhawani Prasad* (2). The trend of certain rulings of Single Judges of this Court had led another Single Judge to hold finally that wherever a rent was reserved over and above the proportionate Government revenue, the transaction could not be one of the transfer of under-proprietary rights. This proposition was dissented from in the Bench ruling quoted above. An under-proprietor is defined in s. 3 (8) as a person possessing a heritable and transferable right of property in land for which he is liable to pay rent. Ob-

(1) 68 Ind. Cas. 906; 9 O. L. J. 334; 4 U. P. L. R. (O.) 85; (1922) A. I. R. (O.) 229.

(2) 84 Ind. Cas. 667; 1 O. W. N. 133; 11 O. L. J. 477; (1924) A. I. R. (O.) 426; 27 O. C 243; 10 O. & A. L. R. 390; L. R. 6 A. (O.) 58.

viously then an under-proprietor may pay rent over and above the proportionate revenue payable for the property transferred to him.

Each case in a suit for pre-emption, where the true transaction is in the nature of things misdescribed, must be decided on its own circumstances. In the present case a perusal of the document leaves no doubt that an under-proprietary right is carved by a proprietor out of his full title. The transferee is given power of transfer, and the indulgence is granted to him so far that he is directed to have his name entered in the list of under-proprietors—Ch. III of the village record. The transferee is directed to pay his share of the revenue and Re. 1 *malikana* to the transferor. The learned Counsel for the respondent was not able to point to any condition discriminating this transaction from one of sale of under-proprietary right. Obviously the transfer is described as that of perpetual lease, and the price, Rs. 1,200, paid for the transfer is described as *nazrana zar-e-peshgi*, to avoid a suit for pre-emption. A transaction is known by the rights it confers on the transferee and not by the name with which it is labelled by the parties for a fraudulent object.

The respondents' learned Counsel inquired where the evidence was of fraud. In a case like the present, where pre-emption was possible, fraud would be presumed when on the face of the document it appears that the transfer was miscalled a lease when in reality it was a sale of under-proprietary rights.

I hold that the transfer in question was one of sale of the under-proprietary rights and the plaintiff was entitled to bring a suit for pre-emption. I set aside the decree of the lower Court and remand the suit to it for trial on the merits under O. XLI, r. 23. Costs here and heretofore shall abide the result.

Z. K. *Case remanded.*

LAHORE HIGH COURT.

CIVIL APPEAL No. 2349 OF 1924.

February 5, 1925.

Present:—Mr. Justice Martineu.

RAM SARUP—PLAINTIFF—APPELLANT

versus

Sheikh KHALIL-UL-RAHMAN—AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 39, 44—Composition, whether binding on creditor not entered in schedule—Cancellation of adjudication, whether amounts to discharge.

Section 39 of the Provincial Insolvency Act makes a composition binding on creditors entered in the schedule. A creditor who is not entered in the schedule and who has not consented to the composition is not bound by the composition.

Firm of Menghraj-Nevandram v. *Firm of Virbhandas-Sirumal*, 76 Ind. Cas. 250; (1924) A. I. R. (S.) 122; 17 S. L. R. 300, *Amthalal* v. *Cursetji*, 9 Bom. L. R. 466 and *Ashrafuddin* v. *Bepin Behari Mullick*, 30 C. 407, referred to.

An order cancelling an adjudication does not amount to a discharge within the meaning of s. 44 of the Provincial Insolvency Act.

Application against an order of the District Judge, Dehli, dated the 29th April 1924.

Mr. *Shamair Chand*, for the Appellant.

Lala *Sardha Ram*, R. S., for the Respondents.

JUDGMENT.—The respondents were adjudged insolvents, but the adjudication was cancelled under s. 39 of the Provincial Insolvency Act on account of their having made a composition, which was approved by the Court, with certain creditors. Afterwards the appellant, who had not consented to the composition, obtained a decree against the respondents and he applied for its execution. He was not one of the scheduled creditors, and in fact a schedule has not yet been prepared, though an order has been passed for its preparation. The Courts below have, however, held that the appellant is bound by the composition and is not entitled to execute his decree. He has filed a second appeal in this Court.

The decision of the Courts below must be reversed. Section 39 of the Provincial Insolvency Act makes the composition binding on creditors entered in the schedule, but there is no provision that it will be binding on unscheduled creditors, and in the absence of such a provision the appellant is entitled to execute his decree. See on this point *Firm of Menghraj-Nevandram* v. *Firm of Virbhandas-Sirumal* (1),

(1) 76 Ind. Cas. 250; (1924) A. I. R. (S.) 122; 17 S. L. R. 300.

Amthalal v. *Curseti* (2) and *Ashrafuddin* v. *Bepin Behari Mullick* (3).

Counsel for the respondents relies on sub-s. (2) of s. 44 of the Provincial Insolvency Act, by which, save as otherwise provided by sub-s. (1), an order of discharge releases the insolvents from all debts provable under the Act. But in this case no order of discharge has been passed. The order cancelling the adjudication is quite distinct from an order of discharge, so that s. 44 (2) does not apply.

Holding, therefore, that the appellant is entitled to execute his decree, I accept the appeal, set aside the orders of the Courts below and direct the Subordinate Judge to dispose of the application for execution according to law. The respondents will pay the appellant's costs in this Court and the lower Appellate Court.

Z. K. *Appeal accepted.*

(2) 9 Bom. L. R. 466.
(3) 30 C. 407.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1036 OF 1923.
February 11, 1925.
Present:—Mr. Justice Mukerji.
MULAY—PLAINTIFF—APPELLANT
versus
BAL GOBIND AND ANOTHER—DEFENDANTS—RESPONDENTS.

Execution of decree—Dismissal of proceedings for default, erroneous—Revival of proceedings—Sale—Private sale by judgment-debtor—Priority.

Certain property belonging to a judgment-debtor was attached in execution of a simple money decree. A sale proclamation was issued but before the sale could take place the execution proceedings were dismissed on the ground that the decree-holder had failed to pay the cost of the proclamation. But the order distinctly stated that the attachment would continue. Four days later the decree-holder again applied for execution and the Court, holding that its previous order dismissing the execution proceeding for default of the decree-holder was wrong, proceeded with the execution from the stage at which matters stood on the date of its previous order, and the property was sold in due course, being purchased by the decree-holder himself. In the meantime, that is to say, after the order passed on the second application of the decree-holder, but before the sale could be held, the defendant purchased the property from the judgment-debtor. In a suit by the decree-holder purchaser to recover possession of the property from the defendant:

Held, that the decree-holder had obtained a complete title to the property and that the defendant having purchased the property in the teeth of the orders of the Execution Court, stating that the attachment still subsisted and that the execution could proceed from the stage at which it had arrived on the date on which the proceedings were erroneously dismissed for default, had obtained no title to the property at all and that, therefore, the plaintiff's suit must succeed. [p. 350, col. 1.]

Where an execution case is dismissed for default of the decree-holder an order directing the attachment to subsist is an improper order, but it is not a nullity and is binding on the parties to it. [*ibid.*]

Muhammad Mubarak Husain v. *Sahu Bimal Prasad*, 65 Ind. Cas. 91; 20 A. L. J. 113; 44 A. 274; (1922) A. I. R. (A.) 62, followed.

Second appeal from a decree of the Subordinate Judge, Meerut, dated the 15th of March 1923.

Mr. *M. L. Sandal*, for the Appellant.

Messrs. *S. N. Sen* and *Panna Lal*, for the Respondents.

JUDGMENT.—This appeal is by the defendant and arises under the following circumstances. Respondent Bal Gobind held a simple money decree against one Kanak Singh, who has since died, and in execution of the decree Kanak Singh's property, which is now in dispute, was attached. Sale proclamation was issued but no sale was effected. On the 11th of September 1920 the Executing Court passed a certain order, the effect of which has to be considered in this appeal. The order was somewhat in the following language:

"Since the decree-holder has failed to pay the cost of *munadi* (proclamation of sale by beat of drums) the execution case be struck off as infructuous. The attachment will stand. The execution costs will be paid by the judgment-debtor."

Four days later, the decree-holder again applied for execution. The Court held that the order dismissing the execution application for default was really a wrong order because nothing whatever was to be done by the decree-holder towards the sale being effected. It, accordingly, proceeded with the execution at the stage it stood on the 11th of September 1920. While the second stage of the proceeding was being held, on the 4th of November 1920, the defendant purchased the property. The attachment effected at the instance of the decree-holder was duly followed by a sale in execution and the property was purchased by the decree-holder. The defendant in pursuance of his private purchase obtained an order for mutation of names in his favour and, therefore, the decree-holder purchaser could not obtain a mutation order in the Revenue Court. He, thereupon institut-

ed the suit for recovery of possession and mesne profits against the purchaser from the judgment-debtor.

Two points have been urged in this Court. One is that in spite of the order of learned Munsif, dated the 11th of September 1920, that the attachment should stand, it did not stand and secondly, in any case, the appellant should be allowed to retain the property by paying off the decretal amount due to the auction-purchaser as the decree-holder.

In my opinion none of the points is tenable.

Taking the second point first. It is clear that the respondent Bal Gobind obtained a complete title to the property if the attachment subsisted. In the circumstances there is no reason why he should lose the property on receiving the decretal amount.

Coming to the first point. It is not even the case that the appellant is purchaser between the two dates, *viz.*, the date of dismissal of the execution proceeding and the date of its revival. I need not express any opinion as to what would have happened if the purchase had been made between those two dates. It has been held in this Court, *vide Muhammad Mubarak Husain* v. *Sahu Bimal Prasad* (1), that an order directing the attachment to subsist in the case of a default on the part of the decree-holder would be an improper order, but it would not be a nullity and would be binding on the parties to it. This is the latest case in this Court and the learned Judge who decided it distinguished an earlier case of *Dildar Husain* v. *Sheo Narain* (2). The appellant in this case claims under one of the parties to the order, *viz.*, the judgment-debtor, and is bound not only by the order of the 11th of September 1920 but also by the order passed on the application dated the 15th of September 1920. On the same date as this application was made, that is to say on the 15th of September 1920, the Court ordered that a sale proclamation should issue. The Court evidently held that the attachment subsisted. In the teeth of these two orders it was not open to the judgment-debtor to transfer the property so as to give a person claiming under him a title, better than his own.

The result is that there is no force in this appeal and it must fail.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 65 Ind. Cas. 91; 20 A. L. J. 113; 44 A. 274; (1922) A. I. R. (A.) 62.

(2) 49 Ind. Cas. 113; 41 A. 157; 17 A. L. J. 52.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 7 OF 1924.

January 8, 1925.

Present :— Syed Wazir Hasan, A. J. C.

DURGA PRASAD—PLAINTIFF—APPELLANT

versus

AGENT, BENGAL AND NORTH WESTERN RAILWAY —DEFENDANT—RESPONDENT.

Railways Act (IX of 1890), ss. 47, 72—Rules framed under s. 47—Goods consigned for carriage—Delivery of goods, proof of—Evidence other than Railway receipt and signature in Railway books, whether admissible.

Neither s. 72 of the Railways Act nor the rules framed under s. 47 of that Act lay down any rules of evidence with regard to the proof of delivery of goods by a Railway.

The facts that a consignor is in possession of the Railway receipt in respect of goods consigned to a Railway Company for carriage and that his signature as to the receipt of those goods does not appear in the Railway books, are not conclusive evidence that the goods have not been delivered to him, inasmuch as these facts are not the only evidence which is admissible to prove delivery of the goods.

Appeal from a decree of the Additional District Judge, Gonda, dated the 28th September 1923, setting aside that of the Munsif, Utraula (at Gonda), dated the 9th October 1922.

Mr. *S. N. Sinha*, for the Appellant.

Mr. *G. N. Mukerji*, for the Respondent.

JUDGMENT.—This is the plaintiff's appeal from the decree of the Additional District Judge of Gonda, dated the 28th September 1923. The plaintiff's case was that on the 27th May 1921 he booked four parcels, three of them containing ready-made caps, with the defendant Company at the Balrampur Railway Station for being carried to Bahraich, where a fair was being held in those days. The plaintiff himself went to Bahraich by the same train which carried the parcels. On reaching Bahraich he asked for the delivery of his parcels, the receipt of which the Railway Company had granted him at Balrampur, but no delivery of his goods was ever made. He, therefore, brought the suit, out of which this appeal has arisen, for the recovery of damages for the loss of his goods. The chief plea in defence, with which I am concerned, was that the goods were delivered to the plaintiff.

The Court of first instance gave a decree to the plaintiff, holding that the plea in defence was not established.

The lower Appellate Court has come to a contrary conclusion and found on consideration of the evidence produced by the Railway Company that the Company delivered the goods to the plaintiff. This is a pure finding of fact and I see no defect in it which would justify the Court of second appeal to go behind it.

At the hearing of this appeal it was argued by the learned Counsel for the appellant that his client being in possession of the Railway receipt, and the signature as to the receipt of the goods not appearing in the Railway books, no other evidence than the receipt and such signature was admissible to prove the delivery. No law in support of the contention has been cited and I am not aware of any. Reference was made to the provisions of s. 72 of the Railways Act as well as of certain rules framed under s. 47 of the same Act. Neither s. 72 nor the rules lay down any rules of evidence in the matter of cases of the present nature or indeed with regard to any other matter.

The appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 125 OF 1924.

February 4, 1925.

Present:—Mr. Justice Stuart.

MANOHAR—DEFENDANT—APPLICANT

versus

Baba MANGAL DAS—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revenue Court, order of—Revision—High Court, power of.

The High Court has no power to interfere in revision under s. 115 of the C. P. C. or otherwise, with any order that has been passed originally, or in appeal, by a Revenue Court, or by a District Judge, in reference to questions decided under the provisions of the Agra Tenancy Act, even where a question is raised as to the jurisdiction of the District Judge to pass the order complained of.

Gaj Kumar Chander v. *Salamat Ali*, 52 Ind. Cas. 756; 42 A. 83; 17 A. L. J. 1057; 1 U. P. L. R. (A.) 142, followed.

Civil revision against an order of the District Judge, Cawnpore, dated the 29th April 1924.

Dr. Sir *T. B. Sapru*, Messrs. *P. N. Sapru* and *J. N. Chak*, for the Applicant.

Mr. *P. L. Banerji*, for the Opposite Party.

JUDGMENT.—The main question raised in these two applications in revision was whether in the particular circumstances of the revenue suit the District Judge had jurisdiction to hear the appeals. But, as a preliminary, it is necessary to decide in the first place: Has this Court any right to interfere with his order in revision?

There have been several decisions in this Court upon the latter point. The only Bench decision which has been placed before me is the decision in *Gaj Kumar Chander* v. *Salamat Ali* (1). I was a member of the Bench which passed that decision. That decision laid down that this Court has no power to interfere in revision under s. 115 of the C. P. C., or otherwise, with any order that has been passed originally or in appeal by a Revenue Court or by a District Judge in reference to questions decided under the provisions of the Tenancy Act, Local Act No. II of 1901.

Ordinarily this would conclude the matter, but it has been argued by the learned Counsel for the applicant that this decision would not affect a case in which the District Judge had patently no jurisdiction at all. It would not be proper for me to decide one way or another as to the District Judge's jurisdiction in this matter; it is enough to say that, in my opinion, the Bench ruling which I have quoted precludes me from entering into the matter.

I must, therefore, dismiss this application with costs on the higher scale.

Z. K. *Application dismissed.*

(1) 52 Ind. Cas. 756; 42 A. 83; 17 A. L. J. 1057; 1 U. P. L. R. (A.) 142.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 247 OF 1924.

November 14, 1924.

Present:—Mr. Justice Srinivasa Iyengar.

CHIDAMBARA CHETTIAR—DEFENDANT—PETITIONER

versus

PARVATHI ACHI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XIII, rr. 1, 2—Madras Civil Rules of Practice, r. 64—Petition to admit documents—Delay—Dismissal—Revision.

Rule 64 of the Madras Civil Rules of Practice requires that the Court should call upon the parties to produce the documents relied upon by them on or before a fixed date.

Where after the settlement of issues but at an early stage of the trial of a suit, the defendant applied to the Court to receive certain documents produced by him in evidence, and alleged in his affidavit in support of the petition that he was unable to find the documents earlier, and there was no counter-affidavit by the plaintiff, and the Judge summarily rejected the application on the ground that the "reasons given for non-production earlier could not be accepted:"

Held, that the order was improper and was liable to be set aside in revision by the High Court.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge, Mayavaram, dated the 29th January 1924, in I. A. No. 27 of 1924, in O. S. No. 29 of 1923.

Mr. *K. S. Jayarama Iyer*, for the Petitioner.

Mr. *C. A. Seshagiri Sastri*, for the Respondent.

JUDGMENT.—The defendant in Original Suit No. 29 of 1923 on the file of the Subordinate Judge's Court, Mayavaram is the petitioner before me. The petition is to revise the order of the Subordinate Judge dismissing his application for receiving certain documents produced by him which documents should have been produced either at the first hearing of the suit, namely, at the settlement of issues, or on or before such date thereafter as might be fixed by the Court. There are no materials before me on which I could possibly say what the practice was in this particular Court or of the particular Subordinate Judge. I am aware that the practice with regard to this matter generally varies from Court to Court and from Judge to Judge. It is possible that the Pleader who appeared for the defendant thought that some date would be fixed for the production of the documents in the possession or power of his client. It is admitted before me that the documents were not called for at the settlement of issues, nor was any date fixed on or before which the parties were required to produce the documents in their respective possession or power. Mr. Seshagiri Sastri the learned Vakil for the respondent, contends that, under O. XIII, r. (1), C. P. C., the provision in the previous Code for the Court calling for the documents has been deliberately omitted. It is, however, noteworthy that r. 64 of the Civil Rules of Practice made by this Court indicates that the documents should be called for on some date fixed by the Court for such documents being produced and left in the Court. However that may be, an affidavit was filed before the learned Judge setting out that the defendant was unable to find the documents earlier and that it was after searching the old record he was able to find the documents then produced and that, therefore, those documents should be received, the delay being excused. There was no counter-affidavit filed and all that the learned Subordinate Judge says in his order is that the reasons given for the documents not having been produced in time cannot at all be accepted. It does not appear from this order that the learned Subordinate Judge paid any attention to the nature of the documents or that his order proceeded on any consideration of the nature of the documents included in the list. I take the order to mean that the reasons set out in the affidavit, though true, are not such reasons as would amount to sufficient reason within the meaning of r. 2 of O. XIII, C. P. C. If, on the other hand, the learned Subordinate Judge meant by his order that the reasons given were not true, it seems to me there was, on the state of the evidence before him, no ground for his rejecting summarily the sworn statement made in the affidavit of the defendant. Further, the stage at which this application was made was a comparatively early stage in the suit and no prejudice whatever could possibly have been done to the other party by the documents being received. It seems to me that the learned Subordinate Judge did not pay sufficient attention to the seriousness, so far as the party was concerned, of the order he was making in rejecting so summarily the application for documents being received. As from the order it is not clear to me what the learned Subordinate Judge meant and as, in any view, I am satisfied that he ought not to have rejected the documents in the summary manner he did, I set aside the order and direct that the petition be re-heard, and, if necessary, after an opportunity being afforded to the plaintiff-respondent to show any cause having regard to the nature of the documents why the same should not be received now. There will be no costs of this petition because the petition is really due to the negligence on the part of the defendant. Each party will pay and bear his own costs here.

V. N. V. *Order set aside.*
Z. K.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 18 OF 1923.

July 2, 1924.

Present:—Mr. Kennedy, J. C., and Mr. Lobo, A. J. C.

DEWANDAS KIMATMAL—PLAINTIFF —APPELLANT

versus

KISSUMAL PAHLUMAL—DEFENDANT —RESPONDENT.

Contract Act (IX of 1872), s. 23—Excise licensee—Partnership contract, legality of.

Where a licensee for sale of intoxicating drugs takes another person as partner in the business, without obtaining the approval of the Collector, as required by the terms of the license, the partnership contract cannot be recognised by a Civil Court, as the object of the contract is illegal, being a violation of the ordinary law under which no person is allowed to sell intoxicating drugs without permission of Government.

Appeal against the judgment and decree of the Joint Judge, Sukkur, dated the 21st April 1923.

Mr. *Tahilram Maniram*, for the Appellant.

Mr. *Dipchand Chandumal*, for the Respondent.

JUDGMENT.—In this case, the Collector of Sukkur gave to one Dewandas Kimatmal a license empowering him to sell intoxicating drugs and make *majun*. Dewandas Kimatmal entered into an agreement with Keshomal Pahlajmal to conduct that business for selling intoxicating drugs and the manufacture of *majun* as his partner. A dispute arose between the partners and the plaintiff, that is to say, the licensee brought an action in the Court of the Subordinate Judge of Sukkur for settling partnership accounts. It appears that one of the terms of the partnership agreement which is not before us was that the plaintiff should employ the brother of the defendant as a servant. The plaintiff failed to do so and consequently trouble arose between the partners. The learned Subordinate Judge of Sukkur passed a preliminary decree winding up the partnership and directed a taking of the accounts but on appeal being made to the District Court of Sukkur, the learned Joint Judge of Sukkur found that the partnership agreement between the parties was illegal and, therefore, no rights accruing under that agreement could be recognised by a Civil Court and, therefore, dismissed the plaintiff's suit.

The plaintiff comes here in appeal but the matter seems to us very clear. It would seem that this partnership contemplated the commission of a series of acts which were not only contrary to the license but also contrary to the law. If you were to rest upon para. 17 of the license alone, it is possible it might be argued that although an infringement of that clause might lead to a penalty being inflicted by the Collector on an erring licensee, yet that infringement would not render an agreement of that kind illegal between the plaintiff and the defendant. But the matter goes further than that because under the ordinary law of the country no person is allowed to sell drugs except with the permission of the Collector. And it is clear that a person who enters into a partnership with the licensee in disregard of the terms of para. 17, is, as a matter of fact, entering into an agreement which makes him a person who undertakes himself to sell intoxicating drugs without the permission of the Collector. What was in contemplation between the parties was not so much the infringement of the license as a commission of an act which in consequence of the infringement of para. 17 became *ipso facto* illegal. Now, it is not the case that an infringement of an Abkari Act is an infringement of a mere fiscal or administrative regulation but it certainly verges on the commission of an act which is *malum in se*. To sell *majun* or intoxicating drugs is a matter which calls for the control of Government, and Government has very wisely laid down in its Act and rules thereunder, the classes of persons who are entrusted with the right to manufacture and sell intoxicating drugs. And it would seem improper that a Regulation which is rightly framed by Government under these powers should be allowed to be set aside and to be rendered nugatory by private and secret agreements between the authentic licensee and some third person. It is for this reason that the clause in the license requires that a licensee if he takes a partner should submit his name for approval to the Collector and until that is done the taking up of a partner is an illegal arrangement and he who enters into such an agreement must bear all consequences of violation of the substantive law.

We agree, therefore, with the lower Court that the object of the contract of partner-

ship was illegal and the Court cannot recognise a contract illegally arrived at between the parties. We, therefore, dismiss this appeal with costs.

N. H. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1430 OF 1922.

October 22, 1924.

Present:—Mr. Justice Devadoss.

GANTA DANIYELU—PLAINTIFF—APPELLANT

versus

GUNTI YESU RATNAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 102—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 28—Succession Act (X of 1865), ss. 43, 187—Suit by heir to recover share in intestate's property—Small Cause Court, jurisdiction of—Will, whether can be set up in defence—Succession—Husband's share in deceased wife's property.

Plaintiff, as the heir of his wife, brought a suit to recover a certain amount of money from the defendant. The defendant put forward a Will alleged to have been executed by the plaintiff's wife the effect of which was to defeat the plaintiff's claim to the property:

Held, that the suit fell within the purview of Art. 28 of Sch. II to the Provincial Small Cause Courts Act and was not, therefore, a suit of a nature cognizable by a Small Cause Court.

Section 187 of the Succession Act does not stand in the way of a defendant putting forward the existence of a Will in answer to a plaintiff's claim to a share in the intestate's property.

Under s. 43 of the Succession Act, a husband can only succeed to half of his wife's property in case the wife dies intestate leaving no lineal descendant. In the absence of the next-of-kin, however, the husband would be entitled to the whole of the property as his wife's heir.

Second appeal against a decree of the Court of the Subordinate Judge, Bezwada, in A. S. No. 45 of 1921, preferred against that of the Court of the District Munsif, Bezwada, in O. S. No. 272 of 1919.

Mr. *P. Somasundaram*, for the Appellant.

Mr. *V. Suryanaryana*, for the Respondent.

JUDGMENT.—A preliminary objection was taken by the respondent to this appeal. His contention is that the suit is one cognizable by a Small Cause Court, and Art. 28 of the Act does not apply to a case like this; and the amount in dispute being less than Rs. 500, the second appeal is incompetent. The plaintiff sues as the heir of his wife; and Art. 28 exempts a suit for a share of an intestate's property from the cognizance of a Small Cause Court. The contention of the respondent's Vakil is that the defendant also must claim the property of the intestate in his right as legatee or as an executor in order to bring the case under Art. 28 and relied upon *Chhedi* v. *Gulabo* (1) and *Tika Shahu* v. *Chirkat Shahu* (2). In this case the defendant does set up a Will and the Will has been found to be genuine. But the respondent's Vakil says that should not be considered, but only the plaint should be considered and that the second appeal should be held to be incompetent. I am unable to accept this contention. On the pleadings it is quite clear that the defendant did put forward the Will and it has been found to be genuine and he relies upon the Will for defeating the plaintiff's claim to the property. That being so, this is not a case which is cognizable by a Court of Small Causes. Therefore, a second appeal lies.

Mr. Somasundaram for the appellant contends that the defendant is not entitled to rely upon the Will as it has not been probated, and he relies upon s. 187 of the Indian Succession Act. Section 187 does not stand in the way of a defendant putting forward the existence of a Will in answer to the plaintiff's claim to a share in the intestate's property. Section 187 is in these terms:—"No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction (in British India) shall have granted Probate of the Will under which the right is claimed, or shall have granted Letters of Administration with the Will or with a copy of an authenticated copy of the Will annexed." What the defendant has done in this case is to contest the right of the plaintiff to a share in the intestate's property on the ground that the defendant has devised her property by a Will. The plaintiff can only succeed in case there is an intestacy, but the existence of a Will is an answer to the plaintiff's claim and, therefore, s. 187 is not a bar to the defendant putting forward the existence of a Will as an answer to the plaintiff's claim which is based upon its absence and I disallow this contention.

Both the plaintiff and his legal adviser

(1) 27 A. 622; A. W. N. (1905) 134; 2 A. L. J. 388.
(2) 27 Ind. Cas. 773; 19 C. W. N. 614.

have overlooked the fact that the husband can only claim half the deceased wife's property when she left no heir of her body. Section 43 is quite clear. No doubt in the absence of the next-of-kin, the husband would be entitled to the whole of it as her heir There is no evidence in this case that the testatrix did not leave any next-of-kin. Though this point was not raised, I am mentioning it for the purpose of drawing attention to the fact that under the Indian Succession Act the husband can only succeed to half of the wife's property in case his wife dies intestate leaving no lineal descendant.

In the result the second appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*
Z. K.

CALCUTTA HIGH COURT.

CIVIL RULE No. 36 OF 1924.
August 25, 1924.
Present:—Mr. Justice Newbould and Mr. Justice Ghose.

KANDRU HALDAR—DEFENDANT—PETITIONER
versus
TARAPRASANNA ROY CHOWDHURI AND OTHERS—PLAINTIFFS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XVI, r. 1—Application for summons made at late stage, refusal of—Duty of Court—Procedure.

The circumstance that an application for the issue of summonses on a party's witnesses is made at a late stage is no ground for refusing the application, though the Court may, when the case is heard, refuse to adjourn the hearing if the witnesses have not been served owing to the delay in making the application for summonses. Except in cases of manifest abuse of procedure, the Court has no discretion to refuse an application for summonses.

Kaji Ahmad v. *Kaji Mahamad*, 9 B. 308; 5 Ind. Dec. (N. S.) 205, and *Abdool Kadir* v. *Shaikh Abin Mirdha*, 24 W. R 290, relied on.

Rule against an order of the Court of the District Judge, Dacca.

Babus *Suresh Chandra Talukdar* and *Kiran Mohan Sarkar*, for the Petitioner.

Babu *Bhupendra Chandra Guha*, for the Opposite Party.

JUDGMENT.—The petitioner in this Rule was the defendant in a suit for rent. After several adjournments the suit was fixed for hearing on the 29th June. On that date it was again adjourned on both parties' prayer to the 26th July, and an order was recorded, "issue process to the witnesses of defendant as prayed for." The record shows that this order was a mistake. The defendant never asked for process on his witnesses on that date. What he asked was for an adjournment in order to enable him to bring his witnesses who were ill. On the 8th July, however, the defendant did file a petition asking for issue of summons on his witnesses. That petition was rejected by the Munsif as untimely filed. On the 26th July the second prayer for issue of process by the defendant was again rejected, and on the defendant's Pleader stating that he had no other instruction the suit was heard and decreed *ex parte*. The appeal to the District Judge failed on the ground that the Munsif was specially empowered under s. 153 of the Bengal Tenancy Act. The learned Judge, however, treated the appeal as an application for revision under that section and dismissed it.

We think that the Munsif acted without jurisdiction when on the 8th July 1921 he rejected the petitioner's application for summons on his witnesses. The provisions of the Code as to the issue of summons are to be found in O. XVI, C. P. C. Nowhere in that order is the Court given discretion to refuse an application which may be made by a party under r. 1 of that Order. It has been held that the circumstance that the application was made at a late stage is no ground for refusing it though the Court may, when the case is heard, refuse to adjourn the hearing. *Kaji Ahmad* v. *Kaji Mahamad* (1) and *Abdool Kadir* v. *Shaikh Abin Mirdha* (2). The question whether a Court should issue a summons or should adjourn are two entirely distinct matters. The Court has, except in cases of manifest abuse of procedure, no discretion to refuse an application for summons.

We hold, therefore, that this Rule must be made absolute, and as the order refusing

(1) 9 B. 308; 5 Ind. Dec. (N. S.) 205.
(2) 24 W. R. 290.

summons was made without jurisdiction we must also set aside the order granting the *ex parte* decree. The Rule is accordingly made absolute and the *ex parte* decree set aside, and the suit will be re-heard according to law.

The petitioner will get his costs from the opposite party in this Rule. We assess the hearing fee at one gold *mohur*.

Z. K. *Rule made absolute.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 70 OF 1923.

April 20, 1925.

Present:—Mr. Dalal, J. C., and Mr. Ashworth, A. J. C.,

MOHAMMAD GHAFOOR KHAN—PLAINTIFF—APPELLANT

versus

MEHDI HASAN KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Widow's estate—Succession, when opens—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint—Alternative case.

It cannot be laid down as a general proposition that the right of a widow of a life-estate without power of alienation must mean that the succession opened at the date of the husband's death and not at the date of the widow's death.

Where a plaintiff relies on a special custom, an amendment of the plaint setting up alternatively that he would be entitled to succeed even if the custom were not proved, should be allowed.

Appeal from a decree of the Subordinate Judge, Sultanpur, dated 22nd September 1923.

Messrs. *Niamat Ullah* and *Wasi Hasan*, for the Appellant.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff Mohammad Ghafoor Khan for possession of 1½ pies share in village Sundarwa The plaintiff claimed as a reversioner of one Ghulam Husain Khan. It was his case that the family was one of Mudarkya Chhatris, originally Hindu but converted long ago to Muhammadanism, and that succession in the family was governed by a custom which was neither a Hindu nor a Muhammadan custom. The custom set up in the plaint, paras. 4 and 6, was that on the death of a male the widow would succeed to a life-estate without any power of alienation and that on the widow's death the reversioners at the time of that widow's death would be entitled to succeed. The Subordinate Judge on the strength of a certain ruling of this Court, namely, *Farzand Ali* v. *Karim Bakhsh* (1), held that if the widow under the custom, as it described in the *wajib-ul-arz* relied upon, held a life-estate without power of alienation then it inevitably followed that upon the widow's death the estate would go not to the reversioners as they existed at the date of the widow's death but to the heirs of the husband (or their successors-in-interest) as they existed at the date of the husband's death. In appeal it is contended that the ruling referred to dealt with a *wajib-ul-arz* quite different in many respects from the *wajib-ul-arz* produced in this case, and that the ruling was no authority for the general proposition that the right of a widow of a life-estate without power of alienation must mean that the succession opened at the date of the husband's death and not at the date of the widow's death. Any such proposition does not seem tenable in view of the Privy Council ruling in the case of *Harnath Kuar* v. *Indar Bahadur Singh* (2), in which it was held that, where a widow held an estate under s. 22, cl. (5), of the Oudh Estates Act succession did not open until her death (notwithstanding that under this provision of law the widow would not have any power of alienation).

We consider that the Subordinate Judge should have proceeded to take and consider all the evidence relevant to the existence and contents of the custom set up, and as he has decided the case upon the preliminary point that the custom set up could not exist we remand the case for disposal on its merits.

It has been urged also by the appellant's learned Counsel that the Subordinate Judge should have allowed his application for amendment of the plaint, a translation of

(1) 61 Ind. Cas. 964; 8 O. L. J. 138.

(2) 71 Ind. Cas. 629; 26 O. C. 223; 9 O. L. J. 652; (1922) A. I. R. (P. C.) 403; 9 O & A. L. R. 270; 44 M. L. J. 489; 37 C. L. J. 346; 45 A. 179; 27 C. W. N. 949; 50 I. A. 69; 18 L. W. 383; 33 M. L. T. 216; 5 P. L. T. 281; 2 Pat. L. R. 237 (P. C.).

which application is printed on page 129 of the record of proceedings, Part I of the Printed Book. This application asked in effect that the plaintiff should alternatively be allowed to set up the case that he was entitled to the property claimed even if the custom, as set up, were held not to exist, and it were held that succession opened at the date of the death of Ghulam Husain Khan and not at the date of the death of the widow, *Musammat* Armani Bibi. We are of the opinion that this application should have been granted or at any rate, as the case now stands, it should be granted.

Accordingly we allow this appeal and send back the case with the above remarks for disposal by the lower Court. The costs of this appeal will abide the result of the case.

N. H. *Appeal allowed; Case remanded.*

PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL COMMISSIONER'S COURT.

February 2, 1925.

Present:—Lord Sumner, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

DHANRAJ JOHARMAL—PLAINTIFF—APPELLANT

versus

SONIBAL—DEFENDANT—RESPONDENT.

Hindu Law—Adoption of orphan, validity of—Agarwallas, views of—Evidence Act (I of 1872), s. 115—Estoppel—Religious status, whether can be established by estoppel—Privy Council appeal—Decree, whether can be objected to—Objection not taken in grounds of appeal.

Under the Hindu Law it is essential to the validity of an adoption that the adopted child should be "given" to the adopter by the father or, if he be dead, by the mother of the child. No other person has the right to give the child in adoption, nor can such right be delegated to anybody else. Therefore, a boy who has lost both his parents cannot be adopted. [p. 359, col. 1.]

Agarwallas generally adhere to Jainism and repudiate the Brahminical doctrines relating to obsequial ceremonies, the performance of *shraddh* and the offering of oblations for the salvation of the soul of the deceased, nor do they believe that a son, either by birth or by adoption, confers spiritual benefit on the father. An adoption among them is a mere temporal arrangement and has no particular spiritual object. Among them the qualifying age for adoption extends to the 32nd year; and the only ceremony consists in tying a turban round the head of the young man who is being adopted, in the presence of the principal men of the community and giving them a feast. [p. 361, col. 2; p. 362, col. 1.]

An Agarwalla Hindu purported to adopt an orphan and died shortly afterwards. His brother made representations to the effect that the adoption had taken place. Two years afterwards the brother also died. In a suit by the latter's daughter against the adopted son of her uncle to recover the property of her father, the defendant set up the plea that the plaintiff's father was estopped from challenging the defendant's adoption and that the plaintiff was consequently bound by the estoppel:

Held, that the representations of the plaintiff's father that the defendant had been adopted by his brother did not estop him or the plaintiff, who was his daughter, from challenging the validity of the adoption on the ground that the adoption being that of an orphan was invalid under the Hindu Law. [p. 358, col. 1.]

Quære:—Whether a status that rests on religious rules and religious sanctions and involves the performance of religious duties can be acquired by mere estoppel. [p. 361, col. 1.]

A litigant cannot be allowed to take exception to a decree before the Privy Council on a ground which he did not urge before the Court below and did not embody in his grounds of appeal. [p. 362, col. 2.]

Appeal from a decision of the Nagpur Judicial Commissioner's Court.

Messrs. *L. De Gruyther, K. C.*, and *S. Hyam*, for the Appellant.

Messrs. *A. M. Dunne, K. C.*, and *B. Dube*, for the Respondent.

JUDGMENT.

Mr. Ameer Ali.—This appeal arises out of a suit brought by the plaintiff, Soni Bai, in the Court of the Additional District Judge of Amraoti, in East Berar, for a declaration that she was entitled by inheritance to the estate of her father, Ramdhan Marwari, who died at Amraoti on the 24th June, 1914. She was a minor at the time and brought the suit by her guardian, her father in-law, Narain Das, as next friend.

The facts of the litigation may be stated shortly for the purposes of this judgment. Ramdhan, the plaintiff's father, resided at a place called Khanapur, Taluk Morsi, in the District of Amraoti and carried on business there; whilst his brother one Joharmal, lived in the township of Chandur Bazar, in Taluk Ellichpur, where he had a shop. Both were Agarwallas by caste.

Joharmal died in September, 1912, and the defendant Dhanraj claims to have been adopted by him some years before his death. On the death of Ramdhan in 1914, Dhanraj took possession of his estate, claiming to be entitled to Ramdhan's property as the adopted son of his brother Joharmal. There appears to have been a

proceeding under s. 145 of the Cr. P. C. with regard to the possession of certain lands belonging to Ramdhan, and by an order of the District Magistrate made on the 17th September, 1914, the defendant was put in possession of that property also.

In order to establish his right to the succession to Ramdhan's estate, in opposition to the claim of Ramdhan's rightful heir, the defendant alleged that he had been adopted in accordance with the rules prescribed by the Hindu Law and that the essential rites were duly performed. He further alleged that Joharmal and Ramdhan were joint and undivided.

The plaintiff's case, on the other hand, is that in the year 1908, when the formal adoption of Dhanraj took place, he was an orphan and as such could not be validly adopted under the Hindu Law. She further controverted the defendant's allegation that Joharmal and Ramdhan were joint. She alleged that they were separate in estate and carried on separate businesses and that consequently Dhanraj, even if he had been validly adopted, which he was not, could not claim the estate of Ramdhan. As a contradiction to the allegation of the plaintiff that in 1908, both his parents being dead, he could not be validly adopted, the defendant averred that some years before, *viz.*, in 1903, his mother, who was alive at the time, gave him in adoption to Joharmal, although the usual ceremonies and documents connected with the adoption were completed in 1908. He further contended that Ramdhan was estopped by his conduct from impugning the validity of the adoption and that, consequently, the plaintiff was affected by the same estoppel.

On these respective allegations of the parties a number of issues were framed by the Additional District Judge, three of which only need consideration, *viz.*:

(1) whether the defendant was validly adopted;

(2) whether Joharmal and Ramdhan were joint in estate; and

(3) whether the plaintiff is estopped from challenging the validity of the defendant's adoption.

It is contended on the plaintiff's behalf that, unless the defendant can establish that the "giving and taking" required by the Hindu Law took place in the lifetime of his mother in 1903, nothing which occurred in 1908 would constitute him a validly adopted son of Joharmal, or entitle him to the estate of Ramdhan even if Ramdhan and Joharmal were joint. A mass of evidence was adduced on both sides; the Additional District Judge was of opinion that the defendant had established the adoption, and accordingly dismissed the suit. On appeal, the Court of the Judicial Commissioner, after a careful analysis of the evidence, came to a totally different conclusion. They have held that the defendant had failed to prove that there was "giving and taking" as required under the Hindu Law in 1903; nor were Ramdhan and the plaintiff "estopped" from impugning the validity of the defendant's adoption. In view of the minute examination of the facts by the learned Judicial Commissioners, their Lordships are relieved of the necessity of discussing them in detail; they, therefore, propose to confine their attention to the salient features of the case.

On the 25th May, 1908, two deeds were executed, one by Joharmal in favour of the defendant, whose parental name was Ghanasham, declaring that he was being adopted by Joharmal as a son and that thenceforth he would be called Dhanraj; the other was executed by the brothers of Dhanraj, the defendant, in favour of Joharmal, declaring that they had from that day forth given their younger brother Ghanasham to Joharmal in adoption. The deed of adoption executed by Joharmal is Ex. "D. 63", and the agreement by the two brothers of Dhanraj is Ex. "D. 62".

This document "D. 62" contains the passage, "Our mother gave him in adoption just in his childhood," on which the defendant's allegation of the "giving and taking" in 1903 mainly, if not entirely, rests. The plaintiff charges that this passage is an interpolation made after its execution for the purpose of corroborating the statements of witnesses as to the "giving and taking" in the lifetime of the mother. The reasoning of the Additional District Judge on this point appears to be open to criticism; he seems to think that as the evidence of the witnesses for the defendant was "consistent" and was corroborated by the passage in question in "D. 62," their statements being thus corroborated, he was of opinion that it could not be an interpolation. Relying practically on the statement in question contained in "D. 62," in conjunction with the oral testimony, he came to the con-

clusion, as already stated, that the defendant had been validly adopted by Joharmal, and that, as Joharmal and Ramdhan were joint in estate, Dhanraj was entitled to the latter's estate.

The Judicial Commissioners consider the passage on which the Additional District Judge rested his decision, as corroborating the story of the defendant's witnesses, was an interpolation.

They also held against the defendant on the plea of estoppel. In view of their decision on the question of fact relating to the adoption they did not consider it necessary to determine whether Joharmal and Ramdhan were separate or joint.

In the appeal to His Majesty in Council, exception is taken to the conclusions of the Judicial Commissioners on both points. Firstly, it is urged that the *factum* of a valid adoption in accordance with the rules of Hindu Law is conclusively established on the evidence; and, secondly, that Ramdhan was estopped by his conduct and representations from questioning the validity of the adoption, which equally affect the plaintiff.

Admittedly, under the Hindu Law, it is essential to the validity of an adoption that the child should be "given" to the adopter by the father or, if he be dead, by the mother. No other person has the rights, nor can such right be delegated to anybody else (Mayne's Hindu Law, para. 132). Consequently, a boy who has lost both his parents cannot be adopted.

In 1908 both the parents of the defendant were dead. In order to establish his adoption as valid under the Hindu Law, he has put forward two allegations: *viz.*, that his mother before her death went actually through the formal ceremony of "giving," and that before she died she delegated the authority "to give" to his two elder brothers. If she had already given him in adoption, the subsequent delegation of authority would seem to be superfluous. Any such delegation would, however, be invalid. The defendant, therefore, had to establish that in 1903, when his mother was alive, she gave him in adoption to Joharmal, and that consequently he is vested with all the rights that appertain to an adopted son under the Hindu system.

The language of the deed of adoption, to which reference has already been made, requires careful attention. After reciting that he has no male issue and old age has approached, he goes on to say:—

I have this day taken you in adoption before the *panchas* and with the consent of your brothers. You are my kinsman and your father was my *gotraj bandhu*. Consequently, for religious purposes and with a view to perpetuate my lineage, I have taken you in adoption, performing the adoption ceremony, presenting you with the turban and giving a feast to all the *panchas*. Therefore, you have become the owner of my moveable and immoveable property from this day. You have acquired the same rights as my born son has from this day. None else than you is my heir. You have become the owner of my shop. From this day you will be named Dhanraj son of Joharmal Gargoti. May you live long! This is my sincere blessing. I have executed this deed of adoption with my free will and pleasure. It is binding against my estate and heirs. Dated the 25th May, 1908. By the pen of Bhagwant Balaji of Chandur Bazar.

It will be noticed that in this document there is no reference to the essential ceremony of "giving and taking" which, if performed, would naturally occupy the forefront of the deed. It expressly states in so many words that he (Joharmal) had taken the defendant in adoption "this day" (25th May, 1908) "before the *panchas*" (the principal members of the caste). No Brahmin or Jati (priest) is mentioned and the ceremony performed to effectuate the adoption, "presenting him with a turban and giving a feast to the *panchas*," has no connection with religious rites. The last part of the document is precise in its language and in effect :—

"You have acquired the same right as my born son from this day.....From this day you will be named Dhanraj."

The agreement executed by Kaluram and the other brother of the defendant is as follows :—

"We both and Ghanasham are three real brothers. You and we are kinsmen of the same caste. You having no male issue, we have with a view to perpetuate your line, given you in adoption our younger brother Ghanasham, 13 years of age, with our free will and pleasure this day, and having his adoption ceremony performed with our free will and consent have presented him with a turban, Ghanasham be-

ing regarded as your son has acquired the same rights as your born son would have had. He has become the owner of your moveable and immoveable property from this day. We both have ceased to have any interest whatsoever in that boy. And that boy has ceased to have any ownership to our property henceforward. The boy in question is given in adoption in the presence of you and us and the village *panchas*. Our mother gave (him) in adoption just in his childhood. From this day the boy in question is named Dhanraj, son of Joharmal, and will be so called in future also. May this family thrive.

"Our right of brotherhood to the said boy has been given up from this day. We have ceased to have any ownership whatsoever henceforward. If we set forth any right it will be null and void by virtue of this document. We have executed this agreement with our free will and consent. It is binding against our estate and heirs. Dated 25th May 1908. By the pen of Bhagwant Balaji of Chandur."

It will be noticed that it declares :—

"Ghanasham, being regarded as your son, has acquired the same rights as your born son would have had. He has become the owner of your moveable and immoveable property *from this day*. That boy has ceased to have any ownership in our property *hence forward*. The boy in question is given in adoption in the presence of you and us and the village *panchas*".

After the passage charged by the plaintiff as having been interpolated, comes the following :—

"*From this day* the boy in question is named Dhanraj, son of Joharmal, and will be so called in future also."

Then comes the following passage ;—

"Our right of brotherhood has been given up from *this day*. We have ceased to have any ownership whatsoever henceforward."

The reference in D. 62 to the giving of the boy by the mother, considering the importance of the ceremony under Hindu Law, strikes one as cursory and creates the impression that the casualness of the reference was due to its compression owing to the exigencies of space. It is in these words : "Our mother gave him in adoption just in his childhood." This solitary reference to a vitally important ceremony has been held by the Judicial Commissioners to be an interpolation. They point out that it was perfectly possible to insert this sentence immediately after the previous words. However that be, there is great force in their observation that the words alleged to be interpolated are quite inconsistent with the main purpose of, and the statement in, the documents "D. 63" and "D. 62". These two deeds in their Lordships' opinion, instead of supporting the evidence on behalf of the defendant, appear to contradict the allegation of a ceremony, and a real effective ceremony, in 1903.

Bhagwant, the writer of the two deeds, was cross-examined respecting the reason why he had omitted in "D. 63" all reference to the ceremony by the mother. His answer, in their Lordships' opinion, is most unsatisfactory. He said as follows :—

"There were two drafts. It did not strike me then that there was any difference between the actual facts and the recitals of the drafts. The recitals in the deeds were not inaccurate at the time of writing. (The recital about the name of Dhanraj starting that day is read out.) Strictly speaking there is a mistake. It is customary to write in this way that the name is changed from the date of writing, and so I did not object to it. I do not remember which of the two documents was written first. Though I knew that the boy had been actually adopted I did not insert that as it was not in the draft. I have been writing documents for the last 35 to 36 years."

Bhagwant professes to have been present at the ceremony said to have been performed in 1903. But neither Kaluram nor Chaturbai, the widow of Joharmal, who is supporting the defendant, mentions him. He is a professional "petition writer" and he gives no reason why, if he was present, no document was executed on that occasion. Another statement of his, to say the least, is extraordinary. He said, evidently in answer to a question why the ceremony of adoption was not completed in 1903 :—

"The boy was given in adoption on *Dashera* day in *Sambat* 1960, but no writing was made that day. His mother and his brothers had come there. His mother gave the boy in adoption to Joharmal. No document was written then as they wanted to wait for an auspicious year. Jowarmal executed Ex. D. 63 in my presence. Kaluram and Jowarmal (his brother) executed Ex. D. 62 in my presence."

According to him the auspicious year did not occur until 1908.

The boy's family lived at the village of Thugaon. The school register produced by the schoolmaster of that place shows that between 1903 and 1907 long after the alleged "giving and taking" he lived in his parental home in Thugaon. As the Appellate Court points out, this circumstance is wholly inconsistent with his having been adopted in 1903, when it is said he was actually made over to Joharmal. Had he been then given in adoption, he would have resided with his adopting parents, his name would have been changed, and he would have taken up his position as the adopted son of Joharmal. In the school register he is entered in his original name of Ghanasham. The question, why was he entered as Ghanasham if he had been adopted in 1903, is answered by the deeds executed on the 25th May, 1908.

The statement of Chaturbai, the widow of Joharmal, contradicts in material particulars those of Kaluram, the brother of Dhanraj. In their Lordships' opinion the oral evidence regarding an adoption in 1903 is wholly unworthy of credit.

Their Lordships agree with the Judicial Commissioners in holding that the defendant has failed to establish his allegation of the adoption in 1903.

But it has been strongly contended that Ramdhan and his heir are estopped by the provisions of s. 115 of the Indian Evidence Act (I of 1872) from questioning the adoption.

That section runs as follows:—

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

What are the "declarations, acts or omissions" of Ramdhan which are said to constitute the estoppel? It is not necessary to decide in this case whether a status that rests on religious rules and religious sanctions and involves the performance of religious duties can be established by mere estoppel. Assuming, however, that such a status can be established by applying the doctrine of equitable estoppel embodied in s. 115, so as to affect the rights of persons other than the adopter, it is necessary to consider in the first place what actually happened in 1908, and what were the acts and representations of Ramdhan which created the estoppel. He is said to have brought the boy to Chandur Bazar from his native village to have become a witness to the deed of adoption; allowed him to perform the cremation ceremony of Joharmal; and at the time of his marriage represented him to be the adopted son of Joharmal.

The parties to this litigation belong to the caste or sect of Agarwallas. These Agarwallas, as has been pointed out in the case of *Bhagwan Das Tejmal* v. *Rajmal* (1), generally adhere to Jainism and repudiate the Brahminical doctrines relating to obsequial ceremonies, the performance of *shraddh*, the offering of oblations for the salvation of the soul of the deceased, nor do they believe that a son, either by birth or by adoption, confers spiritual benefit on the father.

The Agarwallas are said to be divided into a number of sub-castes or sects. In the case of *Sheo Singh Rai* v. *Dakho* (2) in the High Court of Allahabad, which afterwards came before the Judicial Committee, and the judgment of the learned Judges was affirmed by this Board, the parties belonged to the Saraogi sub-caste. In the present case it is not clear to what sub-sect Joharmal adhered, but the evidence shows that the defendant belongs to the Sekhavati sect. The majority of the defendant's witnesses appear to be Moheshris. Whatever difference there might be between these sub-sects in the ritual of worship, there does not appear to be any in the rules relating to adoption recognised by the caste as a whole. The learned Judges, who decided in the High Court of Allahabad the case of *Musammat Dakho* (2) state the difference between the Brahminical Hindus and the Jains in the following words:—

"They differ particularly from the Brahminical Hindus in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They also regard the birth of a son as having no effect on the future state of his progenitor, and consequently adoption is a merely temporal arrangement, and has no spiritual object."

Among the Agarwallas the qualifying age for adoption extends to the 32nd year; and the only ceremony consists in

(1) 10 Bom. H. C. R. 241.
(2) 6 N. W. P. H. C. R. 382.

tying a turban round the head of the young man who is being adopted, in the presence of the principal men of the community (the *panchas*) and giving them a feast. According to the document D. 63, as well as the agreement D. 62, this was the only ceremony performed in 1908, and it is exactly the ceremony referred to in *Musammat Dakho's* case (2).

Their Lordships have no doubt on the evidence that the story about a regular Hindu or rather Brahminical adoption in 1903 was invented with the object of giving to an ordinary Agarwalla adoption, the rights of collateral succession, and with the same object the statement had been put forward that the defendant had been adopted by both brothers, Joharmal and Ramdhan, which is held to be illegal under the Hindu Law.

If the Brahminical fringe is taken off, the whole of the evidence in the present case points to a secular adoption in 1908, and so far as the representation and acts of Ramdhan are concerned, they only relate to that adoption.

This Board in the case of *Gopee Lall* v. *Sree Chundraolee Buhoojee* (3), on the question of estoppel, urged in similar circumstances, said as follows:

"It has been argued on the part of the appellant that the defendants in this case are estopped from setting up the true facts of the case, or even asserting the law in their favour, inasmuch they have represented in former suits and in various ways, by letters and by their actions, that Luchmunjee was the adopted son of Damodurjee adopted by Damodurjee's widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of Luchmunjee or the defendant on any matter of fact. They are alleged to have represented that Luchmunjee was adopted. The plaintiff's case is that Luchmunjee was in fact adopted. So far as the fact is concerned, there is no misrepresentation. It comes to no more than this that they have arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous; but that creates no estoppel whatever between the parties."

(3) 19 W. R. 12; 11 B. L. R. 391 I. A. Sup. Vol. 131; 3 Sar. P. C. J. 217 (P. C.).

A number of rulings of this Board and a decision of the Madras High Court have been referred to in support of the contention that the plaintiff is estopped. Closely examined, it will be seen that those cases relate to adoptions acquiesced in and recognised for a number of years by the person making the adoption, and the Courts considered in substance that a long course of recognition and acquiescence on the part of the person, who was best acquainted with the circumstances, gave rise to the inference that the conditions relating to the adoption were duly fulfilled. In *Dharm Kunwar* v. *Balwant Singh* (4) the estoppel was considered purely personal.

Their Lordships are in entire agreement with the ruling of the Board in *Gopee Lal's case* (3) and think that there is no substance whatever in the plea of estoppel raised by the defendant. On the whole they are of opinion that the judgment of the Court of the Judicial Commissioner is sound and that this appeal should be dismissed with costs

The appellant has, however, taken some exception to the decree made by the Appellate Court. No such objections were either embodied in the grounds of appeal or brought to the notice of the learned Judges. It was only shortly before the hearing of the appeal here that notice was given to the respondent to the effect that objections would be urged against the decree on the hearing. Their Lordships think that to allow a litigant to bring forward at this stage exceptions to a decree, which have never been urged before, is open to very grave objection. The course adopted in the present case was reprehended by the Board in the case of *Musammat Dakho* (2) already referred to, and their Lordships propose to adhere to the principle laid down there. It seems, however, necessary that the decree as framed should be put into a more practical shape in order to avoid difficulties in the Execution Court.

The plaintiff attached six schedules to her plaint. Schedule "A" sets out the amount standing to the credit of the plaintiff's mother in the books of Ramdhan including her ornaments. Schedule "B" refers to immoveable property consist-

(4) 15 Ind. Cas. 673; 39 I. A. 142 at p. 148; 16 C. W. N. 675; 9 A. L. J. 730; 14 Bom. L. R. 485; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60, 34 A. 398; 23 M. L. J. 200 (P. C.).

ing of fields, etc. Schedule "C" includes money lent on mortgages, etc.

Schedule "D" relates to outstandings on current accounts decrees, etc. Schedule "E" gives the amounts due by the plaintiff to certain specified people, and schedule "F" relates to moveable property alleged by the plaintiff to have been taken by the defendant.

The appellant in his reply denied that he took forcible or unlawful possession of the property in dispute. He did not deny the fact that he did take possession of the property. In para. 6 of his reply he denied that the property mentioned in schedule "A" was the property of the plaintiff's mother. In para. 7 he stated that he had not removed any ornaments and cash from the safe of Ramdhan. In para. 8 he stated that the ornaments pledged by Ramdhan to Kaluram belonged to the joint estate of the defendant and Ramdhan and that he was entitled to them; in para. 11 he says that the property mentioned in schedules "B," "C," "D," "E," and "F" does not belong to the plaintiff but to the defendant. Practically he admits having taken possession of all the property which the plaintiff claimed to belong to the estate of Ramdhan. In these circumstances their Lordships think that the decree should run in the following terms: —

(1) that it should be declared that the plaintiff is entitled by right of succession to the estate of her father Ramdhan;

(2) that there should be a decree for possession of the immoveable properties claimed by the plaintiff;

(3) that there should be a decree for the delivery of the ornaments and other moveable property taken possession of by the defendant;

(4) that the defendant should deliver to the plaintiff all documents of title, securities for loans such as mortgages, decrees, etc., which came into his hands as appertaining to Ramdhan's estate;

(5) that if necessary there should be an enquiry as to what was the *stridhan* property of the plaintiff's mother; an account of what is due to Kaluram on the ornaments pledged to him, and

(6) an account of the debts of, and outstandings belonging to, Ramdhan's estate realised by the defendant with liberty to the parties to apply to the Court for directions.

In case any of the debts have been barred by the wilful neglect or default of the defendant, he would necessarily be liable for those debts. For the purpose of taking these accounts and giving effect to the decree generally a Receiver should be appointed.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs, and that the amendments they have indicated should be embodied in the decree.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant. Messrs. *Barrow, Rogers & Nevill.*

Solicitor for the Respondent. Mr. *Hy. S. L. Polak.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION Nos. 169 AND 254 OF 1924.

September 26, 1924.

Present:—Mr. Justice Ramesam.

S. K. DEVASIGAMONY—PETITIONER IN C. R. P. No. 169 OF 1924 AND RESPONDENT IN C. R. P. No. 254 OF 1924

versus

M. R. SETHURATNA IYER AND ANOTHER —RESPONDENTS IN C. R. P. No. 169 OF 1924 AND PETITIONERS IN C. R. P. No. 254 OF 1924.

Madras Local Boards Act (XIV of 1920), ss. 8, 15, 56 cl. (4), 57—Taluk Board President—Absence for three months from meetings, effect of—Presidentship, whether vacated—Restoration to membership, whether operates as restoration to Presidentship—Effect on ex-officio *membership of District Board—Membership—*De facto *member—Collateral attack in election petition——Election Rules—Invalid nomination—Fresh election.*

Under the Madras Local Boards Act of 1920, a President of a Taluk Board who absents himself for 3 successive months from the meetings of the Taluk Board, not only ceases to be a member of the Taluk Board but vacates his office as President of the Board under s. 15 (1) of the Act. A restoration of him to his office as member of the Board under s. 56, cl. 4 of the Act does not operate to restore him to the office of President as well. [p. 364, cols. 1 & 2]

Symmers v. *Regem*, (1776) 2 Cowp. 489; 98 E. R. 1203, distinguished.

A President of a Taluk Board who is an *ex officio* member of a District Board under s. 8 of the Madras Local Boards Act and who subsequently ceases to be President of the Taluk Board also ceases to be a member of the District Board, and is not entitled to take part in the election of its Vice-President. [p. 366, col. 1.]

The Madras Local Boards Act does not recognise any *de facto* member as distinguished from a *de jure* member. When the Act speaks of a member, President or Vice-President, it refers to a member, President or Vice-President validly elected or appointed according to the provisions of the Act. [p. 365, col. 1.]

The effect of s. 57 of the Madras Local Boards Act and the rules framed under the Act is that, in the *case of elected members*, the validity of the election can be questioned by (1) an election petition under the rules or (2) by a petition under s. 57. In the latter case the petitioner is confined to certain grounds. The *election cannot be questioned in any other way*. In the case of a nominated member, the validity of his membership can be questioned by a petition under s. 57 on the grounds alleged in it. But there is nothing in the Act to prevent the fact of membership of a person claiming to be an *ex officio* member from being questioned collaterally in another election petition. [p. 367, col. 1.]

Where on an election petition, the nomination of one of the candidates is found to be invalid under r. 12 of the Election Rules under the Madras Local Boards Act, the Judge has a complete discretion to declare the only other candidate elected or to order a fresh election. [p. 368, col. 1.]

Petitions, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order, dated the 28th January 1924, of the Court of the Subordinate Judge, Trichinopoly, in O. P. No. 9 of 1923.

IN C. R. P. No. 169 OF 1924.

Messrs. *S. Srinivasa Iyengar*, *K. Rajah Iyer* and *V. Ramasami Iyer*, for the Petitioner.

Mr. *D. M. Krishnaswami Iyer*, for the Respondents.

IN C. R. P. No. 254 OF 1924.

Messrs. *D. M. Krishnaswami Iyer* and *R. Sitarama Iyer*, for the Petitioners.

Mr. *K. Rajah Iyer*, for the Respondent.

JUDGMENT.—The facts are simple and are not in dispute. The office of the Vice-President, District Board, Trichinopoly, fell vacant and there was a fresh election on 6th October 1923. The 2nd respondent was proposed by Dewan Bahadur Pethachi Chettiar who also voted for the candidate proposed by him. An objection was taken that the proposer was not legally a member of the District Board, but was overruled. The 2nd respondent obtained 22 votes while the 1st respondent, the rival candidate, got 21 votes. The ground on which the membership of Mr. Pethachi Chettiar is questioned may be stated thus:—Originally he was President of the Taluk Board of Karur, and as such *ex-officio* member of the District Board (s. 8 of the Act). He absented himself for three successive months (June, July and August) from the meetings of the Karur Taluk Board and under s. 56 (1) (*h*) he ceased to hold his office. When he ceased to be a member of the Taluk Board, he vacated also his office as President of the Taluk Board under s. 15 (1). Under s. 56 (4) the Taluk Board of Karur on 8th September 1923, restored him to his office as member of the Taluk Board, but thereby he was not restored to the Presidentship of the Taluk Board of Karur. He could become President of the Taluk Board of Karur only by a fresh election (s. 17). There was no such election. If he was not President of the Taluk Board of Karur, he was not *ex-officio* member of the District Board. The argument was accepted by the Sub-Judge of Trichinopoly in O. P. No. 9 of 1923, and both sides have filed revision petitions.

Mr. S. Srinivasa Iyengar who appeared for the petitioner in C. R. P. No. 169 of 1924 urged three contentions:—

(1) The first point urged by Mr. Srinivasa Iyengar is that Mr. Pethachi Chettiar was restored to his office and the effect of this restoration by the meeting of the 8th September was as if he never lost it. He relies on *Symmers* v. *Regem* (1). (See also Grant on Corporations 248). In that case the defendant's election depended on whether the votes of ten of the voters should be received. These ten voters were burgesses and for ten years acted as burgesses. There was an order of disfranchisement against them by the Common Council which proceeded on the footing that they were burgesses. But the order of disfranchisement was set aside and they were restored in pursuance of peremptory writs of mandamus. On these facts Lord Mansfield said: "But on looking into it, this is no disfranchisement, nor is there a pretence for calling it so; but it is doing that which the Common Council had not the semblance of a right to do; taking upon themselves to judge of the validity of an election ten years before, and to declare it null and void for want of a qualification at that time .....But the fact is, it is no disfranchisement at all.....But upon consideration, I think, that let the restoration come when it will, it relates to original right. It would be so in the case of a probable ground of disfranchisement. But here, there is not a probable ground: there is no colour for a removal; the act of Common Council was a mere nullity, and the restoration makes them in from the beginning." In that case, it is clear from the above extracts that the act by which the ten burgesses were said to have been disfranchised was an act of the Common Council which was a nullity. It was set aside. In such a case it was

(1) (1776) 2 Cowp. 489; 98 E. R. 1203.

rightly held that the restoration makes them in from the beginning. It is obvious that such a case can have no application to the facts before me. If, in any case of restoration, under s. 56 (4), the effect is the same as if there was no cessation and the restoration relates to the original right and restores the holder as from the beginning the words "cease to hold his office" in s. 56 become nugatory. If the object of the Legislature is to wipe out the intermediate cessation altogether, on condonation by the Board, the scheme would have been entirely different. The act would then, instead of providing for cessation of the office on the expiry of three months, would have provided for the fact being reported as in cl. (4) and then, if it is not condoned, for the cessation of the office. The scheme of the Act, as it is, provides for the cessation as the result of failure to attend. The cessation is the result of the Statute. There is no question of its being void or of its being set aside. It cannot be set aside. The Board can restore him only from the date of the order excusing his absence. An example of the opposite scheme is afforded by s. 52 of the Municipal Corporation Act (5 and 6 William IV, Ch. 76). [See *Hardwick* v. *Brown* (2)] by s. 36, sub-s. 2, of the Municipal Corporation Act, 1882 (until the Council declares the office vacant), there is no vacancy, see *Peace* v. *Lowden* (3) and *Reg.* v. *Welchpool Corporation* (4) and by s. 46, sub-ss. (6) and (7) of the Local Government Act, 1894 (*Vide* Lumley on Public Health, Vol. I, page 1031). There was, therefore, a vacancy in the office of the membership between 1st and 9th September. Mr. Pethachi Chettiar ceased also to be President of the Taluk Board on 1st September and was never re-elected President.

Mr. Srinivasa Iyengar's second contention under s. 35 of the Act is that the proposal and the voting of Mr. Pethachi Chettiar should be deemed to be valid. In the first place there is nothing in the section or any part of the Act about *de facto* or *de jure* members. When the Act speaks of a member, President or Vice-President, it refers to a member, President or Vice-President validly elected or appointed according to the provisions of the Act (ss. 7 to 19, 54 to 56). It will lead to absurd and anomalous results if it is held that, if a person who was not a member, President or Vice-President acts as a member, President or Vice-President, the acts are valid, nor does the section say so. All that the section says is that the acts of a person who is a member, President or Vice-President, shall not be questioned on certain grounds. One of the grounds is not that the person voting is not a member, President or Vice-President. In the present case, the membership of Mr. Pethachi is not questioned on the ground of any defect in the establishment of the Local Board or on the ground that he was disqualified for membership. As a matter of fact, Mr. Pethachi Chettiar was not under any disqualification (ss. 53, 55 and 56). He was perfectly qualified for the office of membership of the District Board. His acts are questioned on the ground that he was not a member of the District Board. The last cl. of s. 35 has nothing to do with the matter. That provides for the validity of the acts of Local Boards, Committees, Presidents or Vice-Presidents or Members in cases when the Board is incomplete, *i. e.*, when the Presidentship or Vice-Presidentship or a membership has fallen vacant and has not been filled up. For example, when a Board has no President, the acts of the Board, of the Vice-President or of the members are valid. Similarly, when there is no Vice-President, the acts of the Board, President or of the members are valid; also when one or more memberships are vacant the acts of the Board, the President, the Vice-President and other members are all valid. The section does not lend colour to such paradoxical propositions, as the act of the President, when there is no President, is valid or the act of a Vice-President, when there is no Vice-President, is valid; or the act of a member when he is not a member, is valid. Of course, the act of a member, when there is a vacancy in some memberships, is perfectly valid.

The present case affords an example of the application of the last clause of s. 35. On 8th September 1923, there was a meeting of the Taluk Board of Karur. It had then no President, Mr. Pethachi Chettiar, having by his absence for three months, ceased to be a member [s. 56 (1) (*h*) and ceased to be the President (s. 15 (1)]. The Board (which had no President) met. The Vice-President reported the fact that Mr. Pethachi Chettiar vacated his office as member and President. The Board restored him to his membership,

(2) (1873) 8 C. P. 406; 28 L. T. 502; 21 W. R. 639.
(3) (1899) 1 Q. B. 386; 68 L. J. Q. B. 239; 63 J. P. 56; 79 L. T. 672.
(4) (1877) 35 L. T. 594.

Section 35 provides that this act of the Board was not invalid merely because the Board has no President.

I am, therefore, of opinion that s. 35 does not help the petitioner.

Section 42 of the Municipal Corporation Act, 1882 (45 & 46 Vic. Ch. 50) resembles s. 35 and with reference to it, a similar view has been taken by Mathew and Cave, JJ., in *Nell* v. *Longbottom* (5) and in *Bland* v. *Buchanan* (6). They are cases of disqualified voters. In the present case, the voter was not a member of the Board and in my opinion this is a stronger case.

The last point urged by Mr. Srinivasa Iyengar is that the validity of the membership of Mr. Pethachi Chettiar cannot be questioned collaterally in another election petition. He first argues that proceedings ought to have been taken against Mr. Pethachi Chettiar himself under s. 57 (1) but that section cannot apply to *ex officio* members of the Board. It applies only to elected or appointed members. Section 8 of the Act shows that *ex officio* members as a class are different from elected or nominated members. Section 9 (3) provides that, for the pruposes of sub-s. (2), *ex officio* members who do not hold a salaried office under Government shall be deemed to be elected members and shows that *ex officio* members holding such office cannot be deemed to be elected members even for the purpose of calculation of proportion and must form a distinct class. For purposes other than sub-s. (2), *ex officio* members are a distant class.

Mr. Srinivasa Iyengar relies on *Symmers* v. *Regem* (1), for the point also. (See also 8 Halsbury's Laws of England, para. 355 at page 799). Lord Mansfield says "it is true, that, in general, the person elected must take upon himself to support the right and title of his electors : it is so in a variety of cases. In the election of Aldermen of the City of London, Coroners, Members of Parliament, etc. all these are bound to support the right of their electors". This is against the petitioner. Lord Mansfield then says: "But, for the sake of justice and convenience, a distinction has been made in cases where the right of election depends upon corporate franchises. There are qualifications to the exception, such as have been stated by Mr. Buller. The general question has never been fully settled, though it has been touched upon in many cases". All this is scarcely authority for the petitioner. His further remarks at page 1210* and again at page 1212* as to freemen in their corporate description have no application here. Again at page 1212* he says "in cases of elections in the City of London, certain qualifications are required at the poll: therefore, it must be seen that in some degree the candidates have that qualification," and at page 1213* he says: "Suppose a corporate body consisting of twenty-four were to add ten to their number. That would be an absolute nullity; because they never were corporators *de facto*. But the present question is, whether in a *quo warranto* against particular members, you can go into the title of other corporators *de facto*, etc."

The case before me is not one of *quo warranto* proceedings. In *Nell* v. *Longbottom* (5) and *Bland* v. *Buchanan* (6), already cited by me, the Judges were of opinion that the validity of a vote in an election petition may be questioned. It is true that Channel, J., in the later case considered the reasoning in the former inconclusive but apart from the reasoning he was of opinion that it was right. In those cases, it was not considered that the proceeding *quo warranto* were the only remedy. One of the objects of an election petition is to see if there is an improper reception or refusal of a vote. (See r. 11, cl. (c) of the Rules for conduct of inquiries G. O. No. 650). I do not see how this object is to be achieved if the validity of the vote of the right of the voter to vote is not to be examined. In my opinion, the rule makes it clear that the position of the voters can be and ought to be scrutinised. It is suggested that the Full Bench decision in *Kokku Parthasarathy Naidu* v. *Chintalchervu Koteswara Rao* (7), decides the point in favour of the petitioner; in my opinion it does not. All that was held in that case was that, where an election petition was filed and the validity of the vote of one of the members was questioned under s. 57 on grounds other than those mentioned in s. 57, the District Judge had no jurisdiction to enquire into the petition, the grounds mentioned in s. 57 not being even alleged. I stated so express-

(5) (1894) 1 Q. B. 767; 63 L. J. Q. B. 490; 10 R. 193; 70 L. T. 499

(6) (1901) 2 K. B. 75; 70 L. J. K. B. 466; 65 J. P. 404; 49 W. R. 601; 84 L. T. 390; 17 T. L. R. 348.

(7) 78 Ind. Cas. 98; 47 M. 369; 46 M. L. J. 201; 19 L. W. 402; (1924) M. W. N. 272; (1924) A. I. R. (M.) 561.

*Pages of 98 I. C.—[*Ed.*]

ly at page 380*. Waller J. said at page 381* "He cannot disqualify them save on grounds that are not applicable here." Schwabe, C. J. said "what he has jurisdiction to decide is whether a person so appointed is disqualified under s. 55 or 56 and nothing else." The rest of the sentence of Schwabe, C. J. ought to be considered in the light of the above observations. I do not think that case lays down that the validity of a vote cannot be questioned. In that case the person whose appointment as a member was in question was also the person elected as President. Rule 1 of the rules provides that except by s. 57, no election can be questioned except by an election. In the present case it is not the election of Mr. Pethachi Chettiar that is being questioned, but the fact of his membership. The effect of s. 57 and the rules is that, in the *case of elected members*, the validity of the election can be questioned by (1) an election petition under the rules or (2) by a petition under s. 57. In the latter case the petitioner is confined to certain grounds. The *election cannot be questioned in any other way.* In the case of a nominated member, the validity of his membership can be questioned by a petition under s. 57 only on the grounds alleged in it. But there is nothing in the Act to prevent the fact of the membership of a person claiming to be an *ex officio* member from being questioned. In *Forrester* v. *Norton* (8), the election of a person as Alderman and Mayor of the Borough was questioned on the ground that he was not validly re-elected a Councillor. The question whether the election as Councillor was valid was fully considered. It was found that, though he was disqualified, his election not being questioned within one year, the election became valid under s. 73 (No such provision like s. 73 exists in our Act curing the effect of a disqualification by lapse of time). The question whether the election could be valid if one year did not elapse was expressly raised by Channel, J. This case is against the petitioner's contention.. Channel, J., takes care to say: "I must not, however, be understood to say that all *de facto* Councillors are Councillors within that section". In *R.* v. *Mayor and Common Council of Bedford* (9), where the Council of a Corporation was to elect 13 Common Council men out of 25 burgesses and the 13 should elect the Mayor by a majority, the election of Mayor was held to be void on the ground that one of the 13 Council men was only a freeman and not a burgess and was not validly elected as a Council man. It is true that, in *R* v. *Mein* (10) it was held that the rule that the title of the electors is not to be brought in question by attacking the title of the person elected by them does not apply when there is no method of prosecution by which the title of the electors may be questioned in the first instance. I already held that s. 57 does not apply to *ex officio* members. Whether proceedings '*quo warranto*' lie or not is not clear and the possibility of it ought not to stand in the way of the membership being questioned having regard to all the other cases. Neither in this nor in *Nell* v. *Longbottam* (5), *Bland* v. *Buchanan* (6), was any reference made to the possibility of *quo warranto* proceedings or such possibility being an obstruction to the validity of the vote being considered. The authorities cited by either side on the question whether a Mandamus or a *quo warranto* proceedings *viz.*, (10 Halsbury 81) *R.* v. *Corporation of Bedford* (11), *R.* v. *Mayor of Chester* (12) are not relevant. I, therefore, decide that the validity of the vote of Mr. Pethachi Chettiar can be and ought to be decided in this election petition. See also Rogers on Election, page 128. The result is Civil Revision Petition No. 169 of 1924 is dismissed with costs. Pleader's fee the minimum for a civil revision petition.

Civil Revision Petition No. 254 is by the respondents in Civil Revision Petition No. 169 of 1924. The point raised by them is that there ought not to be a fresh election but that 1st respondent ought to have been declared elected. Mr. Krishnaswami Iyer relies on *Brown* v. *Benn* (13) and *Monks* v. *Jackson* (14) and *R.* v. *Hawkins* (15) and Rodgers on Elections, pages 127 and 128. These authorities support him. But here we

(8) (1911) 2 K. B. 953; 80 L. J. K. B. 1288; 105 L. T. 375; 75 J. P. 510; 9 L. G. R. 991; 55 S. J. 668; 27 T. L. R. 542.

*Pages of 47 M.—[*Ed.*]

(9) (1795) 8 Mod. 34; 88 E. R. 26.
(10) (1790) 3 T. R. 596; 100 E. R. 752.
(11) (1800) 102 E. R. 31; 1 East 79.
(12) (1855) 25 L. J. Q. B. 61; 5 El. & Bl. 531; 2 Jur. (N. S.) 114; 119 E. R. 578; 103 R. R. 603.
(13) (1889) 5 T. L. R. 247.
(14) (1876) 1 C. P. D. 683; 46 L. J. C. P. 162; 35 L. T. 95.
(15) (1808) 103 E. R. 755; 10 East 211.

are concerned not with English practice, but with our own rules. Under r. 12, the Sub-Judge has a complete discretion either to declare the only other candidate elected or to order a fresh election. Seeing that the petitioner in Civil Revision Petition No. 169 was himself qualified to be a Vice-President and he loses his election on the ground of a defect in the proposer's qualification, I think the Subordinate Judge exercises his discretion rightly. Nor will I interfere with his order as to costs. The result is Civil Revision Petition No. 254 is also dismissed with costs. Pleaders' fee minimum in a Civil Revision Petition.

V. N. V. *Petition dismissed.*

ALLAHABD HIGH COURT.

SECOND CIVIL APPEAL No. 539 OF 1923.

March 3, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

SRI LAL GOAIKA—PLAINTIFF—APPELLANT

versus

KESHO DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Benares District—Haq chaharum, *right to recover—Judgment in which right admitted, value of*—Halat dehi, *entry in, value of—Appeal, second*—Parjaut *land—Finding of fact*—Jamabandi, *entry in, value of.*

Where the question is whether the land in dispute is or is not *parjaut* land, an entry in a *jamabandi* showing that the land is *parjaut* land is admissible in evidence and is of great value. [p. 368, col. 2.]

A finding that certain land is *parjaut* land is a finding of fact and is binding on the High Court in second appeal. [*ibid.*]

The District of Benares is a permanently settled District and there was no Regular Settlement in that District in 1883, but there was a revision of Settlement in that year and in substitution for a proper *wajib-ul-arz* a document called the *halat dehi* was prepared. In addition to the record of other matters it contains a memorandum of existing customs as ascertained by Settlement Officials during the course of the Settlement operations. An entry in such a record that *haq chaharum* was realised by the proprietor of a *mahal* on sale of houses is of considerable importance in proving the existence of the custom. [p. 369, cols. 1 & 2.]

The mere fact that in a suit to recover *haq chaharum* the vendor confessed judgment and the vendee allowed the case to be decreed without contest does not establish that the judgment is of no weight as an instance in which the right to recover *haq chaharum* was held to exist. If the existence of the custom is well-known the vendor and the vendee may very well not think it worth their while to contest the case. [p. 369, col. 2.]

Second appeal from a decree of the District Judge, Benares, dated the 12th January 1923.

Messrs. *P. L. Banerji* and *Gadadhar Prasad*, for the Appellant.

Mr. *H. K. Mukerji* and *Dr. S. N. Sen*, for the Respondents.

JUDGMENT.—This is a defendant's appeal arising out of a suit for recovery of a sum of money claimed as *haq chaharam* payable on the sale of a house situated in *Patti* Kasho Das *mahal* Pirthipal Singh in the village Kashipur within the Municipal limits of the City of Benares. The plaintiff alleged that there was a custom in existence under which all houses situated on *perjaut* lands were liable to the payment of such dues. The defendant-vendee denied the existence of any such custom and also denied that the land on which the house was situated was *parjaut* land.

The Court of first instance came to the conclusion that the site was not *parjaut* land at all and that no *parjaut* had ever been paid in respect of it. It also came to the conclusion that the evidence produced by this plaintiff was totally insufficient to prove the existence of any such custom in this particular *mahal*.

On appeal the learned District Judge has reversed both the findings of the Court of first instance and come to the conclusion that the site is *perjaut* land and that the custom of *haq chaharam* is established. In the course of his finding on the question of custom he has also noted that the respondent's-defendant's Pleaders have in argument conceded that point and admitted that the finding of the lower Court against the existence of the custom is wrong.

As regards the question whether the land is or is not *parjaut* land we are of opinion that the finding of the learned District Judge is a finding of fact and cannot be challenged in second appeal. The learned Judge had before him the *jamabandi* of the year 1883 in which this was clearly recorded as *parjaut* land on which Rs. 1-8 *parjaut* was payable. There was a further fact that in the sale-deed executed by the defendant-vendor in his favour there was a clear recital that it was *parjaut* land liable to the payment of Rs. 1-8. There also appears to have been some oral evidence, *e. g.*, that of the *patwari*. It is true

that the learned District Judge when referring to the *jamabandi* has said that the Court of first instance's view that it was not properly "attested" was not intelligible. Apparently the two Courts have taken the word to mean two different things. What the Court of first instance had meant was that the document had not been witnessed by the tenants and *raiyats*, whereas the learned Judge thought that it had been duly prepared by the Settlement Officer. In any case an entry in the *jambandi* was admissible and was certainly of great value. The learned Judge had before him evidence on which he could come to a finding as to whether the land was *parjaut* land or not. His finding is a finding of fact and is binding on us.

On the question of custom although there is a finding that its existence is established, and although there is a remark that the learned Pleaders for the defendant conceded in argument the point that the finding of the lower Court was wrong, we have allowed the learned Advocate for the appellant to show us that the evidence as regards the existence of the alleged custom was really legally insufficient. The plaintiff produced several pieces of evidence in support of the alleged custom. In this first place we have the *halat dehi* which was prepared in the year 1883 in which there is a clear recital that *zemindars* of the *mahal* get a quarter share in the price on sales of miscellaneous trees standing on land without rent, groves and houses. It has been strongly urged that the *halat dehi* is of no value at all because it is not the *wajib-ul-arz* and, therefore, it cannot justify any presumption that it contains a record of a custom. We may note that the District of Benares is a permanently Settled District and that there was no Regular Settlement in 1883, but there was a revision of settlement in that year and in substitution for a proper *wajib-ul-arz* the *halat dehi* was prepared. The Settlement Officer in his report on the Survey and Revision of Records of the Benares District (1887) at page 13 has remarked that the *halat dehi* was prepared by way of a substitute for the old *wajib-ul-arz* as recommended by the Committee in 1883. The paper contains mention of the methods by which instalments of Government Revenue are paid, rents collected, cesses realised, and other matters of local interest such as rights of irrigation *et cetera*. It is also a memorandum of *existing customs ascertained by Settlement Officials* during the course of the Settlement operation. It is clear, therefore, that an entry in such a record that *haq chaharum* was realised on sales of houses is of considerable importance.

In addition to this *halat dehi*, the plaintiff has produced a number of judgments and decrees showing that such a custom was upheld by Courts with regard to the sales of houses situated in village Kashipur. Exhibits 3 and 13 are a decree and judgment in a case of 1873 with regard to a house in *Mahal* Kashipur. The learned Subordinate Judge has conceded that this *mahal* is situtated in village Kashipur. Exhibit 4 is a decree of 1894 relating to *Mahal* Kabir Chaura which also is a part of the village of Kashipur. Exhibits 5 and 12 are copies of a judgment and decree with regard to the right of *haq chaharum* in village Kashipur. They are of the year 1890. The mere fact that the vendor in that case had confessed judgment and the vendee allowed the case to be decreed without contest, doest not establish that the judgment is of no weight. If the existence of a custom is well-known the vendor and the vendee may very well not think it worth their while to contest the case. Then there is a decree of 1887 relating to *Mahal* Kashipur.

The learned Advocate for the appellant has strongly contended that leaving aside the *halat dehi* all these judgments do not prove the custom because it may very well be that a custom exists in certain *mahals* but not in the *Mahal* Pirthipal Singh in which the house is situated. But there it is not shown that in any case the Court has ever held that the custom does not exist in any part of village Kashipur, on the other hand it is established that such a custom exists in certain *mahals* of village Kashipur and it is further established that as regards *halat dehi* prepared for *Mahal* Pirthipal Singh there is an express mention of such a custom, the conclusion is irresistible. There is a further fact that in the sale-deed in favour of the defendant vendee there is a recital that the vendor has not paid any *haq chaharum* and will not be liable to pay it. That cannot amount to an admission on the party of the vendor that the right to collect *haq chaharum* does exist, but it does certainly appear that he was aware that it was likely that a claim may be made and

he wanted to make his position clear that he was not liable. Having regard to these pieces of evidence we are of opinion that there was legally sufficient evidence before the lower Appellate Court on which it could come to the conclusion that the custom had been established.

The finding that the custom exists must, therefore, be accepted. The result, therefore, is that this appeal accordingly fails and is dismissed with costs including in this Court-fees on the higher scale.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 876 OF 1921.
March 5, 1925.
Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Harrison.
HARPHUL—DEFENDANT—APPELLANT
versus
BHAG MAL—PLAINTIFF—RESPONDENT.

Custom—Gift—Collateral allowed to take possession of land with consent of other collaterals, effect of—Extinction of line of donee—Reversion of land to heirs of donors.

After the death of a proprietor his collaterals permitted one of themselves, who had married the widow of the deceased to take possession of the land belonging to the deceased, without receiving any consideration:

Held, that the transaction must be regarded as a gift by the collaterals in favour of the second husband of the widow of the deceased, and that, on the extinction of the latter's line, the property must revert to the heirs of the donors.

Appeal against a decree of the District Judge, Karnal, dated the 22nd February 1921.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—The only question for determination in this second appeal is whether the land which belonged originally to Sahib Singh, was gifted by his collaterals to Brij Ram who married Sahib Singh's widow in or about the year 1876. Now, the entry in the Settlement Record of 1880 shows that Brij Ram was allowed to take possession of the land with the consent of the collaterals of Sahib Singh, and there can be no doubt that the collaterals with the exception of Brij Ram's brothers received no *quid pro quo* for the transfer of the property. The learned District Judge has correctly set out all the circumstances relating to the transaction, and we concur in his conclusion that it cannot be regarded as anything but a gift from the point of view of the collaterals other than Brij Ram's brothers.

Now, Brij Ram's descendants have died out and the property must revert to the donors's family. We accordingly confirm the decree of the learned District Judge and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 226 OF 1924.
March 20, 1925.
Present:—Mr. Justice Boys.
FIRM BISESAR RAM-DASSI RAM
—PETITIONER
versus
FIRM HAR KISHEN-PAHLAD RAI
—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 17—"Amount due under decree," meaning of.

The words "the amount due from him under the decree" in s. 17 of the Provincial Small Cause Courts Act, mean the amount due under the decree at the date it was given and not the amount due under the decree at the time of presenting the application.

Civil revision from an order of the Judge of the Court of Small Causes at Azamgarh, dated the 20th October 1924.

Mr. *Mukhtar Ahmad*, for the Applicant.

Mr. *Shiva Prasad Sinha*, for the Opposite Party.

JUDGMENT.—In this case a decree was passed *ex parte* on the 4th of August 1924 for a sum of Rs. 174-7-9 with six per cent. interest. On the 16th of August 1924, the defendant applied for restoration under s. 17 of the Provincial Small Cause Courts Act. When he applied for restoration the defendant deposited the sum of Rs. 174-7-9, which was the amount due under the decree at the date of the decree the 4th of August 1924. The Judge of the Court of Small Causes dismissed the application for restoration on the ground that the application should have been accompanied by a deposit of the amount due from the judgment-debtor under the decree. So far he was clearly correct. But he went on to interpret these words to mean the amount entered in the decree plus the future interest at 6 per cent. from the 4th of August to the 16th of August 1924, and here by the respondent an attempt is made

to suggest that the words "at the time of presenting the application" in s. 17 govern not only the action to be taken by the applicant, namely, his making a deposit or giving security but that they govern also the words "the amount due" and that, therefore, the amount to be deposited is the amount due under the decree at the time of presenting the application. I do not think that this is so. The words "the amount due from him under the decree" are certainly capable of two interpretations and may mean "due under the decree" as entered in the decree or due under the decree at the time of presenting the application. To my mind the words mean "due under the decree at the date it was given." The case is quite different from other cases where the person who has to make a deposit must know the exact amount to a fraction of an anna which he has to deposit. In this case under s. 17 of the Provincial Small Cause Courts Act, if the Court of Small Causes is correct he would have to deposit not only the sum of Rs. 174-7-9, but would have to calculate the exact amount of interest that was due and, if in making that calculation he was subsequently found to have been short in the amount deposited by half an anna, he would, according to the view that has been taken by the lower Court, necessarily have his application rejected. I do not think that this is so, I think that in depositing Rs. 174-7-9 the defendant-applicant did all that he was called upon to do.

I, therefore, set aside the order of the lower Court and remand the case to the Court of Small Causes to restore it to its original number and dispose of it in accordance with law. Costs will follow the event.

Z. K. *Order set aside; Case remanded.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 36 OF 1924.

April 9, 1924.

Present:—Mr. Justice Daniels.

RAM LAL SINGH—PLAINTIFF—APPLICANT

versus

BEHARI SINGH—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, Sch. II, para. 15—Appeal—Reference to arbitration—Misconduct of arbitrator—Objection, decision of—Revision, whether lies.

During the pendency of an appeal the parties agreed to refer their dispute to certain arbitrators. The arbitrators made an award but the award was attacked on the ground that the arbitrators had made secret enquiries and the Court before whom the appeal was pending gave effect to the objection and entertained and decided the appeal without reference to the arbitration:

Held, that the question of the misconduct of the arbitrators having arisen for decision by the Appellate Court and the Court having jurisdiction to decide it, it could not be said that the Court had acted without jurisdiction or had acted illegally or with material irregularity in deciding the question and that, therefore, its order was not open to revision.

Appeal against an order of the Additional Subordinate Judge, Gorakhpur.

Mr. *Sankar Saran*, for the Applicant.

Mr. *S. P. Sinha*, for the Opposite Party.

JUDGMENT.—In this case a preliminary objection is taken that no revision lies. That objection is, in my opinion, well founded. While the appeal was pending in the Court below the parties agreed to refer their dispute to certain arbitrators. These arbitrators made an award. The award was attacked as vitiated by misconduct on the ground that the arbitrators made secret enquiries. It appears to have been common ground that they had made secret enquiries. The learned Subordinate Judge held that this amounted to misconduct and, therefore, entertained and decided the appeal from the Munsif's decision without reference to the arbitration. It may be that I should have come to a different conclusion on the legal question, but it cannot be said that the learned Judge acted without jurisdiction or that he acted illegally or with material irregularity in deciding a point of law which arose before him for decision and which he had jurisdiction to decide. A similar view was taken in the case of *Ganga Sahai* v. *Beldeo Singh* (1) which is practically on all fours with the present case.

I, therefore, accept the preliminary objection and dismiss the application with costs.

Z. K. *Application dismissed.*

(1) 65 Ind. Cas. 779; (1922) A. I. R. (A.) 64; 20 A. L. J. 117.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 658 OF 1922.

October 20, 1924.

Present:—Mr. Justice Srinivasa Iyengar.

SIVAGAMI AMMAL AND ANOTHER—PLAINTIFFS NOS. 2 AND 3—PETITIONERS

versus

T. S. GOPALASWAMI ODAYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 9—Suit in forma pauperis—*Death of plaintiff—Legal representative, whether can be dispaupered—"Plaintiff," whether refers to physical person—Court-fee, levy of, on dispaupered plaintiff.*

When a plaintiff in a suit instituted *in forma pauperis* dies, his executor is not liable to be dispaupered because personally he is not a pauper. [p. 372, col. 2.]

The expression 'plaintiff' in r. 9 of O. XXXIII of the C. P. C., when applied to the legal representative of a deceased pauper plaintiff refers not to the physical person before the Court but to the legal person in his representative capacity as the legal representative of the deceased pauper plaintiff. [*ibid.*]

Venkatanarasayya v. *Achemma*, 3 M. 3; 1 Ind. Dec. (N. S.) 558, *In the matter of the petition of Mary Ann Bill*, 7 M. 390; 2 Ind. Dec. (N. S.) 855, relied on.

Manaji Rajuji v. *Khandoo Baloo*, 11 Ind. Cas. 724; 36 B. 279; 13 Bom. L. R. 577, dissented from.

Perumal Koundan v. *Tirumalvayapuram Jananukoola Dhanasekhara Sanka Nidhi Ltd.*, 45 Ind. Cas. 164; 41 M. 624; 34 M. L. J. 421, referred to.

The mere fact that a right to sue *in forma pauperis* is a personal right is no reason for holding that the legal personal representative of a pauper plaintiff loses that right. [p. 374, col. 1.]

Obiter.—There is no provision in O. XXXIII of the C. P. C. giving retrospective effect to an order dispaupering a plaintiff. A dispaupered plaintiff cannot, therefore, be required to pay the Court-fee in respect of a plaint which has been by the order of the Court admitted to be filed without any fees. [p. 374, col. 2.]

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Subordinate Judge, Kumbakonam, dated the 2nd September 1922, in I. A. No. 449 of 1922, in O. S. No. 56 of 1917.

Messrs. *T. Narasimha Iyanger* and *K. S. Desikan*, for the Petitioners.

Mr. *A. V. Viswanatha Sastri*, for the Respondents.

JUDGMENT.—The question raised in this civil revision petition is of considerable importance. A suit for partition was allowed to be instituted by the plaintiff *in forma pauperis*. He died during the pendency of the suit leaving a Will and appointing two of his sisters as executrixes. On their application to be brought on the record as legal representatives, they were made plaintiffs Nos. 2 and 3 in the suit. One of the defendants in the suit would thereafter appear to have applied to the lower Court under r. 9 of O. XXXIII, to dispauper the plaintiffs so added as legal representatives and the learned Subordinate Judge directed that they should as a condition precedent to continuing the suit pay the institution fee in respect of the plaint on or before a date fixed by him. Against that order, this civil revision petition has been preferred.

The questions that arise for determination are whether, when the plaintiff in a suit instituted *in forma pauperis* dies, his executor is liable to be dispaupered because personally he is not a pauper and whether he is also liable to be called upon at that stage to pay the Court-fees payable on the institution of the suit. The learned Judge in the Court below made the order following the judgment of Mr. Justice Davar in the case of *Manaji Rajuji* v. *Khandoo Baloo* (1). It is true that that decision is a direct authority for the position. The learned Vakil for the petitioners drew my attention to the statement at page 281 of the report of the judgment in that case where the learned Judge states that it was admitted before him that if the executor had come before the Court and asked to institute the suit *in forma pauperis*, the application would necessarily have to be refused. I am unable to say why or how such an admission came to be made, and how far the decision of the learned Judge was influenced by such admission. However that may be, I cannot regard the decision as correct. The real question is whether the expression "plaintiff" in r. 9 of O. XXXIII of the C. P. C., when applied to the legal representative of a deceased pauper plaintiff refers to the physical person before the Court or the legal person in his representative capacity as the legal representative of the deceased pauper plaintiff. Under the General Clauses Act, the word "person" includes not only individual human beings but also companies or associations or bodies of individuals whether incorporated or not. As I understand the scheme of the law of procedure in this country, the word "person" indicates a juridical person. In that view, it is possible that an individual human being might by reason of his possessing several juridical capacities be susceptible of possessing a number of juridical per-

(1) 11 Ind. Cas. 724; 36 B. 279; 13 Bom. L. R. 577.

sonalities. Rule 4 of O. VII of the C. P. C., is as follows:—"Where the plaintiff sues in a representative character, the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it". Rule 5 of O. II runs as follows:—

"No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents". These provisions would clearly seem to indicate that the person contemplated even by the law of procedure is the juridical person. To hold otherwise would obviously lead to serious and inconvenient consequences. If the trustee of a pauper trust should not be allowed to sue *in forma pauperis* because he has got private means, what about the converse case of a person himself a pauper but being possessed of sufficient means as the trustee of a trust with plenty of money. Could it then be contended that because it is the same human individual that is possessed of sufficient means though in his capacity only as a trustee, he should not be allowed to sue as a pauper in respect of his own personal claims? The very expression "legal representative" clearly indicates the representative character of the person brought on the record in the place of the deceased. From r. 3 of O. XXII it would seem that it is obligatory on the Court to allow the legal representative of the deceased plaintiff to come on the record and proceed with the suit. In r. 9 of O. XXXIII, therefore, if the expression "plaintiff" should be construed as including the plaintiff's legal representative, then the means of the plaintiff can only be regarded as the means of the person who is the legal representative in his character as such legal representative.

In the case of *Bhagbut Doss* v. *Buloram Doss* (2), the learned Judges state as follows:—"There was really no necessity for inquiry whether the applicant, who claimed to be the representative of an admitted pauper, was a pauper or not. No such provision is found in Ch. V of the Civil Code. The Court, if satisfied that the appellant was the legal representative of the deceased, ought to have admitted him to carry on the suit". Justice Davar in the Bombay case, I have already referred to animadverts against this decision and states that he was unable to understand the reasoning of it. It seems to me that in that case the learned Judges only laid down that once a person is allowed to sue as a pauper and he dies, it follows necessarily that his legal representative is also a pauper in his character as such legal representative and that, therefore, no inquiry is necessary or prescribed. Again in the case of *Venkatanarasayya* v. *Achemma*, (3). Sir Charles Turner, C. J., and Mr. Justice Kindersley held that the rule of English practice which prevents a minor from instituting a suit *in forma pauperis* through his next friend unless he gives proof not only that he is himself a pauper but that the next friend also is a pauper and that he cannot get any substantial person to act as his next friend, is not to be found in or deduced from the section of the Procedure Code and that the minor may sue as a pauper by a next friend who is not a pauper. The principle to be gathered from this decision is that regard must be had to the real juridical plaintiff in the case and not to the person who may be really acting for plaintiff.

Again *In the matter of the petition of Mary Ann Bill* (4), their Lordships Sir Charles Turner, C. J., and Justice Muthuswami Iyer held that the Procedure Code while it excepts certain cases does not exclude persons holding a fiduciary character from suing *in forma pauperis* and in India where it is difficult to procure administrators, it may have been thought inexpedient to introduce the English rule. This case has been explained by Mr. Justice Davar in his judgment already referred to on the ground that in that case the administratrix was herself a pauper. It may have been so. But nevertheless when the learned Judges refer to persons holding a fiduciary character, I believe they were really referring to persons holding a representative character; and when the learned Judges refer to the difficulty of procuring administrators in India as the

(2) 3 W. R. Misc. 20.

(3) 3 M. 3; 1 Ind. Dec. (N. S.) 558.

(4) 7 M. 390; 2 Ind. Dec. (N. S.) 855.

probable reason for the Indian Legislature having thought it inexpedient to introduce the English rule in India, it seems to me that they were referring not to any inducement to paupers to accept the administratorship, but to the immunity granted to them for not being required to pay their own monies for financing the litigations in respect of the estates they might undertake to represent.

In the case of *Perumal Koundan* v. *Tirumalvayapuram Jananukoola Dhanasekhara Sanka Nidhi Ltd.*, (5). Mr. Kumaraswami Sastriar, delivering the judgment of this Court held that the liquidator of a Company though not a pauper himself may file a suit *in forma pauperis* on behalf of a pauper Company. In the course of his judgment the learned Judge referring to the case of *Manaji Rajulu* v. *Khandoo Baloo* (1) and also the case of *In the matter of the Will of Dawubi* (6) says that they were cases of executors suing and the learned Judge expressly refrains from expressing any opinion as to the correctness of the decisions.

The learned Subordinate Judge seems to have adopted the suggested distinction as final, overlooking altogether the intimation that the Court did not wish to express any opinion as to the correctness of Mr. Justice Davar's view in the Bombay case.

In *Mohammad Zaki* v. *Municipal Board of Mainpuri* (7), the Chief Justice Mr. Richards and Mr. Justice Banerjee, held that while a person suing *in forma pauperis* becomes an insolvent, the Receiver in insolvency is entitled to continue the suit *in forma pauperis* as the insolvent might have done.

The learned Vakil for the respondent referred to the case of *Farzand Ali Khan* v. *Amir Haider* (8), for the position that leave to sue *in forma pauperis* is a personal right. Undoubtedly it is so. But the mere fact that it is a personal right is no reason for holding that his legal personal representative loses that right.

I consider that the Bombay case of *Manaji Rajuju* v. *Khandoo Baloo* (1), has been wrongly decided and I prefer to follow the Madras cases already referred to by me and the undoubted principle underlying them. It may be that in the r. 9, O. XXXIII, the legal representative of the deceased plaintiff is sometimes shown to have come into possession in his character, as legal representative and out of the estate of the deceased, of sufficient means within the meaning of cl. (*b*). Then undoubtedly he too may be dispaupered even as the original plaintiff might have been.

The learned Subordinate Judge also refers to the fact that the two executrixes are also legatees under the Will. It appears that there are other legatees as well. I do not however see the relevancy of the reference to the petitioners executrixes being also legatees. It is not shown or sought to be argued that in their capacity as executrixes or legatees they are in possession of sufficient means. It follows, therefore, that the learned Subordinate Judge was wrong in dispaupering the petitioners and ordering them to pay the Court-fee payable on the plaint.

It is very doubtful whether even after a plaintiff is dispaupered, he could be required to pay the Court-fee in respect of the plaint which has been by the order of Court admitted to be filed without any fee. The right of the Court to levy Court-fees from the plaintiff in such a case would, under the procedure, laid down only be by the decree. My attention has been drawn to r. 11 of O. VII, C. P. C. I cannot consider that rule as aptly worded or ever intended to refer to the case of a dispaupered plaintiff or to any such stage in this suit. In the absence of any clear provision in O. XXXIII, giving retrospective effect to the order dispaupering, I cannot see how in reason a dispaupered plaintiff could be required to pay at a later stage what might have been demanded from him at an earlier stage had he not been allowed to proceed as a pauper. However, it is not necessary for the purpose of the present case to decide the point because I have already held that the order of the lower Court is wrong on a more fundamental ground.

I, therefore, set aside the order of the Subordinate Judge in the Court below and direct that the petitioners be allowed to continue the suit *in forma pauperis*. The respondents will pay the costs of the petitioners in this suit.

V. N. V. *Order set aside.*

(5) 45 Ind. Cas. 164; 41 M. 624: 34 M. L. J. 421.
(6) 18 B. 237; 9 Ind. Dec. (N. S.) 656.
(7) 47 Ind. Cas. 577: 16 A. L. J. 440.
(8) 26 Ind. Cas. 714; 1 O. L. J. 709; 18 O. C. 64.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 103 1924.

July 3, 1924.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Hugh Walmsley, KT.

RAM KUMAR LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Deposit of title-deeds by manager—Suit to enforce mortgage—Receiver, appointment of—Discretion of Court.

The members of a joint Hindu family, along with others, formed a limited Company. The manager of the family made a deposit of title-deeds of property belonging to the family to secure an over-draft upon the banking account of the limited Company. The adult members of the family were aware of the deposit of title-deeds and a large portion of the over-draft was used for the purposes of the joint family business. In a suit to enforce the equitable mortgage created by the deposit of the title-deeds, a Receiver was appointed in respect of the mortgaged property. On appeal:

Held, that an inference could be drawn from the circumstances under which the deposit was made that the money was raised for legal necessity and that, therefore, it could not be said that the discretion of the lower Court in appointing a Receiver was exercised wrongly or in a manner which was not judicial. [p. 376, cols. 1 & 2.]

Appeal against the decision of Mr. Justice C. C. Ghose, dated the 10th April 1924.

Messrs. *Pugh* and *S. M. Bose*, for the Appellants.

Messrs. *N. N. Sircar* and *S. C. Bose*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal by Ram Coomar Lal and others against the judgment of my learned brother Mr. Justice C. C. Ghose which was delivered on the 20th of April 1924. By that judgment the learned Judge appoined a Receiver to take charge of certain immovable properties which were referred to in the petition presented by the Chartered Bank of India, Australia and China.

It is not necessary, in my opinion, to deal in great detail with the facts of this case but the following are the facts which it is necessary to mention.

A joint Mitakshara family owned certain mica properties which I understand, are in the neighbourhood of Hazaribagh and the business was carried on in the name of Johormull Sundermull and also in the name of J. S. Mull & Co.

There was a Firm of Y. Artin & Co. the members of which were Sunder Mull, Sree Nath Pal, & Simpson. They were acting as selling agents in respect of the joint family business.

In May 1919 a Limited Company was formed, the Memorandum of Association being signed by Sundermull, Sreenath Pal & Simpson in order to take over the business of Y. Artin & Co. and that Limited Company was called J. S. Mull & Co. Ltd, and, as I understand, their course of business was that the mica was raised by those carrying on the family business and was delivered to J. S. Mull & Co. Ltd.—sometimes bought by that Company and sometimes sold by that Company on commission.

Both J. S. Mull & Co. and Y. Artin & Co. had accounts with the Chartered Bank. They were kept alive by leaving a small sum of money to the credit of each account: and a current account was opened in the name of J. S. Mull & Co. Ltd. with the Chartered Bank and that was the account which was operated upon. Advances were made from time to time by means of an overdraft on that account.

Apparently, about July 1920 the Bank required further security for the advances which they were making: and, on the 23rd of July 1920 the deeds relating to certain properties were deposited together with a letter, signed by Sundermull and directed to the Chartered Bank, and it ran as follows:—

"We send herewith conveyance for properties as per list attached with present valuations; which please hold as collateral security against your loan to Messrs. J. S. Mull & Co., Limited.

"We are arranging to deliver the other titles as promised and hope to do so shortly.

"I am agreeable to execute a security bond or mortgage on any or all of the properties in your favour whenever called upon to do.

Yours faithfully.
Sundermull.

"Properties belonging to Rai Sabib Sundermull,

	Rs.
1. No. 64-3, Cross Street ...	10,00,000
3. Nos. 2 and 3. Gobind Chunder Dhur's Lane ...	2,50,000
	12,50,000"

In addition to this there was a hypothecation letter of certain stocks of mica given on the 30th of November 1920.

It appears that the operations upon the current account of the Limited Company were brought to an end in November 1921. It is in evidence that the overdraft on the Limited Company's accounts with the Bank was largely in respect of cheques drawn by the Limited Company in favour of Johurmul Sundermull which sums, it is stated, were used for the purpose of the family business. The said amounts were alleged to aggregate the sum of Rs. 76,25,200, out of a total debit of Rs. 87, 21, 630 inclusive of interest. It was agreed on both sides that the properties of which the title-deeds were deposited, are the property of the joint family and that Sundermull was acting in his capacity as *karta* of the joint family, when he deposited the title-deeds.

It was stated in the Bank's petition that all the defendants had agreed to execute a legal mortgage and a draft was accordingly prepared, but the negotiations with regard to this mortgage fell through as the parties could not agree as to the exact amount due and on certain other points.

The suit was brought to enforce the equitable mortgage, which was created by the deposit of the title-deeds, against J. S. Mull & Co. Ld, Sundermull in his personal capacity, as well as a partner in the Firm of Johormull Surdermull, and also as a *karta* of the joint family carrying on the joint family business, Ram Coomar, who is the brother of Sundermull, and the sons of Sundermull and of Ram Coomar.

The argument of the learned Counsel for the appellant, stated shortly, was, that in this case there is a dispute as to whether Sundermull as *karta* of the family had authority to pledge the title-deeds of the properties in question, and there being a dispute as to that point, it was not right for the learned Judge to appoint a Receiver.

In my opinion there are facts from which an inference may *prima facie* be drawn that the adult members of the joint family were aware of the deposit of the title-deeds by Sundermull and that although the overdraft was upon the banking account of the Limited Company, it may be inferred that the money, or at all events a large portion thereof, was used for the purpose of the joint family business.

That being so, there is some evidence that the deposit of the title-deeds by the *karta* of the family for the object of raising money for the abovementioned purposes was caused by legal necessity.

The result is that in my judgment it cannot be said that the learned Judge's discretion in appointing a Receiver was exercised wrongly or in a manner which was not judicial.

I desire to make it clear that I am giving no decision upon the points, which Mr. Pugh argued on behalf of the appellants in this appeal. If the suit comes to trial it may be that these questions will have to be investigated and decided.

We are now merely dealing with an interlocutory application in respect of the appointment of a Receiver and upon evidence, which is contained solely in affidavits.

For these reasons, I am of opinion that the appeal should be dismissed with costs.

Walmsley, J.—I agree.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 322 OF 1922.

October 30, 1924.

Present:—Mr. Justice Devadoss.

AVASARALA VENKATA RAO AND OTHERS —DEFENDANTS NOS. 7 TO 9, 14 TO 16, 31, 17 TO 20, 22, 24 TO 26 AND 28 TO 30—APPELLANTS

versus

AVASARALA MANGO RAO AND OTHERS —PLAINTIFF, DEFENDANTS NOS. 1 TO 5, LEGAL REPRESENTATIVE OF DEFENDANT NO. 7 AND DEFENDANTS NOS. 10 TO 12—RESPONDENTS.

Inam—Karnam *service* inam—*Enfranchisement*—Patta, *grant of, to occupants of land, effect of—Subsequent delivery of possession to office-holder—Title, divesting of.*

Enfranchisement of a service *inam* confers full title on the grantee whether or not he was the actual holder of the office at the time of the enfranchisement. [p. 378, col. 2.]

Where at the time of enfranchisement, the actual holder of the office is refused the *patta* which is ordered to be issued in the names of persons in actual occupation of the *inam* land, the enfranchisement must be held to enure to the benefit not of the office-holder but of the grantees of the *patta*. [p. 379, col. 2.]

Venkata Jagannadha v. *Veerabhadrayya*, 61 Ind. Cas. 667; 44 M. 643; 41 M. L. J. 1; 34 C. L. J. 16; 14 L. W. 59; (1921) M. W. N. 401; 30 M. L. T. 14; 26 C. W. N. 302; (1922) A. I. R. (P. C.) 96; 48 I. A. 244 (P. C.), distinguished.

Venkata v. *Rama*, 8 M. 249 at p. 262; 9 Ind. Jur. 185; 3 Ind. Dec. (N. S.) 172, *Venkatarayadu* v. *Venkataramayya*, 15 M. 284; 5 Ind. Dec. (N. S.) 549, *Tariya Gowdu* v. *Vonamo Gowdu*, 22 M. 204; 8 Ind. Dec. (N. S.) 146, *Dharanipragada Durgamma* v. *Kadambari Virragu*, 21 M. 47; 7 M. L. J. 233; 7 Ind. Dec. (N. S.) 389 and *Gourikantam* v. *Ramamurthy*, 80 Ind. Cas. 557; 46 M. L. J. 482 at p. 490; 34 M. L. T. 234; 19 L. W. 663; (1924) M. W. N. 565; (1924) A. I. R. (M.) 783, relied on.

It is immaterial in such a case that after the enfranchisement proceedings are over, the holder of the office obtains possession of the lands. Such possession does not operate to divest a title which has been conferred by the grant of the *inam patta*. [p. 380, col. 2; p. 381, col. 1.]

Lakshminarasimham v. *Venkataratnayamma*, 70 Ind. Cas. 642; 30 M. L. T. 334, dissented from.

S. A. No. 287 and 288 of 1921, *Gourikantam* v. *Ramamurthy*, 80 Ind. Cas. 557; 46 M. L. J. 482 at p. 490; 34 M. L. T. 234; 19 L. W. 663; (1924) M. W. N. 565; (1924) A. I. R. (M.) 783, and *Sankara Subbayyar* v. *Ramasami Ayyangar*, 20 M. 454; 7 Ind. Dec. (N. S.) 321, relied on.

Second appeal against a decree of the District Court, Godavari, dated the 16th April 1921, in Appeal Suits Nos. 15 and 25 of 1919, preferred against that of the Court of the Subordinate Judge, Cocanada, in Original Suit No. 16 of 1917.

Messrs. *D. Apparao* and *B. Somayya*, for the Appellants.

Messrs. *G. Lakshmanna* and *A. Satyanarayana*, for the Respondents.

JUDGMENT.—Plaintiff and defendants Nos. 1 to 31 are the descendants of five brothers. The plaintiff represents one branch, defendants Nos. 1 to 6 another branch; defendants Nos. 7 to 9 the third branch, defendants Nos. 10 to 12 the fourth branch and defendants Nos. 13 to 21 the fifth branch. The plaintiff's suit is for partition of his share of the family property. The plaint property was *karnam* service *inam* and was enfranchised in 1903 and *inam* title deeds were issued in 1904.

Defendants Nos. 1 to 9 pleaded that 40 acres odd were not joint family property and the plaintiff could not claim a share of it. Defendants Nos. 13 to 31 pleaded that 23 acres and odd were their separate property and the rest of the property, about 40 acres odd, was joint family property and they, as representing the fifth branch, were entitled to one-fifth share.

The Subordinate Judge granted a preliminary decree for partition in favour of the plaintiff for one-fifth of the plaint property. Against that decree defendants Nos. 7, 8, and 9 preferred one appeal and defendants Nos. 13 to 16, 31, 17 to 22 and 24 to 30 preferred another appeal. The District Judge dismissed both the appeals and affirmed the judgment of the Subordinate Judge. The defendants have preferred this appeal, and evidently defendants Nos. 1 to 9 and 13 to 31 have made common cause against the plaintiff.

The first contention urged by Mr. Somayya for the appellant is that the enfranchisement was for the benefit of the *karnam*, and the other members of the family had no interest in the plaint property. At the time of the enfranchisement, the *karnam's* office was held by Venugopal Rao under whom the defendants Nos. 13 to 31 claim. The argument of Mr. Somayya is that Venugopal Rao was *karnam* at the time of the enfranchisement, and the enfranchisement must, therefore, be for his benefit, and the *inam* lands enfranchised became his private property, and he strongly relies upon the rent decision in *Venkata Jagannadha* v. *Veerabhadrayya* (1). What really happened in this case was Venugopal Rao was appointed *karnam* in the place of his father. He brought a suit S. S. No. 47 of 1902, for recovery of the *inam* property attached to the office of *karnam* against the relations and a decree was passed in his favour for possession of 3 *puttis* and 19 *tooms*, *vide* Ex. 1. This decree was affirmed on appeal by the Collector of Godavari District on 14th January 1904, *vide*, Ex. 1. Before the appeal was disposed of proceedings for the enfranchisement of the *karnam's inam* were started and the Inam Deputy Collector passed proceedings on 2nd August 1903 and directed that Inam title deed should be issued in the names of the persons who were actually in possession of the land constituting the *karnam's inam*, *vide* Ex. II. Venugopal Rao who was given a decree for possession of 3 *putties* and 19 *tooms* was unable to get possession of what was decreed to him, by reason of the issue of an injunction in a suit by some of the defendants against the delivery of the property to him. The Inam Deputy Collector in his proceedings did not order *patta* in the name of Venugopal Rao. He ordered *patta* to be issued only in the names of persons then in actual occupation of the

(1) 61 Ind. Cas. 667; 44 M. 643; 41 M. L. J. 1; 34 C. L. J. 16; 14 L. W. 59; (1921) M. W. N. 401; 30 M. L. T. 14; 26 C. W. N. 302; (1922) A. I. R. (P. C.) 96; 48 I. A. 244 (P. C.).

inam land. His father Kama Razu was in possession of some of the *inam* lands and his name was included in the *inam patta*. If the enfranchisement was for the benefit of the *karnam* then in office, no doubt, Venugopal Rao would have been entitled to the whole of the enfranchised land. But the Inam Deputy Collector for reasons which are not quite clear, directed *patta* to be issued only in the names of persons in actual occupation, and he even included the name of one Ammachi Lakshmamma, the widow of one of the members of the family on the ground that she had an interest in the *inam* property. In *Venkata Jagannadha* v. *Veerabhadrayya* (1) it was decided that when land is enfranchised and *patta* is issued in the name of a *karnam*, the enfranchised *inam* land becomes his private property and the members of his family have no right to it. The decision, therefore, has no application to the facts of the present case. If the enfranchisement was in the name of Venugopal Rao, the other members of the family could not claim a share of the property. The enfranchisement is not in his name but in the names of the other members of the family. The contention that the enfranchisement was to enure for the benefit of the *karnam* in office at the time of the enfranchisement receives no support from the decision in *Venkata Jagannadha* v. *Veerabhadrayya* (1). On the other hand their Lordships lay considerable emphasis on the fact that the *inam patta* should not be treated as a mere formality, but should be treated as giving title to the property to the person in whose name the *inam patta* is granted. They observe at p. 655* "when accordingly, on the 21st March 1906, the title-deed already quoted was granted by way of an *inam* to the appellant's father and was in express words confirmed 'to him, his representatives and assigns, to hold or dispose of as he or they think proper,'" the Board is of opinion that that enfranchisement must be given full effect to and that it is not subject to be eviscerated or altered by the claim for partition or division put forward in the present suit." This decision overrules the decision in *Gumaiyan* v. *Kumakshi Ayyra* (2) and the cases which follow that case. Their Lordships approve of the Full Bench decision in *Venkata* v. *Rama* (3) in which it was held that the enfranchisement of the service *inam* in favour of the holder of the office for the time being though he had no hereditary title to the office, enured for his benefit, and his title was not liable to be defeated at the suit of the hereditary office-holder who was able to evict him from the office. The principle of the decision is that the land which is given to a village officer is Government land and the village officer is only entitled to the emoluments or income from the land so long as he holds the office. Whether the office be hereditary or not, the service *inam* land is only attached to the office and if the office happens to be held by any person whether with or without hereditary right to it, the enfranchisement in his favour confers an absolute title on him. His relations who on his demise or on his dismissal would succeed to the office could not claim the enfranchised land as belonging to the family of which the *karnam* is a member. It follows, therefore, that the Government has an undoubted right to enfranchise the *inam* in favour of any person and no one has a right to question it. No doubt according to *inam* rules the enfranchisement is made in favour of the person holding the office. But that would not give a right to the other members of the family to a share in the land so enfranchised in favour of the holder of the office. *Vide* decision in *Venkatarayudu* v. *Venkataramayya* (4).

In this case rightly or wrongly the Inam Commissioner declined to issue *inam patta* in the name of Venugopal Rao who was the holder of the office of *karnam* at the time of the enfranchisement proceedings, and though he was aware of the fact that Venugopal Rao had obtained a decree for possession of the *inam* land yet he declined to make out a *patta* in his name unless he executed the decree within two months. The two months having expired and the decree not having been executed the Deputy Collector proceeded to order *pattas* according to possession. The *inam pattas*, therefore, conferred title on the persons in whose names the *pattas* were issued. In *Tariya Gawdu* v. *Vonamo Gowdu* (5) *pattahs* were issued in the name of the members of the family of hereditary office holders although only one of them was the actual office holder. It was held that such a grant was not illegal. The learned Judges observe at page

(2) 26 M. 339.

(3) 8 M. 249 at p. 262; 9 Ind. Jur. 185; 3 Ind Dec. N. S.) 172.

*Page of 44 M.—[*Ed.*]

(4) 15 M. 284; 5 Ind. Dec. (N. S.) 549.

(5) 22 M. 204; 8 Ind. Dec. (N. S.) 146.

206* "we cannot find any legal foundation for the view which appears to be held by the two lower Courts that if on enfranchisement the Government grants a portion of the *inam* lands to a man who, although a member of the family of the hereditary office-holders was not himself actually in office at the time of enfranchisement, such a grant is illegal, and must be set aside by a Civil Court." This case is against the contention of the appellants that the grant enured for the benefit of Venugopal Rao. In *Dharanipragada Durgamma* v. *Kodambari Virragu* (6) the lands constituting the emoluments of the office of the *karnam* were enfranchised in favour of a widow who had been in possession since the death of her deceased husband which took place about 18 years previously. They were subsequently sold by her. The Court held that the reversioners could not dispute the alienation. With regard to the Full Bench ruling in *Venkata* v. *Rama* (3) the learned Judges observe: "that decision proceeded on the broad ground that the plaintiff did not hold the office of *karnam* at the time of the enfranchisement and, therefore, had no title to sue for the lands and that the land when enfranchised was at the disposal of Government and alienable to whomsoever the Government pleased." In this case, as I have already observed, the Inam Commission rightly or wrongly refused to grant *inam patta* in the name of Venugopal Rao who was the *karnam* in office and who had obtained a decree for the possession of the *inam* land, and it must, therefore, be taken that the enfranchisement in the names of the persons mentioned in Ex. II enured not for the benefit of the *karnam* but for the benefit of the persons in whose name the *pattas* were made out. That the *inam patta* gives a good title is clear from a recent decision of a Bench of this Court in S. A. Nos. 287 and 288 of 1921. In that case Sir William Ayling, J. obsrves as follows: "I think the judgment of the Privy Council" [meaning *Venkata Jagannadha* v. *Veerabhadrayya* (1)] amounts to stating that the grant of a title deed at enfranchisement of a service *inam* (unlike the case of personal *inam*) does confer a new title and that for this reason it cannot be questioned by other members of his family." This decision was followed in a recent case by Wallace, J., in *Gourikantam* v. *Rammaurthy* (7). He observes at p. 490*: "Since, however, I hold that enfranchisement is a clear and unequivocal resumption by the Government of the land and re-grant to whomsoever it pleases, it follows that, unless, Government had at the time of the resumption no right to resume, the 1st defendant has no case." It is unnecessary to decide in this case whether there was an actual resumption by the Government of the service *inam* or not. It is sufficient for the purpose of this case to hold that the Government enfranchised the *inam* land which it had absolute power to dispose of, in favour of the persons in whose names *pattas* were issued by the Inam Commissioner. The first contention, therefore, that the enfranchisement in 1903 was for the benefit of Venugopal Rao, the *karnam* then in office, is not sustainable.

The second contention is that the decree in S. A. No. 47 of 1902 was for the whole of the *karnam's inam* which measured about 63 acres and owing to some miscalculation only 23 acres were delivered to the plaintiff Venugopal Rao. It is argued that the whole of the land having been decreed to Venugopal Rao, the others had no right to the land and, therefore, it must be taken that Venugopal Rao was in possession of the whole of the land and the enfranchisement proceedings were for his benefit. It is unnecessary to consider this point in detail in view of my decision on the third point.

The next point urged by Mr. Somayya is that the defendants Nos. 13 to 31 are entitled to 23 acres. This contention is based on the fact that subsequent to the *inam* proceedings the decree in S. A. No. 47 of 1902 was executed by Venugopal Rao and he got actual possession of 23 acres. He no doubt got possession of 23 acres by virtue of his being the *karnam* in office. But unfortunately for him the enfranchisement proceedings were over before he got possession, and the *inam pattas* had been issued or ordered to be issued. According to the proceedings of the Inam Deputy Collector, Ex. II, persons who were actually then in possession were granted *pattas*. And he says: "Venugopal Rao decree-holder in the Summary Suit referred to above admits that he has himself no pos-

(6) 21 M. 47; 7 M. L. J. 233; 7 Ind. Dec. (N. S.) 389.

*Page of 22 M.—[*Ed.*]

(7) 80 Ind. Cas. 557; 46 M. L. J. 482 at p. 490; 34 M. L. T. 234; 19 L. W. 663; (1924) M. W. N. 565; (1924) A. I. R. (M.) 783.

*Page of 46 M. L. J.—[*Ed.*]

session, but he says that the Virayala people do not hold a half share in it, but he has not proved it, and besides he has nothing to do with the land not being one in possession." The argument for the appellant is that 23 acres odd had become the property of Venugopal Rao, and that the enfranchisement proceedings could not take away that right, and he relies upon the decision in *Lakshminarasimham* v. *Venkataratnayamma* (8). In that case Spencer and Ramesam, JJ., held "the fact that the Government enfranchised a *karnam* service *inam* and issued title deed in the name of a person, did not of itself confer a title on such person and the *inam* title deeds could create no title where no title existed before." Mr. Justice Spencer observes at page 335*: "On this point I am of opinion that the language of their Lordships should not be strained too far so as to make it apply to circumstances which were not before them. To say that *inam* title-deeds created a title where no title existed before, would be to disregard the provisions of Madras Act VIII of 1869 which expressly state that 'nothing contained in any title-deed shall be deemed to define, limit, infringe or destroy the rights of any description of holders or occupiers of the lands from which any *inam* is derived' or 'affect the interests of any person other than the *inam* holder named in the title-deed, and nothing contained in Madras Act IV of 1862 or in Madras Act IV of 1866 shall be deemed to confer on any *inam* holder any right to land which he would not otherwise possess.'" Mr. Justice Ramesam observes at p. 336*: "The judgment of their Lordships of the Privy Council in *Venkata Jagannadha* v. *Veerabadhrayya* (1) cannot be used as an authority for the proposition that the *inam* title-deed is conclusive as to the persons in whose favour enfranchisement is to operate." If this decision is good law no doubt the appellant's contention could prevail. But Mr. Justice Ayling and Mr. Justice Odgers have dissented from the view of Mr. Justice Spencer and Mr. Justice Ramesam in the case already referred to, S. A. Nos. 287 and 288 of 1921: and Mr. Justice Wallace also dissents from this view in *Gouri Kantam* v. *Ramamurthy* (7). The view of Spencer and Ramesam, JJ., is opposed to the decision in *Sankara Subbayyar* v. *Ramasmi Ayyangar* (9), where the facts were; *inam* lands constituting the emoluments of the office of Nattamgar were enfranchised in favour of the plaintiff and defendant separately. In November 1890 the defendant was informed that a *patta* for half of the lands would be issued in his name, and it was so issued on the following May. In April 1891 (after the resolution to enfranchise the land was come to) the plaintiff was appointed to be the sole *Nattamgar* and he sued in 1894 for the cancellation of the enfranchisement *patta* issued to the defendant, and for the issue of a *patta* in his own name in respect of the lands compromised therein and for possession of the lands. The Court held that the plaintiff was not entitled to the relief sought. The learned Judges observe at page 456*: "We think that the enfranchisement of half of the land in second defendant's name was in accordance with the principle accepted in the Full Bench case [*Venkata* v. *Rama* (3)] referred to by the District Judge, inasmuch as the right of the 2nd defendant, established by the suit under Regulation VI of 1831, was never subsequently set aside or even disowned by the Revenue Authorities. The appointment of the plaintiff as sole *Nattamgar* in April 1891 was never intended to affect the right of the 2nd defendant to the moiety of the lands. It was merely an act of policy on the part of the Government for the more convenient discharge of the duties of the office and could only affect the right of the 2nd defendant from the date of such appointment. We do not think it would be reasonable, nor is there any authority for holding that the plaintiff's appointment in April 1891 should have effect retrospectively so as to divest the second defendant of the right which had vested in him by the prior order to enfranchise half the lands in his name." The order for enfranchisement was passed before Venugopal Rao got possession of the lands. His subsequent possession cannot divest the title which was created by the grant of *inam patta* in favour of the persons then in possession of the lands. If the subsequent appointment of the plaintiff in *Sankara Subbayyar* v. *Ramasami Ayyangar* (9), could not divest the title of the 2nd defendant in that suit which had vested in him, it is difficult to see how the getting

(8) 70 Ind. Cas. 642; 30 M. L. T. 334.

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(9) 20 M. 454; 7 Ind. Dec. (N.S.) 321.

*Page of 20 M.—[*Ed.*]

possession of the land in execution of the decree in the summary suit could divest a title which had been conferred by the grant of the *inam patta*. In this view Nenugopal Rao and his descendants could not claim exclusive title to the 23 acres in their possession. They do not attempt to set up adverse possession for more than 60 years against the Government, and granted that they could get prescriptive title against the plaintiff, they have not proved that they were in possession for more than 12 years before the date of suit. As a matter of fact their possession was only subsequent to 1905 and the suit was filed in 1917.

In the result the second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

PATNA HIGH COURT.

CIVIL REVISION No. 2 OF 1925.

March 17, 1925.

Present:—Mr. Justice Kalwant Sahay.

SURAJ NARAIN MISSER AND OTHERS —PETITIONERS

versus

HARDOWAR SINGH AND OTHERS— OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 90—Execution of decree—Sale of non-transferable occupancy holding—Purchaser of portion of holding, whether can apply to set aside sale—Collusion —Sale set aside—Revision.

A purchaser without the landlord's consent of a portion of a non-transferable occupancy holding has an interest in the holding sufficient to entitle him to apply after an execution sale of the holding, as a representative of the tenant, to have the sale of the holding set aside under O. XXI, r. 90 of the C. P. C. on the ground of fraud. [p. 381, col. 2.]

Dayamoyi v. *Ananda Mohan Roy Chowdhuri*, 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52, relied on.

Mahadeo Lal v. *Langat Singh*, 40 Ind. Cas. 257; 2 P. L. J. 457; 1 Pat. L. W. 504; (1917) Pat. 169, distinguished.

Where a Court finds that there was collusion between the judgment-debtor and the decree-holder, and that there was a material irregularity in the sale proclamation, and that the value of the property as stated in the sale proclamation was grossly inadequate, and that the price fetched at the sale was also inadequate, it has jurisdiction to set aside the sale and its order cannot be questioned in revision. [p. 382, col. 1.]

Application against an order of the District Judge, Monghyr, dated the 31st October 1924, reversing that of the Munsif, Monghyr, dated the 6th April 1923.

Messrs. *Abani Bhusan Mukerjee* and *B. C. Dey*, for the Petitioners.

Messrs. *N. N. Sinha* and *B. P. Sinha*, for the Opposite Party.

JUDGMENT.—The petitioners obtained a rent decree and in execution, thereof proceeded to sell the holding. The sale took place on the 25th of October, 1922 and the petitioners themselves were the purchasers. On the 30th October, 1922 an application was made by the opposite party for setting aside the sale under the provisions of O. XXI, r. 90 of the C. P. C. The opposite party are the purchasers of a portion of the holding from the original tenant by a private sale.

The Munsif before whom the application was made dismissed the application for setting aside the sale. On appeal the learned District Judge has allowed the application and has set aside the sale. Against this order of the learned District Judge on appeal the petitioners have come up in revision to this Court.

The first point taken by the learned Vakil for the petitioner, is that the application under O. XXI, r. 90 of the C. P. C. was not maintainable at the instance of the opposite party inasmuch as they were the purchasers of a portion of a non-transferable occupancy holding and, therefore, they were not persons whose interests were affected by the sale. This question does not appear to have been raised either in the Trial Court or in the Court of Appeal below. There is no allegation in the application for revision filed in this Court to the effect that the holding was a non-transferable occupancy holding and it is too late for the petitioners to raise this point for the first time in revision in this Court. It raises question not only of law, but also of fact and, as the question was not raised in the Court below, it cannot be entertained for the first time in the present application in revision. Reliance has been placed by the larned Vakil for the petitioners on the decision of the Special Bench in *Mahadeo Lal* v. *Langat Singh* (1), but that was a case which depended on the construction of s. 170, cl. (3) of the Bengal Tenancy Act and not on the construction of the provisions of O. XXI, r. 90 of the C. P. C. The learned Chief Justice in the course of his judgment in

(1) 40 Ind. Cas. 257; 2 P. L. J. 457; 1 Pat. L. W. 504; (1917) Pat. 169.

that case at page 459* observed as follows:—

"Both sides have in this case admitted the correctness of the propositions laid down by the Full Bench in *Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (2), and it may be conceded that, as held in that case, a purchaser without the landlord's consent of a part of a non-transferable occupancy holding has an interest in the holding sufficient to entitle him to apply after an execution sale, as a representative of the *raiyat*, to have the sale of the holding set aside on the ground of fraud, but the question which we have to decide is whether such a person has an interest in the holding 'voidable on the sale' within the meaning of s. 170 of the Act."

This decision of the Special Bench, therefore, cannot be of any help to the petitioners in the present case.

The next point taken is that it being found by the learned District Judge in concurrence with the Trial Court that the sale proclamation was duly served and that the processes were not suppressed, the mere finding that the price fetched at the sale was inadequate was not sufficient in law to entitle the learnd Judge to set aside the sale. Now the learned Judge has found that there was collusion between the judgment-debtors and the decree-holders, that there had been material irregularity in the sale proclamation, that the value of the property as stated in the sale proclamation was grossly inadequate, and that the price fetched at the sale was also inadequate. On those findings the learned District Judge was perfectly competent to set aside the sale. There is no question of want of jurisdiction involved in the present case; and this application must be dismissed with costs. Hearing fee two gold *mohurs*.

Z. K. *Rule discharged.*

(2) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52.

*Page of 2 P. L. J.—[*Ed.*]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1691 OF 1922.

November 13, 1924.

Present:—Mr. Justice Ramesam.

DORAISWAMI MUDALIAR AND ANOTHER—DEFENDANT No. 3—APPELLANTS

versus

M. DORAISWAMI IYENGAR AND OTHERS—PLAINTIFFS AND DEFENDANT No. 2—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 130—Assignment of debt, what constitutes—Words of transfer, absence of—Assignment of part of debt, validity of—Notice to debtor, whether assignment—Evidence Act (I of 1872), s. 91—Stamp Act (II of 1899), s. 35—Unstamped transfer deed—Secondary evidence, admissibility of.

To constitute a valid assignment of a debt under s. 130 of the Transfer of Property Act there must be words of transfer in the instrument which must be executed in favour of the assignment and such assignment must be of the whole debt and not merely of a part of the debt. [p. 386, col. 1.]

A notice to the debtor not containing words of transfer nor referring to a transfer does not amount to an instrument of transfer. [p. 383, col. 2.]

For a document to operate as an equitable assignment, the fund out of which the payment is to be made should be specified and if no fund is specified the order does not operate as an equitable assignment. [p. 385, col. 2.]

The word 'absolute' in s. 130, Transfer of Property Act, is used in contrast to the expression 'by way of security' and has nothing to do with the question whether the assignment is of the whole debt or of a part thereof. An assignment may be of the whole debt by way of security though when the security is worked out, a part only may suffice. [p. 386, cols. 1 & 2.]

No secondary evidence can be given of the contents of a letter of assignment of a debt which is admitted to have been unstamped. [p. 383, col. 1.]

Raja of Bobbili v. *Inuganti China Sitaramasami Garu*, 23 M. 49; 4 C. W. N. 117; 26 I. A. 262; 7 Sar. P. C. J. 597; 8 Ind. Dec. (N. S.) 428 (P. C.), followed.

Second appeal against a decree of the District Court, North Arcot, at Vellore, in Appeal Suit No. 102 of 1921, preferred against that of the Court of the District Munsif, Vellore, in Original Suit No. 531 of 1919.

Mr. *C. V. Anantakrishna Iyer*, for the Appellant.

Mr. *L. A. Govinda Raghava Iyer*, for the Respondents.

JUDGMENT.—The facts of this second appeal may be briefly stated. The 2nd defendant is a contractor who entered into a building contract in respect of the Vellore Municipal Hospital Works with the P. W. Department. By September 1914, a sum of Rs. 2,156-8-1 was due to him. At that time he owed Rs. 1,600 to the 3rd defendant. When the 3rd defendant demand-

ed the payment of his debts, he executed certain letters intending (I assume this in favour of 3rd defendant) to transfer Rs. 1,600 out of the amount due to him from the P. W. D. In December 1914, he owed Rs. 6,750 to the plaintiffs and intending to transfer the whole of the said amount, he executed similar letters. The documents that came into existence in September and December respectively may be shown in a tabular form as follows:—

	3rd Defendant dated 22nd September 1914.	Plaintiffs, dated 10th December 1914.
2nd defendant to assignee	Letter not exhibited.	Exhibit C.
2nd defendant to the Executive Engineer ...	I	„ E.
Assignee to Executive Engineer ...	III	„ D.
Reply by Executive Engineer to Assignee ...	II	Endorsement on D.

From the above table, it is seen that, on each occasion, the scheme was the same, consisting of (1) a letter from assignor to assignee *as an instrument of transfer*, (2) a letter from assignor to Executive Engineer being the notice intended by s. 130 of the Transfer of Property Act. The letter of transfer to the 3rd defendant though referred to in Ex. III is not forthcoming. It is admitted to be unstamped (D. W. No. 1) and no secondary evidence can be given of its contents [*Raja of Bobbili* v. *Inuganti China Sitaramasami Garu* (1).] In the written statement of 3rd defendant, it was alleged (paras. 3 and 5), "When the 2nd defendant was demanded payment, he gave this defendant a letter of authority asking him to draw Rs. 1,600 from the amount due to him for the Pentland Hospital Works and also he sent a letter to the Executive Engineer, North Arcot, asking him to pay the said amount to this defendant. This was on or about the 22nd September 1914. The alleged assignment referred to in para. 4 (plaint) is a fraud and not sustainable in law when the 2nd defendant had already given *a letter of assignment* to this defendant to draw the amount, referred to in para. 3 of this statement." It is, therefore, clear, that the only assignment to the 3rd defendant pleaded by him is the letter addressed to him, of which no secondary evidence can be given. As the assignment to 3rd defendant cannot be proved, it follows that there is no assignment in his favour and the appeal must fail on this ground. Mr. Anantakrishna Iyer contends that, apart from the assignment intended by the missing letter, Ex. I only is enough to prove an assignment. In the first place, this is opposed to the pleadings in which the letter of 22nd September 1914 other than Ex. I was described as the letter of assignment and the plea cannot be allowed to be raised. In the second place, to allow the plea to be raised is an evasion of s. 91 of the Evidence Act and of the Stamp Law and the principle of the ruling in *Raja of Bobbili* v. *Inuganti China Sitaramasami Garu* (1). A perusal of Exs. I and III only or of even I alone leaves in one's mind the impression that something like a transfer was intended. It is so easy to infer the transfer but to allow such an inference to be made and to give effect to it is to allow secondary evidence of the letter of assignment to be given.

For the sake of argument, I will leave these two considerations aside and consider the question whether Ex. I by itself amounts to an assignment. In my opinion, if the matter is dealt with, apart from the English decisions to be considered lower down, it does not. There must be words of transfer in the instrument. A notice to the debtor not containing words of transfer nor referring to a transfer is not an instrument of transfer. Otherwise every order of payment is a transfer. Every cheque or bill of exchange is a transfer. In the first place one would expect that an instrument of transfer should, in general, be an instrument executed in favour of the assignee. I say 'in general,' for there is the well recognized exception of a transfer effected by an endorsement on the bond or other paper evidencing the debt sought to be transferred. The case in *Rama Iyen* v. *Venkatachellam Pattar* (2) is an example. So also is the decision in *Harding* v. *Harding* (3). In civilised communities, such an endorsement ordering the debtor to pay, has been always considered as a transfer—an idea borrowed from the law and practice of Ne-

(1) 23 M. 49; 4 C. W. N. 117; 26 I. A. 262; 7 Sar. P. C. J. 597; 8 Ind. Dec. (N. S.) 428. (P. C.).

(2) 30 M. 75; 1 M. L. T. 329; 16 M. L. J. 554.

(3) (1886) 17 Q. B. D. 442; 55 L. J. Q. B. 462; 34 W. R. 775.

gotiable Instruments—and the intention is given effect to by recognizing the endorsement as a transfer. But, apart from such cases, I would expect an instrument of transfer to be addressed to the assignee. The settlement of accounts containing the entry in *Seetharama Ayyar* v. *Narayanaswami Pillai* (4) was between the assignor and assignee and must be regarded as addressed to the assignee. But assuming that the instrument may be addressed to the debtor, there must be words operating as a transfer.

In England, the matter has been complicated by the history of the law relating to the assignment of choses-in-action. At common law, except in the case of an annuity, a chose-in-action cannot be assigned at all. The inconvenience of the rule was avoided by permitting the assignee to sue in the name of the assignor [see reference in foot-note (*n*) to s. 780 of Halsbury's Laws of England, Vol. IV.] The case where the debtor consents and a *novatio* is effected is really not an assignment. But Courts of Equity recognized equitable assignments from the earliest times—*Ryall* v. *Rowles* (5). The assignment may be verbal (Halsbury's Laws of England, Vol. IV, s. 796). An agreement to assign is enough [see Tudsbery. on Equitable Assignments, pages 54 and 53 and *Ryall* v. *Rowles* (5).] An agreement may be made out from a course of dealing between the parties. (Halsbury's Laws of England, Vol. IV, s. 796). An order to pay will be enough provided the intention is clear. *Brandt Sons & Co.* v. *Dunlop Robber Co.* (6). Then came the Judicature Act, s. 25 (6). The Act created no new rights but enabled the assignee to sue in his own name. It has not made assignable contracts which were not assignable in equity before. Nor does it impair the efficacy of equitable assignments which would previously have been valid. (Halsbury's Laws of England, Vol. IV, s. 783). Mr. Anantakrishna Iyer also contended that no particular form of assignment under the Statute is required, and relied on Halsbury's Laws of England, Vol. IV, s. 788, where it is said: "A direction or order by the creditor to pay the amount is sufficient" and reference is given to *Harding* v. *Harding* (3) and *Brice* v. *Bannister* (7). In the former (not a case of debt) the assignor George Harding writes the instruction to pay at the foot of the account furnished by the trustees. The case is similar to *Rama Iyen* v. *Venkatachellam Pattar* (2), Wills, J., recognizes that, "before the Judicature Act, it would have been impossible to give a legal title to Laura Harding, so as to enable her to sue in her own name in respect of this right of action; she could have maintained a suit in equity, but the legal title could not have been completed in her. Now it can be done." He then points out that the trustees assented to the assignment. "It seems to me that that fact carries us a step further, and imports into the case another doctrine of equity." Lord Alverston, C. J., in *Brandt, Sons & Co.* v. *Dunlop Rubber Co.* (8) thinks this is the real ground of the decision—a remark not affected by the reversal of the decision by the House of Lords in *Brandt Sons & Co.* v. *Dunlop Rubber Co.* (6) as I shall show lower down. In *Brice* v. *Bannister* (7), the only point argued and decided was that there can be a good equitable assignment of a future debt. It is true that Lord Coleridge, C. J., regarded it as a good assignment under the Statute, but on appeal, this position was attacked and the Counsel for the respondent supported the judgment on the ground that there was a good assignment in equity. Cotton, L. J., opens his judgment by saying that there was a "good equitable assignment." Brett, L. J., who dissented discusses the case only on that footing. None of the Lords Justices refers to the Statute. This has been pointed out by Chitty, L. J., in *Durham Brothers* v. *Robertson* (9): "It is necessary to refer to *Brice* v. *Bannister* (7).....Lord Coleridge, C. J. held that the assignment was within the 25th section. The Court of Appeal decided the case quite apart from the Act. Cotton, L. J., expressly decided the case on the ground of equitable assignment.....Bramwell, L. J. reluctantly assented to this view. Brett, L. J., dissented, but on general principles. So soon as it was ascertained that there was a good equitable assignment, with power to give a discharge, it became unnecessary to consider whether it fell

(1) 17 Ind. Cas. 719.

(5) (1750) 1 Wh. & T. L. C. (7th Ed.) 96 at pp. 111 & 112; 1 Ves. Sen. 348; 27 E. R. 1071.

(6) (1905) A. C. 454; 74 L. J. K. B. 898; 93 L. T. 495; 21 T. L. R. 710; 11 Com. Cas. 1.

(7) (1878) 3 Q. B. D. 569; 47 L. J. Q. B. 722; 38 L. T. 739; 26 W. R. 670.

(8) (1904) 1 K. B. 387 at p. 394; 73 L. J. K. B. 247; 52 W. R 501; 90 L. T. 106; 20 T. L. R. 195; 9 Com. Cas. 149.

(9) (1898) 1 Q. B. 765 at p. 773; 67 L. J. Q. B. 484; 48 L. T. 438.

within the Act or not." In *Brandt Sons & Co.* v. *Dunlop Rubber Co.* (6), Lord Macnaghten says (page 161*) "With the utmost deference to the Court of Appeal, I have great difficulty in following to their reasoning. The plaintiffs' case was put in two ways. It was presented as a case within subs. (6) of s. 25 of the Judicature Act. It was also presented as a simple case of equitable assignment perfected by notice. Unfortunately the stress of the argument was laid on the Judicature Act. The Court of Appeal devoted almost the whole of their attention to it. The substantial question—the only question worth considering—was all but ignored. It was treated as subordinate to the question on the Statute and bound up with it. The Lord Chief Justice, with whom the other members of the Court agree says: 'I come to the conclusion that this document,—does not fulfil that which is necessary in order to entitle the plaintiff to sue,...on the ground that it is not an absolute assignment or an *assignment at all within that section.*" Why that which would have been a good equitable assignment before the Statute should now be invalid and inoperative because it fails to come up to the requirements of the Statute. I confess I do not understand. The Statute does not forbid or destroy equitable assignments, or impair their efficacy in the slightest degree. When the rules of Equity and the rules of the Common Law conflict, the rules of Equity are to prevail. Before the Statute, there was a conflict as regards assignment of debts and other choses-in-action. At law it was considered necessary that the debtor should enter into some engagement with the assignee. That was never the rule in Equity. In certain cases, the Judicature Act places the assignee in a better position than he was before. Whether the present case falls within the favoured class may be doubted. But, says the Lord Chief Justice "the document does not, on the face of it, purport to be an assignment nor use the language of an assignment." "An equitable assignment does not always take that form. It may the addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain." After the references I have made to Cotton and Brett, L. JJ., in *Brice* v. *Bannister* (7), to Chitty, L. J., in *Durham Brothers* v. *Robertson* (9) and to Lord Macnaghten in *Brandt Sons & Co.* v. *Dunlop Rubber Co.* (6), I confess I do not understand the sentence in s. 788 of Halsbury's Laws of England, Vol. IV. It seems to me conclusive from the manner in which Lord Macnaghten deals with Lord Alverston, C. J.'s judgment, that an assignment to be under the Statute must either "purport to be an assignment or use the language of an assignment."

Now the Privy Council in *Mulraj Khatau* v. *Vishwanath Prabhuram Vaidya* (10) say: "The error arose from the learned Judges not having appreciated that the positive language of the section precluded the application in India of the principles of English Law on which they based their decision."

Mr. Anantakrishna Iyer referred me to *Nandubai* v. *Gan* (11). There, Chandavarkar, J., relies on a sentence from Leake on Contracts, 3rd Edition, page 1005. The passage also occurs in the 8th Edition at page 881 and runs thus: "But an order for payment out of a debt accruing due under a contract, as for goods sold, or for work and labour, or the like, is an assignment of a debt which must be stamped as a transfer of property." *Buck* v. *Robson* (12) is cited as an authority. On an examination of the case, I find that the letter is not an order of payment but contains express words of assignment. It runs: "I hereby assign to Messrs. R. & Son, etc." It was held that the letter was not an order for payment of money. The point discussed was that the letter related to a debt that may accrue due in future. The Court, following *Brice* v. *Bannister* (7) and differing from *Ex parte Shellard, In re Adams and Kirby* (13), Bacon, V. C., held that it was assignment and it was admitted to evidence on payment of penalty. I do not think that the case supports the statement in Leake or the decision in *Nandubai* v. *Gan* (11).

I may point out that there are other difficulties in the way of holding Ex. I to be an assignment. For the letter Ex. I to operate as an equitable assignment, the fund out of

*Page of (1905) A. C.—[*Ed.*]

(10) 17 Ind. Cas. 627; 37 B. 198 at p. 210; (1912) M. W. N. 1247; 12 M. L. T. 652; 11 A. L. J. 7; 24 M. L. J. 60; 17 C. W. N. 209; 15 Bom. L. R. 9; 17 C. L. J. 162; 40 I. A. 24 (P. C.).

(11) 27 B. 150; 4 Bom. L. R. 951.

(12) (1878) 3 Q. B. D. 686; 48 L. J. Q. B. 250; 39 L. T. 325; 26 W. R. 804

(13) (1874) 17 Eq. 109; 43 L. J. Bk. 3; 30 L. T. 691; 22 W. R. 152.

which the payment was to be made should be specified and if no fund is specified, the order does not operate as an equitable assignment [Halsbury's Laws of England, Vol. IV, s. 801, page 378] citing *Percival* v. *Dunn* (14),] where the order was handed to the third party as is the case before me [*Ryall* v. *Rowles* (5)] citing *Rodick* v. *Gandell* (15).] But a more formidable difficulty is that the assignment of a debt must be of the whole debt. It is true that the word "absolute" in the English Statute does not occur in the Transfer of Property Act. But the effect of the word 'absolute' is that it should not be by way of charge [*Durham Brothers* v. *Robertson* (9)] and the omission of the word permits an assignment of the debt by way of security [*Mulraj Khatau* v. *Vishwanath Prabhuram Vaidya* (10) see also *Vencatachellam Iyer* v. *Subramanya Iyer* (16).] But the distinction between absolute transfers and transfers by way of security has nothing to do with the question whether the assignment should be of the whole or may be of a part. In my opinion the assignment of the debt must be of the whole and cannot be of part. The observations of Chitty, L. J. in *Durham Brothers* v. *Robertson* (9) at page 774* are pertinent. "It does not say "or any part of a debt or chose-in-action." It appears to me as at present advised to be questionable whether an assignment of part of an entire debt is within the enactment. If it be, it would seem to leave it in the power of the original creditor to split up the single legal cause of action for the debt into as many separate legal causes of action as he might think fit." The right of assignment is not a Common Law right and is the creation of the Act and I do not think the Act ought to be construed so as to cause such obvious inconvenience to the debtor. Darling, J., expresses a similar doubt in *Jones* v. *Humphreys* (17). Lord Alverston, C. J., uses words to the same effect in *Brandt Sons & Co.* v. *Dunlop Rubber Co.* (8) and the reversal by the House of Lords in *Brandt Sons & Co.* v. *Dunlop Robber Co.* (6) does not affect this portion of the Lord Chief Justice's judgment. The different opinion of Darling, J., in *Jones* v. *Humphreys* (17) does not convince me, the decision being reversed by the Court of Appeal (on another point), as the reasons given do not meet the difficulties pointed out by Chitty, L. J., in *Durham Brothers* v. *Robertson* (9). He deduces his conclusion from the fact that a future debt may be assigned. In *Sabjan Sahib* v. *Abdul Azeez Sahib* (18), Seshagiri Iyer, J., makes an observation that the omission of the word 'absolute' was perhaps intended to settle the conflict in the English decisions. I have already pointed out that the word 'absolute' is used in contrast to 'by way of security' and has nothing to do with the point now raised. An assignment may be of the whole debt by way of security though when the security is worked out, a part only may suffice. There may be a series of assignments each of the whole debt by way of security. The assignees will then be in the position of a number of mortgagees. I am, therefore, of opinion for all these reasons, that Ex. I is not an assignment or a valid assignment.

The appeal fails and is dismissed with costs of respondents Nos. 1 to 4 (plaintiffs).

V. N. V.

Z. K. *Appeal dismissed.*

(14) (1885) 29 Ch. D. 128; 54 L. J. Ch. 570; 52 L. T 320.

(15) (1852) 1 De. G. M. & G. 763; 19 L. J. Ch. 113; 13 Jur. 1087; 42 E. R. 749; 12 Beav. 325; 91 E. R. 282.

(16) 14 Ind. Cas. 144; 11 M. L. T. 245; (1912) M. W. N. 461.

(17) (1902) 1 K. B. 10 at p. 14; 85 L. T. 488; 18 T. L. R. 54; 71 L. J. K. B. 23; 50 W. R. 191.

*Page of (1898) 1 Q. B. - [*Ed.*]

(18) 42 Ind. Cas. 684 at p. 693.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1442 OF 1921.

October 17, 1924.

Present:—Mr. Justice Madhavan Nair.

PERIYA KOVIL KELVI APPAN GOVINDA RAMANIYA PERIYA JEEYANGARSWAMI—PLAINTIFF—APPELLANT

versus

MAHOMED ESOOF SAHIB—DEFENDANT No. 2—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Ejectment suit—"Discontinuance of possession," meaning of—Adverse possession—Article applicable.

The starting point for limitation under Art. 142 of Sch. I to the Limitation Act is the date of dispossession or discontinuance. The words "discontinuance of possession" mean an abandonment of possession by one person, followed by actual possession of another person; for, if no one succeeded to the possession vacated or abandoned, there could be no one in whose

favour or for whose protection the Statute could operate. To constitute discontinuance there must both be dereliction by the person who has the right, and actual possession, whether adverse or not, to be protected. The Article has no application to claims which neither in terms nor in substance are claims to possession made necessary by reason of dispossession or discontinuance of possession. [p. 387, col. 2]

Where in a suit in ejectment, the plaint does not show any case of dispossession or discontinuance of possession and the defendant denies the plaintiff's title and sets up a claim by adverse possession, the proper Article applicable is Art. 144 of Sch. I to the Limitation Act. [p. 389, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Chingleput, in Appeal Suit No. 175 of 1920 (A. S. No. 179 of 1920 on the file of the District Court, Chingleput), preferred against that of the Court of the District Munsif, Poonamallee, in Original Suit No. 149 of 1919.

This second appeal came on for hearing on the 11th and 26th of March 1924.

Mr. *C. S. Venkatachariar*, for the Appellants.

Messrs. *P. Elayalwar Ayyangar* and *P. Varadachariar*, for the Respondents.

JUDGMENT.—The plaintiff-appellant instituted a suit for establishing his right to the suit-land and for recovery of its possession from the defendants. He alleged in the plaint that the land belonged to the *devasthanam* of which he was the *dharmakartha*, that it was leased to the father of the defendants and that when possession was demanded of them it was refused. The contesting defendant, *viz.*, the 2nd defendant, claimed the land as his own, as he and his ancestors enjoyed it for more than 50 years as owners without any objection. On these pleadings three issues were raised, namely, (1) Is the plaint lease true? (2) Does the plaintiff possess a valid title to the suit property? and (3) Is the suit barred by limitation under Art. 144 of the Limitation Act? The District Munsif found in favour of the plaintiff on all these issues and gave him a decree. On appeal by the 2nd defendant, the Subordinate Judge held that the property belonged to the plaint *devasthanam* but that the lease alleged was not proved. As regards the question of possession raised in the case, he set down two points for determination; —Point No. 3:—"Whether the plaintiff was in possession of the land within twelve years before suit?" and Point No. 4:—"Whether he (2nd defendant) and his ancestors have been in adverse possession for over twelve years." On both these points he found against the plaintiff and, in the result, dismissed his suit.

It is argued before me that, in considering the question of limitation, namely, Point No. 3, the Subordinate Judge has erred in applying Art. 142 of the Limitation Act to the facts of this case and that, as regards adverse possession raised in Point No. 4, his conclusion is not based upon the evidence but on pure surmises. I think the contentions of the learned Vakil for the appellant on both these points are well-founded. Article 142 runs as follows:—"For possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession twelve years, the date of the dispossession or discontinuance." The starting point for limitation under this Article is the date of dispossession or discontinuance. In *M'Donnell* v. *M'Kinty* (1), Blackburn, C. J., states that "the word 'discontinuance of possession' in the Statute means an abandonment of possession by one person, followed by the actual possession of another person; for, if no one succeed to the possession created or abandoned, there could be no one in whose favour or for whose protection the Statute could operate. To constitute discontinuance there must be both dereliction by the person who has the right, and actual possession, whether adverse or not, to be protected." In *Smith* v. *Llyod* (2), Baron Parke laid down the law as follows:—"We are clearly of opinion that the Statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of, and another in possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the Statute. We entirely concur in the judgment of Blackburn, C. J., in *M'Donnel* v. *M'Kinty* (1) and the principle on which it is founded." The principle laid down in these decisions was accepted in the well-known case of *Trus-*

(1) (1847) 10 Ir. L. R. 514.
(2) (1854) 156 E. R. 240; 9 Ex. 562; 2 Com. L. R. 1008; 2 W. R. 271; 23 L. J. Ex. 194; 22 L. T. (o. s.) 289; 96 R. R. 837.

tees and Agency Company v. *Short* (3) which was followed by the Judicial Committee in *Secretary of State for India* v. *Krishnamoni Gupta* (4). In the words of Mookerjee, J., in *Brojendra Kishore Roy Chowdhury* v. *Bharat Chandra Roy* (5): "Dispossession implies the coming in of a person and the driving out of another from possession. Discontinuance implies the going out of the person in possession and his being followed into possession by another." [See also *Charu Chandra Pramanik* v. *Nabush Chandra Kundu* (6)]. Article 142 of the Indian Limitation Act has no application to claims which neither in terms nor in substance are claims to possession made necessary by reason of dispossession or discontinuance of possession [per Heaton, J., in *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna Thite* (7)]. The pleadings in this case clearly show that no case of dispossession or discontinuance as above explained was raised by the plaintiff in the plaint, nor was it attempted to be made out by the defendants. The actual issues framed related only to a case of adverse possession and even in the grounds of appeal to the lower Appellate Court the case of the defendants was that they had perfected a title by adverse possession for over twelve years. In these circumstances, I am of opinion that the learned Judge was wrong in having applied Art. 142 to the facts of this case. The true Article to be applied to a case of this kind is, in my view, Art. 144 of the Limitation Act. Though the lease has been found against, it is quite open to the plaintiff to rely on his title for recovery of possession of the suit property. The principle to be applied to the decision of the case is thus stated by Lord Shaw in *Secretary of State for India* v. *Chelikani Rama Rao* (8): "Nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct, it would be open to the possessor for a year or a day to say, 'I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions.'". This view has been confirmed by the Privy Council in a recent decision in *Kuthali Moothavar* v. *Peringati Kunharankutty* (9), where the principle is thus stated at page 890*: "Standing a title in 'A' the alleged adverse possession of 'B' must have all the qualities of adequacy, continuity, and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor." In *Jai Chand* v. *Girwar Singh* (10), the facts are thus stated in the judgment:—

"The plaintiff is the *zemindar* of the village and his title has been established in both Courts. He alleged that the defendant was put in possession for certain purposes unnecessary to mention, by leave and license. The defendant denied the license in his written statement and set up an adverse title. Mr. Baldeo Ram for the defendant says that it is not proved that the license was ever granted or revoked. In our opinion that is now immaterial. The plaintiff based his case upon it, and from the moment that the defendant repudiated the license and set up adverse possession, it was no longer possible for the defendant to rely on the license or to deny its revocation. He was in the position of a trespasser without any defence to the suit unless he succeeded in establishing his title by adverse possession"; he, however, failed to prove that he had been in adverse possession of the land for more than twelve years. It was held by Walsh and Ryves, JJ., that "the plaintiff was entitled to succeed simply on the strength of his *prima facie* title as *zemindar*. It was not necessary for him to go further and prove that he had been in actual possession at some period within twelve years previous to the commencement of the suit." The decision in *Maddali Venkatarayudu* v. *Movva Sanka-*

(3) (1888) 13 A. C. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132.

(4) 29 I. A. 104; 29 C. 518; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 269 (P. C.).

(5) 31 Ind. Cas. 242; 20 C. W. N. 481; 22 C. L. J. 283.

(6) 74 Ind. Cas. 630; 36 C. L. J. 35; (1923) A. I. R. (C.) 1; 50 C. 49.

(7) 8 Ind. Cas. 639; 35 B. 79 at p. 92; 12 Bom. L. R. 956.

(8) 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.).

(9) 66 Ind. Cas. 451; 44 M. 883; 14 L. W. 721; (1921) M. W. N. 847; 41 M. L. J. 650; 30 M. L. T. 42; 48 I. A. 395; 26 C. W. N. 666; 24 Bom. L. R. 669; (1922) A. I. R. (P. C.) 181 (P. C.).

(10) 52 Ind. Cas. 366; 41 A. 669; 17 A. L. J. 814.

*Page of 44 M.—[*Ed.*]

rayya (11), quoted by the learned Vakil for the respondents, to the effect that Art. 142 of the Limitation Act applies to a case of this kind must be held to have been overruled by the decision of the Privy Council in *Secretary of State for India* v. *Chelikani Rama Rao* (8). In the present case as in the Privy Council case, the defendant denied the plaintiff's title and also set up a claim by adverse possession. The fact that the plaintiff has put forward an alternative case of lease also which has been denied by the defendant and found against by the lower Court does not in my view make Art. 142 applicable [See *Jai Chand* v. *Girwar Singh* (10) quoted above.] It follows, therefore, that the proper Article applicable to this case is Art. 144. The learned Subordinate Judge has no doubt found that the defendants have succeeded in proving adverse possession for more than twelve years, but in arriving at this finding I am inclined to think the learned Judge seems to have been to a certain extent influenced by his view that the decision in *Framji Cursetji* v. *Goculdas Madhowji* (12) seems to be inapplicable to Madras in considering the character of the possession of a temporary nature of a vacant site in view of the conditions prevailing in this Presidency. I may, however, point out that the decision in *Framji Cursetji* v. *Goculdas Madhowji* (12) has been followed by this Court in *Chokkalinga Naicken* v. *Muthusami Naicken* (13) and *Putloor Boyanna* v *Golusu Asethu* (14). I would, therefore, ask the learned Judge to submit a fresh finding on the evidence in the case on the issue: "Whether the 2nd defendant and his ancestors have been in adverse possession of the suit land for over twelve years?" The finding is to be submitted before the 1st August. Time for objection, ten days.

In compliance with the order contained in the above judgment the Subordinate Judge of Chingleput submitted the following

FINDING.—In this appeal I am directed by the High Court to submit a fresh finding on the issue framed by the High Court, *viz.*, "whether the 2nd defendant and his ancestors have been in adverse possession of the suit land for over 12 years?"

(11) 6 Ind. Cas. 667; 20 M. L. J. 306; (1911) 1 M. W. N. 93.
(12) 16 B. 338; 8 Ind. Dec. (N. S.) 703.
(13) 21 M. 53; 7 Ind. Dec. (N. S.) 394.
(14) 24 Ind. Cas. 735; 16 M. L. T. 48.

The onus of proof regarding this issue is on the 2nd defendant who has set up this claim of acquiring title by being in adverse possession for over the statutory period. This was not disputed by the learned Vakil for 2nd defendant who at the trial here argued the case first. The question is whether the 2nd defendant had discharged that burden satisfactorily.

The evidence shows that the father of 2nd defendant built a hut some 20 or 25 years ago, that it was destroyed by fire subsequently and that the present tiled house was put up about five or six years before suit (D. W. No. 4). The defence evidence also shows clearly that the hut put up by the father was in the Ilupa *tope* belonging to the plaint temple. It will be seen from the defence evidence that there was prickly-pear fence all round the *tope* and that 2nd defendant's father put up the hut at the northern end by removing the prickly-pear fence in that portion. D. W. No. 2 says that there was a thorn fence around on all sides, that Pachamian Sahib removed the fence and built his house in the temple *tope* lying immediately south of the north *veli*. No doubt when the house was built a wall was also put up at the northern side. But D. W. No. 3 says that the thorn fence was north of the wall and that 2nd defendant's father put up his shed after removing the thorn fence. It is thus clear that the old hut was put up in the temple *tope* which was enclosed within prickly-pear fence all round. No doubt the evidence shows that the hut was put up by 2nd defendant's father more than twelve years ago.

The question then is whether on that ground, it should be held that the possession of 2nd defendant's father and 2nd defendant is adverse to the temple. The question whether such possession would be adverse or not may also depend upon the nature of the property. Here the property is a *tope* belonging to the temple. It is practically a vacant site. It was only a hut that has been put up. That must be with small twigs, etc., to serve a temporary purpose. That being so, I think the cases in *Framji Cursetji* v. *Goculdas Madhawji* (12) and *Chokkaliga Naicken* v. *Muthusami Naicken* (13) are applicable to the facts of this case.

Moreover the temple has been exercising acts of ownership in the *tope*. The evidence shows that the temple authorities

are now and then cutting Ilupa trees from the *tope*. D. W. No. 4 says that there are Ilupa trees by the side of the hut and those trees were also cut by the temple authorities. Even the 2nd defendant says that there were trees to the south of his house and the temple might have cut them. It is only in this way that the temple can exercise its rights of ownership over this *tope*. If a person who has title "has been exercising during the currency of his title various acts of possession, then the quality of these acts even although they may have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds *Kuthali Moothavar* v. *Kunharankutty* (9).

Even the defence evidence indicates that the temple was exercising rights of ownership. There is also the evidence on the plaintiff's side in support of this fact that the temple was exercising rights of ownership in the *tope*. That means that the 2nd defendant and his father cannot be considered to have uninterrupted exclusive enjoyment of the house site. There is also the fact that *patta* stands in the name of the temple and the temple is paying *cist*. The 2nd defendant or his father was never paying any *cist*. That only indicates that the temple only wants to assert its title and possession. There is no evidence as to when the hut was burnt down or that immediately after the hut was burnt the new house was built. Some time might have elapsed between the destruction of the hut and the construction of the new house. Having regard to the nature of the property and the rights of ownership exercised by the temple; we must take it that when the hut was burnt, the 2nd defendant abandoned it and it must go to the temple who has got title. Moreover the defence evidence is that the new house was built not on the same site but on a site a few feet south of it (D. W. No 4). So it is clear that the new house was built not on the old site. The new house was built only five or six years ago and 2nd defendant cannot claim to have acquired title by being in possession for over the statutory period. In any view of the case, I do not think that 2nd defendant has made out that he or his father was in uninterrupted exclusive possession of the suit site for over the statutory period. I find the issue against 2nd defendant.

This second appeal coming on for final hearing this day after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—The finding of the lower Court has not been objected to by the respondent. He does not appear. I accept the finding and reverse the lower Court's decree and restore the decree of the District Munsif with costs here and in the Court below.

V. N. V. *Appeal accepted.*
Z. K.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 632 OF 1924.
December 1, 1924.
Present:—Mr. Justice Srinivasa Iyengar.
KARPAGA NIDHI LTD., COIMBATORE BY SECRETARY RANGIA GOUNDAR —PETITIONER
versus
VANIA VILASA NIDHI LTD., BY SECRETARY NAMMALWAR CHETTIAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 73—Execution of decree—Realisation of assets—Subsequent application for rateable distribution, maintainability of.

Under s. 73 of the C. P. C. every person who has applied, previous to the realisation of assets, to the Court for execution of the decree obtained by him is entitled to rateable distribution. The section is not rendered inapplicable merely because the application for rateable distribution is presented subsequent to the realisation of assets.

Somasundaram Chetty v. *Thirunarayana Pillai*, 25 Ind. Cas. 592; (1914) M. W. N. 738 and *Muthiah Chetty* v. *Alagappa Chetty*, 47 Ind. Cas. 296; (1918) M. W. N. 520; 24 M. L. T. 179, distinguished.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Principal District Munsif, Coimbatore, in C. M. P. No. 1008 of 1924, in O. S. No. 1257 of 1922.

Mr. *S. Nagaraja Iyer*, for the Petitioner.

Mr. *P. Markandeyalu*, for the Respondent.

JUDGMENT.—I think this petition ought to be allowed. The District Munsif in

the Court below was apparently under the impression that he had no jurisdiction to order payment out on the application of the petitioner for the reason that his application for rateable distribution was presented subsequent to the realization of the assets. The learned District Munsif obviously overlooked the provisions in s. 73, C. P. C. that evey person that had applied to the Court previous to the realization of assets for execution of the decree obtained by him was entitled to come in under that section and have rateable distribution. The learned Vakil for the respondent has drawn my attention to two decisions of this Court. The first is the one reported in *Somasundaram Chetty* v. *Thirunarayana Pillai* (1). In that case this Court refused to interfere because it was of opinion that a regular suit was in the circumstances of that case the more efficacious remedy having regard to the fact that the rights of parties not before this Court might conceivably be affected by any order that may be made behind their backs. There is no such difficulty here because in the present case when the petition was filed, no payments had been ordered to be made, and I do not now propose to make the order finally. The other case cited by the learned Vakil for the respondent is that reported in *Muthiah Chetty* v. *Alagappa Chetty* (2). There are certain observations in the course of the judgment in that decision to the effect that if an enquiry should be found necessary for determining the rights of particular judgment-debtors in the fund applied for to be distributed, the appropriate procedure would be not under s. 73 but in a regular suit. No such enquiry is or could at all be necessary in this case, because both the judgment-debtors in the suit in which the property was sold were judgment-debtors also in the suit in which the decree was obtained for which rateable distribution is now applied for. Both of them being liable for the entire decree of the petitioner no enquiry into any share or interest of particular judgment-debtors would be necessary. The lower Court having dismissed the petitioner's application on the misconception that an application must have been made by him before distribution of assets, the order should be set aside; and I hereby set aside the order and remand the application to the lower Court for being heard if necessary after notice to all the parties concerned. The respondent will pay the petitioner's costs of this civil revision petition.

V. N. V. *Petition remanded.*
Z. K.

(1) 25 Ind. Cas. 592; (1914) M. W. N. 738.
(2) 47 Ind. Cas. 296; (1918) M. W. N. 520; 24 M. L. T. 179.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 66 OF 1924.
October 30, 1924.
Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.
VELOVOLU POTHURAJU—PETITIONER—APPELLANT
versus
MATTA ADISESHU AND ANOTHER—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, rr. 1, 4—Review—Discovery of new and important matter—Want of knowledge, strict proof of—"Other sufficient case," whether can be relied on.

On an application for review under O. XLVII, r. 1, C. P. C., on the ground of discovery of new and important matter, the Court has no power to grant a review without calling for strict proof that the new matter was not within the knowledge of the petitioner at the time of the original hearing. Nor can in such a case the Court grant a review "for other sufficient reason" and evade the requirements of r. 4 (2) by adopting as its own reason without any inquiry, the petitioner's reason for seeking review.

Tirbeni Kunwar v. *Mohan Lal*, 66 Ind. Cas. 558; (1922) A. I. R. (A.) 366, doubted.

Appeal against an order of the Court of the Subordinate Judge, Kistna at Ellore, dated the 24th July 1924, in C. M. P. No. 107 of 1923, in A. S. No. 549 of 1921.

Mr. *Ch. Raghava Rao*, for the Appellant.

Messrs. *A. Venkatarayaliah* and *L. Venkatanarasiah*, for the Respondents.

JUDGMENT.—There can be no doubt from 1st respondent's petition that the reason put forward by him for seeking review was the discovery of new and important matter, which was not within his knowledge, when the decree was passed. The lower Appellate Court granted the review, because of its view that this discovered matter was new and important. This it had no power to do without calling for strict proof of the allegation that the new matter was not within the knowledge

of 1st respondent when the decree was passed, and the Judge has not called for any proof at all.

The 1st respondent argues that the Judge for himself decided that the most important matter was 'other sufficient reason' within the meaning of r. 1 of O. XLVII of the C. P. C. The Judge does not say so, nor was there before him anything else but the discovery of this new and important matter. To hold that in such a case the Judge can evade the requirements of r. 4 (2) and absolve the applicant from his statutory duty of producing strict proof of his allegation by adopting as his own reason, without any enquiry, the applicant's reason for seeking review, is in our mind tantamount to abolishing r. 4 (2) (*b*) altogether and we are not prepared to adopt such a view. To allow that any Court may, at any time after the decision of a suit, re-open it by merely stating that an important document has been ignored or since discovered is to render impossible any finality in litigation. If the ruling in *Tirbeni Kunwar* v. *Mohan Lal* (1) implies such a view, we are not prepared to follow it.

We must hold that the lower Court's order is a breach of O. XLVII, r. 4 (2) (*b*) and was, therefore, without jurisdiction. It is, therefore, set aside. In the absence of any record to show whether or not any evidence read by respondent was shut out, we think it proper to direct that the application be re-heard and the provisions of r. 4 (2) (*b*) strictly observed.

Appellant will get his costs throughout upto date in both Courts.

V. N. V. *Appeal accepted.*

Z. K.

(1) 66 Ind. Cas. 558; (1922) A. I. R. (A.) 366.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 155 of 1923.

December 8, 1924.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Buckland.

THE OFFICIAL ASSIGNEE OF BENGAL —APPELLANT

versus

THE YOKOHAMA SPECIE BANK, LTD. —RESPONDENTS.

Presidency Towns Insolvency Act (III of 1909), s. 55 —Transfer of all available assets by insolvent in favour of creditor, validity of—Good faith—Burden of proof —Principles applicable.

If a trader assigns all his property, except on some substantial contemporaneous payment, or some substantial undertaking to make payment in future, the assignment amounts to an act of bankruptcy and is void against the creditors of the assignor because nothing is left with which to carry on his business, whereas if he had received substantial assistance, something would have been left to carry on the business. [p. 395, col. 2.]

Khoo Kwat Siew v. *Wooi Taik Hwat*, 19 C. 223; 19 I. A. 15; 15 Ind. Jur. 750; 6 Sar. P. C. J. 98; 9 Ind. Dec. (N. S.) 594 (P. C.), relied on.

When a transaction is challenged under s. 55 of the Presidency Towns Insolvency Act, the onus of proving that the transfer was in good faith and for valuable consideration lies on the transferee. [*ibid.*]

Per *Buckland, J.*—In considering the effect of a transaction which is challenged under s. 55 of the Presidency Towns Insolvency Act, the facts must be considered in the light of the law of bankruptcy the object of which is to ensure rateable distribution of an insolvent's property among his creditors. A transaction which may in other circumstances be free from all taint may amount to an offence when it is established that it contravenes the law of bankruptcy. [p. 399, col. 1.]

Appeal against the judgment of Mr. Justice Greaves, dated the 14th August 1923.

Messrs. *Pugh, Langford James* and *B. Basu*, for the Appellant.

Messrs. *S. R. Das* and *B. K. Ghose*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the Official Assignee from the judgment of my learned brother Greaves, J., delivered on the 14th August 1923, whereby he dismissed an application by the Official Assignee for an order, that a deed, dated the 14th July 1920 executed by or on behalf of a Firm of Mogi & Co., in favour of the Yokohama Specie Bank, Limited, might be declared void and inoperative.

The application further was for an account of the Bank's dealings with the assets of the insolvents under the said deed, for an order for the payment to the Official Assignee of the sum found due, for a declaration that the Bank was not entitled to retain a sum of Rs. 20,000 and for an order for the payment of the said sum to the Official Assignee.

The material facts are as follows:—

Messrs. Mogi & Co., were a Japanese firm with a Head Office in Japan, carrying on business in Calcutta and Bombay, and in other parts of the world.

It appears from the evidence of the Sub-

Manager of the Yokohama Specie Bank in Calcutta that in February and March 1920 there were strong rumours about the financial instability of Messrs. Mogi & Co., and in June 1920 the Calcutta Branch of Mogi & Co., was closed and the Manager of the Branch went to Japan. Mogi & Co., were at that time indebted to the Calcutta Branch of the Yokohama Specie Bank to the extent of about Rs. 1,38,000.

On the 28th June 1920, Messrs. Curlender & Co., instituted a suit against Mogi & Co., in this Court, claiming Rs. 1,84,000 as damages for alleged breaches of certain contracts made by Messrs. Mogi & Co.

An order was made by this Court at the instance of Messrs. Curlender & Co. for the attachment of Mogi & Co.'s assets at Bombay and on the 28th September 1920 certain assets belonging to Messrs. Mogi & Co. at Bombay were attached in accordance with the order.

In October 1920 the Yokohama Specie Bank made an application in the Bombay Small Cause Court to set aside the attachment on the ground that Messrs. Mogi & Co., had executed a deed, dated 14th July 1920, whereby they had hypothecated the assets, which had been attached, in favour of the Bank, in pursuance of which the Bank had entered into possession. The assets consequently were released from attachment.

On the 22nd November 1920 the Bombay Office of Messrs. Mogi & Co., was closed.

On the 10th February 1921, Messrs. Mogi & Co., were adjudicated insolvents upon the petition of Curlender & Co. At the date of the deed, *viz.*, 14th July 1920, Mogi & Co., were indebted to the Bombay Branch of the Yokohama Specie Bank to the extent of about Rs. 3,76,000 and at the date of the insolvency, *viz.*, 10th February 1921, to the extent of about Rs. 2,75,000. Notice of the application, which gave rise to these proceedings, was dated the 28th May 1923. This Court was informed by the Official Assignee that Messrs. Curlender & Co., had made a claim in the insolvency of Mogi & Co., for the amount of the damages claimed in respect of the alleged breaches of the above-mentioned contracts and one or two other creditors had sent in their claims.

The Official Assignee informed the Court that he had not up to the hearing of the appeal admitted any claim—in fact no steps had been taken beyond the above-mentioned application, as the Official Assignee could not ascertain that there were any assets in India except those which are the subject-matter of this application.

He, however, stated that he had examined the claim of Curlender & Co., and was prepared to admit it, and I understand that he in fact signed the claim as being admitted during the hearing of the appeal.

This application, which is now under consideration, was made under s. 55 of the Presidency Towns Insolvency Act, 1909.

This section provides as follows:—

"Any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be void against the Official Assignee."

The learned Judge came to the conclusion that the Bank had shown that the transfer of property involved in the deed of 14th July 1920 was made in good faith and for valuable consideration and that it was not void against the Official Assignee. Consequently he dismissed the application.

In this Court it was argued on behalf of the appellant that the transfer of property involved in the deed of 14th July 1920 constituted an act of insolvency and that the Bank were fully aware of the insolvency of Mogi & Co., at the time the deed was executed. Under these circumstances, it was urged that the transfer could not be considered as having been made in good faith and for valuable consideration within the meaning of s. 55 of the Presidency Towns Insolvency Act. On the other hand, it was argued on behalf of the respondents that the transaction was for valuable consideration by reason of the advances which had been made by the Bank to Mogi & Co., that it was made honestly inasmuch as the Bombay Branch of the Bank had no reason to think that Mogi & Co., were in financial straits at the time the deed was executed, that even if the transfer amounted to a preference of the Bank over the other creditors, it should not be deemed fraudulent inasmuch as Mogi & Co., were not adjudicated insolvent within three months after the date of the deed: and reference was made to the

provisions of s. 56 of the Presidency Towns Insolvency Act.

In my judgment the Bank must have known in July 1920 that Messrs. Mogi & Co., were insolvent.

I have already mentioned that there were rumours in Calcutta as to the financial instability of Mogi & Co., in February or March 1920. In June 1920 the Calcutta Office of Mogi & Co., was closed and the Manager went to Japan, leaving a large overdraft at the Bank.

It would be unreasonable to assume that those in control of the Yokohama Specie Bank at Bombay were not made acquainted with this fact. In my opinion they must have known of it. In July 1920 the Bank at Bombay demanded payment of the overdraft which amounted to about Rs. 3,76,000. They were aware, as appears from the affidavit of Elizo Wakabayashi, the Accountant of the Bombay Bank, that Mogi & Co., could not meet this liability.

In my opinion, the evidence shows that the Bank succeeded in obtaining a pledge of all the available assets of Mogi & Co., at Bombay.

Apparently Mogi & Co., had two warehouses and an office at Bombay.

By the deed of the 14th July 1920 Mogi & Co., pledged to the Bank all the goods lying in the two warehouses and the goods which were lying in Port Trust Warehouse.

In addition to this security the Bank obtained a pledge of all the goods, furniture articles and things lying in the office shop and godown at 178 to 182, Jackeria Musjid Road. The Bank on the 14th July 1920 placed its representative in possession of these premises and a notice was put up that the Yokohama Specie Bank as mortgagee was in possession.

It is to be noted that the security was for Rs. 50,000 and for other moneys then due or which might thereafter become due, but there was no contemporaneous advance, nor was there any undertaking to make any advances in the future, with a view to assisting Mogi & Co., in the carrying on of their business.

The deed of 14th July 1920 provided that the Bank's representative should enter into possession and that Mogi & Co., should obtain the previous permission of the Bank before they sold any of the goods and should pay the prices received from the purchasers to the Bank's representative.

What happened in fact after the deed of 14th July 1920 is clear from the account which has been exhibited and from the evidence in the case.

The goods were sold from time to time, the proceeds were paid to the Bank, and the amounts were credited to the account of Mogi & Co. Two sums of Rs. 3,500 and Rs. 3,700 were debited to the account of Mogi & Co., which appeared to have been on account of customs. It was not seriously disputed that these payments were made for the purpose of obtaining delivery of goods from the customs, in order that they might be sold, and the proceeds paid to the Bank.

There was another small sum, *viz.*, Rs. 422-14-0 debited to the account which apparently was a payment to Haridas & Co., as to which no evidence appears, and a further sum of Rs. 3,950 in respect of an unpaid cheque, the amount of which appears on the credit side. It is obvious, therefore, that after 14th July 1920 Mogi & Co. were not carrying on their business in the ordinary way. It appears beyond doubt that after the Bank entered into possession, the goods were sold, and the proceeds were paid to the Bank with a view to paying off the Bank's debt: in effect the business was carried on merely for the purpose of realizing the security, given to the Bank, and re-paying the Bank as far as the proceeds of the sales would provide. In fact the Bank's debt appears to have been reduced by these means from about Rs. 3,76,000 in July 1920 to about Rs. 2,17,000 in June 1921.

It appears that Mogi & Co.'s Bank in Japan had suspended payment and that the firm in Japan was in difficulties, though it was stated in a letter sent to Messrs. Curlender & Co.'s Solicitors in August 1920 by Mogi & Co.'s Solicitors that it was hoped the difficulties were only temporary.

There is no evidence as to the exact position of the firm in Japan, though it appears that in 1922 a body called "The Re-Adjustment Committee of Mogi & Co," consisting of the representatives of certain Banks, had the affairs of Mogi & Co., in hand.

In view of the evidence I am of the opinion that the Bank must have known in July 1920 that Mogi & Co., were in serious financial straits, that they could not pay

their debts as they became due, and that they were in fact insolvent.

The Bank, therefore, determined to obtain, and succeeded in obtaining, control over all the available assets in India of Mogi & Co. This was achieved by the deed of the 14th July 1920.

Those in control of Mogi & Co.'s business at Bombay must have known that they were insolvent. They pledged the whole of the assets which were available in India to the Bank; they obtained no further advances to enable them to carry on the business at Bombay; they obtained no undertaking from the Bank, express or implied, to make any further advances to enable them to carry on their business. They had nothing left with which they could carry on their business, and they had no prospect of carrying on their business further.

In point of fact the firm in Bombay was closed in November 1920: the debt due to the Bank at that time had been reduced by means of the realizations to about Rs. 3,13,000. In my opinion the Bank must have known that the assignment of July 1920 would defeat or delay the other creditors in India of Mogi & Co. The Bank by that deed succeeded in obtaining control of substantially all the assets of Mogi & Co., in India; Mogi & Co., in Japan were in difficulties owing to the suspension of their Bank; what possible prospect was there of any creditor in India having his debt or any part thereof paid by Mogi & Co. ?

Judging from the letter of 10th July 1920 from Mogi & Co., Bombay, to Curlender & Co., Calcutta, written only four days before the assignment to the Bank, it appears that a representative of Mogi & Co., had recently seen Messrs. Curlender & Co., with reference to their claim, which Curlender & Co., must have been pressing at that time. Their suit had been instituted on the 28th June 1920 and an order for substituted service was made on the 26th July 1920. The dates are significant and, in my opinion, it is not unreasonable to assume that the Bank at Bombay as well as Mogi & Co., knew of the institution of Curlender & Co.'s suit in Calcutta as alleged by Curlender & Co.

If this be so, they must have realized that if they were going to obtain control of Mogi & Co.'s assets, it was time for them to do so.

There is no doubt that Mogi & Co., were adjudged insolvent within two years of the deed of 14th July 1920; and, the question therefore, arises whether on the facts of the case the Court should hold that the transfer of property, created by the deed of 14th July 1920, was made in good faith and for valuable consideration within the meaning of s. 55 of the Presidency Towns Insolvency Act.

It has not been disputed that the onus of proving that the transfer was in good faith and for valuable consideration was on the Bank.

The learned Judge has found that the Bank discharged that onus.

With much respect to the learned Judge I do not hold the same opinion.

This is not a case in which the decision of the learned Judge depended upon oral evidence—the evidence is contained in affidavits, and, therefore, this Court is in as good a position to judge of the facts as the learned Judge was.

Indeed there is little dispute as to the facts: the question really depends upon the inference which should be drawn from the facts of the case.

In *Khoo Kwat Siew* v. *Wooi Taik Hwat* (1), Lord Hobhouse stated the well-known rule of law as follows at page 231* :—

"The well-known rule of law is, that if a trader assigns all his property, except on some substantial contemporaneous payment, or some substantial undertaking to make payment *in futuro*, that is an act of bankruptcy, and is void against the creditors and the assignee, simply because nothing is left with which to carry on his business, whereas if he receives substantial assistance, something is left to carry on the business."

This statement of the law was made before the passing of the Presidency Towns Insolvency Act of 1909, but I have no doubt that the rule as stated by Lord Hobhouse prevails at the present time.

In this case Mogi & Co., assigned all the assets, which were available in India, to the Bank. They obtained no contemporaneous payment or any undertaking to make any payment *in futuro* to enable them to carry on their business, and, as already stated, I can arrive at no other conclusion except that the deed of 14th July 1920 was executed to enable the Bank to

(1) 19 C. 223; 19 I. A. 15; 15 Ind. Jur. 750; 6 Sar. P. C. J. 98; 9 Ind. Dec. (N. S.) 594 (P. C.).

*Page of 19 C.—[*Ed.*].

realize all the assets of Mogi & Co. which were available, both parties knowing that there was nothing left with which the business of Mogi & Co., could be carried on and that there was no prospect of the other creditors of the firm being paid any part of their debts.

In considering whether the transfer involved in the deed of 14th July 1920 was made in good faith and for valuable consideration within the meaning of s. 55 of the Presidency Towns Insolvency Act, 1909, it is not possible, in my judgment, to leave out of consideration the insolvency of Messrs. Mogi & Co., and the law which applies in an insolvency, and the question is whether the transaction is one which the law will allow.

If there were no question of insolvency involved, and the law relating to insolvency had not to be considered, it might be possible to hold that the transfer was made in good faith and for valuable consideraiion.

In this case, however, Messrs. Mogi & Co., were adjudicated insolvents in February 1921, about seven months after the deed of 14th July 1920 was executed, and, in my judgment, both the Bank and Messrs. Mogi & Co., must have known in July 1920 that if any creditors were to take proceedings, the adjudication of Mogi & Co., as insolvents would be inevitable.

Having regard to these facts, in my judgment, the transaction is one which the law relating to insolvency does not permit and the Court ought not to hold that the transfer of property, created by the deed of 14th July 1920, was made in good faith and for valuable consideration within the meaning of s. 55.

Consequently, in my opinion, the deed was void as against the Official Assignee.

The result is that, in my judgment, this appeal must be allowed, the decision of the learned Judge must be set aside, and a declaration must be made that the deed is void as against the Official Assignee.

There will be order as prayed in para. (*b*) of the petition.

This Court expresses no opinion as to the sum of Rs. 20,000 mentioned in para. (*c*) of the petition as we are not in possession of sufficient materials to deal with it.

This matter should be investigated in the taking of the accounts: liberty to apply to the learned Judge taking insolvency matters.

The respondents must pay the appellant's costs in respect of the appeal and in respect of the proceedings before the learned Judge on the Original Side.

Buckland, J.—The question involved in this appeal concerns the right of the Official Assignee to certain assets in the hands of the respondent Bank as assignee of Mogi & Co., insolvents.

Mogi & Co., were Japanese traders who carried on business among other places at Bombay and in Calcutta.

In the month of June 1920 they closed their business in Calcutta owing the local branch of the respondent Bank the sum of Rs. 1,38,100.

On the 14th July they executed an assignment in favour of the respondent Bank of goods and office furniture in Bombay as security for money due and for future advances and put the Bank in possession.

Subsequently the Bank realized various sums on the goods purporting so to have been hypothecated to them which they placed against the insolvents' overdraft.

On the 22nd November Mogi & Co., closed their office in Bombay owing the local branch of the respondent Bank a sum of about three lakhs of rupees.

On the 10th February 1921 Mogi & Co. were adjudicated insolvents in Calcutta on the petition of Curlender & Co., who claim to be creditors for the sum of Rs. 1,84,000. On that date they owed Rs. 2,75,427-6-6 to the Bank in Bombay.

The Official Assignee now claims that the monies realized by the Bank should be available to the creditors of the insolvents on the ground that the inrtrument of the 14th July 1920 is void under s. 55 of the Presidency Towns Insolvency Act, 1909.

It is alleged that the goods hypothecated comprised in effect the whole of the insolvents' available assets, that there was neither any promise to make further advances nor were any further advances made in fact.

My learned brother Mr. Justice Greaves has held that the burden of showing that the transfer was made in good faith and for valuable consideration lay upon the Bank and that the Bank has discharged it. He observed that there was nothing

to show that all the property of the insolvents was hypothecated.

These findings of fact have been challenged on appeal.

It will be convenient first to consider the evidence as to the allegation that all the property of the insolvents was hypothecated, for unless this is established it is conceded that the appeal must fail.

The instrument of the 14th July specifies :—

"The goods lying at this date in our warehouse in Building Nos. 361 to 369 situated in Jackeria Musjid otherwise known as Bhuj Moholla and also Port Trust Warehouse as per list herewith.

The goods lying at this date in our warehouse at Chinch Bunder Road on the ground floor of the house No. 18 as per list herewith.

The goods, furniture, articles and things lying in our office shop and godown at Nos. 178 to 182, Jackeria Musjid Road, as per list herewith."

In order to appreciate how some of the evidence to which I shall refer is to be found on the record, it is necessary to state that Curlender & Co., instituted on the 28th June 1920 a suit in this Court to recover the sum which they allege to be due to them.

On the 27th August 1920 an order was made for attachment before judgment whereupon certain goods were attached by the Court of Small Causes in Bombay. The respondent Bank applied to have the attachment removed on the ground that it was in the position of mortgagee in possession. In the course of such proceedings evidence was taken and has been imported as evidence into these proceedings.

In June 1922 Jumukichi Yamamoto, the Sub-Manager of the Bank in Calcutta, was examined before the Registrar in insolvency. In the course of his deposition he said that in February or March 1920 there were rumours about Mogi & Co., and his Bank became cautious how it dealt with them.

As we know the insolvents left Calcutta in June leaving a considerable overdraft at the local branch of the Bank, it is incredible that the circumstances were not communicated to the Bombay branch.

The Accountant of the Bank in Bombay has made an affidavit in which he says, among other things, that in July Mogi & Co., were not in a position to pay their debt to the Bank and asked for time and offered to pledge the goods covered by the instrument impugned.

That the insolvents had only the goods contained in the warehouses specified appears from the evidence of Toyokachi Hasegawo in the Bombay Small Cause Court where he said that on the 17th July the Bank sent their representative to take possession of goods in their office and shop, and in answer to a question by the Court particularised two godowns about 5 or 10 minutes' walk from the office.

There is no oral evidence that the insolvents had any property other than that comprised in the document, and so far as appears from the record no desire or attempt to produce any such evidence was expressed or made.

Turning to such documentary evidence as is available it appears that on the 20th August 1920 when Curlender & Co., were pressing Mogi & Co., the Manager of Mogi & Co., in Bombay instructed his Solicitors to write to Curlender & Co.'s Solicitors in the hope of inducing the latter to persuade their clients to stay their hands. The letter says that:—

"Mr. Okhura informs us he has had express instructions to carry on the business with a view to effecting a settlement of all claims as soon as finances have been arranged in Japan; the temporary difficulties in which the firm finds themselves being due to the suspension of their Bank in Japan."

This makes it clear that the respondent Bank did not intend further to finance Mogi & Co. The letter adds that all these (silver and other goods) stocks are under lien to Banks, which excludes the existence of unhypothecated goods and there is no suggestion that any Bank other than the respondent Bank was interested, were it material to enquire.

A subsequent letter dated the 23rd August, similarly addressed, emphasises though it does not add to the information. The statement that Mogi & Co., were not in a position to furnish security can only mean that they had no goods which they had not already hypothecated.

After the Bank had entered into possession it made some advances to the insolvents which were debited to the latter's account, but these were only for the purpose of enabling them to clear and realize the goods in the Port Trust Warehouse. This appears from details given in the accounts and from

a statement in the affidavit of the Sub-Manager of the Bank in Calcutta. There is no evidence whatever of any advance made for the purpose of enabling the insolvents to carry on their business, nor, indeed, is there any evidence that the Bank promised to make such advances, and the transfer contains no such stipulation.

Upon the evidence I think it is clear that Mogi & Co., purported to and did hypothecate all their available property to the Bank. The learned Judge seems to have been impressed by the subsequent advances, but as I read the evidence those were made solely for the purpose of enabling the Bank to realize so much of their security as without money could not be realized at all, and were not advances upon which the Bank can rely for the purpose of putting a favourable complexion upon the transaction and defeating the claim of the Official Assignee.

Had the learned Judge taken the same view of the facts it is possible that he would have decided in favour of the appellant, for he appreciated that the case must depend upon s. 55 of the Act. His observation that a good deal of confusion has arisen by seeking to import into the provisions of s. 55 considerations which would arise, were the application made under s. 56, indicates that the case was argued before him, as here, that if once it could be shown that the facts established that which would have been a preference within s. 56, it necessarily followed that it was within s. 55.

It may be that facts, which would justify an order under s. 56, were the circumstances otherwise appropriate for such an order to be made, are facts which would bring a case within s. 55, but this appeal must be decided upon the words of s. 55. Over and over again has it been enunciated that all that Courts have to do is to construe or apply the words of the Statute and all that we need do is to decide whether or not the transfer impugned was made in good faith for valuable consideration.

Though a considerable number of authorities were cited in the course of the argument I do not think that I need refer to more than a very limited number.

In *Khoo Kwat Siew* v. *Wooi Taik Hwat* (1), Lord Hobhouse stated the rule as follows:—

"The well-known rule of law is, that if a trader assigns all his property, except on some substantial contemporaneous payment, or some substantial undertaking to make payment *in futuro*, that is an act of bankruptcy and is void against the creditors and the assignee, simply because nothing is left with which to carry on his business, whereas if he receives substantial assistance something is left to carry on the business."

We have not to consider whether Mogi & Co., were guilty of an act of bankruptcy as such, but whether, as observed, the transfer was made in good faith and for valuable consideration. Had other circumstances, *e.g.*, the period which elapsed between the transfer and the order for adjudication, admitted of an application under s. 56, there can be no question that, notwithstanding the proviso to the section, the transaction must have been held to have been within that section. The further question then arises whether such a transaction can be said to have been entered into in good faith and for valuable consideration so as not to offend against s. 55.

In *Ex parte Chaplin, In re Sinclair* (2), Cotton, L. J. observed:—

"Still, in my opinion, if persons will take from a man who is in difficulties a deed of this description, which has the effect of withdrawing, and is intended to withdraw, all the property of the debtor from the legal process which his creditors have a right to enforce against him, and bankruptcy ensues, the deed is void under the bankruptcy law. It is fraudulent as well as void, whatever may have been the view of those who were engaged in the transaction that it might be the best thing for the debtor, or that it might afford an effectual way of paying the creditors."

This is more general in its application, and it carries the matter a stage further.

In *Tomkins* v. *Saffery* (3), Lord Blackburn had occasion to consider the meaning of the words "in good faith and for valuable consideration," used in the proviso to s. 92 of the Bankruptcy Act, 1869 which deals with fraudulent preferences.

I will pause here to refer again to Lord Hobhouse's judgment in which in the paragraph immediately preceding that which I have already quoted, he deals with the use of the word "fraudulent" in this connection. His Lordship said:—

"It is better not to use the term 'fraudulent' in such a case, though that term

(2) (1884) 26 Ch. Div. 319; 53 L. J. Ch. 732; 51 L. T. 345.

(3) (1878) 3 A. C. 213; 47 L. J. Bk. 11; 37 L. T. 758; 26 W. R. 62.

has, by rather an unhappy use of language, been applied by Courts of Equity to transactions which are not at all dishonest in their nature, but are only such as the law will not allow. In this case there is no suggestion from beginning to end of there being anything dishonest in the transaction. The sole question is as to its legal validity."

From this and from a passage in Lord Blackburn's speech I infer the principle which is to be found running through all the authorities that in considering the effect of a transaction of this nature the facts must be considered in the light of the law of bankruptcy, the object of which is to ensure rateable distribution of an insolvent's property among his creditors. A transaction, therefore, which may in other circumstances be free from all taint becomes an offence when it is established that it contravenes the law of bankruptcy.

This is what I think Lord Blackburn had in mind when he said :—

"It comes round to this, that I think (I am stating it in my own words, but it is very nearly what the Lord Chancellor has already said) that when they knew that the man was insolvent and unable to pay his debts, when they knew that this money was given them to prefer a particular body of creditors to all the other creditors, if there were others, they were then fixed with the knowledge of an infringement of the Statute, and although they were told by the man who afterwards became a bankrupt that he had no other creditors, they cannot get out of it; they took their chance If he had told them the truth, and there had been in fact no other creditors, this transaction would have stood and been perfectly good; if he had any other creditors it would not stand. They knew all that it was necessary for them to know, and I think they took their chance, and they must take the consequences."

Applying this principle to the facts before us the conclusion at which I have arrived is that the Bank was well aware of the financial difficulties in which Mogi & Co., were involved and that the Bank took the security in order to protect itself in the event of insolvency supervening. There can be no question on the evidence that the Bank desired to protect itself against Curlender & Co., and we have been informed by the Official Assignee that no other claims have been admitted.

I have already stated my reasons for the conclusion that the insolvents' entire property was hypothecated to the Bank. It is a fair inference that the Bank was aware that the insolvents had no other property—otherwise no doubt the Bank would have taken steps to include it in the instrument, seeing that after all the goods in the Port Trust Warehouse had been sold there was still a deficit of over two lakhs of rupees. In this it may also be presumed that Mogi & Co., would have assisted them had it been in their power to do so, for one may at all events credit them with a desire to continue their business if their financial difficulties could be surmounted.

Though the Bank may have acted honestly in the popular sense they cannot be deemed to have acted in good faith within the law of insolvency, however, honestly they may have endeavoured and thought they were justified in endeavouring to secure the property of the insolvents as security for their own debt.

As Lord Blackburn observed with regard to valuable consideration:—"Yes, we must, I suppose, take it that they are so (payees for valuable consideration) but 'in good faith.'" So should I answer the question here as regards valuable consideration, but in my judgment a transaction effected in circumstances surrounding the transaction assailed in these proceedings cannot be deemed to have been effected in good faith and must be declared to be void against the Official Assignee.

I agree that the appeal should be allowed and concur in the order to be made.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

REFERRED CASE No. 8 OF 1923.

December 15, 1924.

Present:—Mr. Justice Devadoss and Mr. Justice Wallace.

KOTHANDARAMA CHETTIAR AND ANOTHER—PLAINTIFFS

versus

ANNAMALAI PILLAI AND ANOTHER—DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 5—Attachment of immoveable property before judgment—Small Cause Court, power of.

A Court exercising the jurisdiction of a Small Cause Court has power to attach immoveable property before judgment under O. XXXVIII, r. 5 of the C. P C. [p. 400, col. 1.]

(Case-law considered.)

Case stated under O. XLVI, r. 1, C. P. C., by the District Munsif, Ariyalur, in Small Cause Suit No. 1258 of 1923.

The Government Pleader, as *Amicus Curiæ*.

JUDGMENT.—The question referred for the opinion of the High Court by the District Munsif of Ariyalur is whether a Court exercising the jurisdiction of a Small Cause Court has power to attach immoveable property before judgment under O. XXXVIII, r. 5 of the C. P. C.

The C. P. C. of 1908 is made applicable to all Courts of Civil Judicature, unless the whole or portions of it are declared not applicable to any Court or the jurisdiction of any Court. Section 7 enacts that certain provisions of the C. P. C. shall not extend to Courts constituted under the Small Cause Courts Act of 1887 or to Courts exercising jurisdiction of the Court of Small Causes under that Act. Under O. L. it is provided that certain provisions of the C. P. C. shall not extend to Courts constituted under the Provincial Small Cause Courts Act or to Courts exercising jurisdiction of the Court of Small Causes under that Act. Order XXXVIII is not one of the orders mentioned in O. L. Order XXXVIII of the C. P. C. is, therefore, applicable to the Court of Small Causes or Court exercising Small Causes Jurisdiction. Under O. XXXVIII, a Court is empowered to attach before judgment moveable and immoveable property. It has also power to arrest the defendant before judgment, if proper cause is shown. So far as this Presidency is concerned, the jurisdiction of a Small Cause Court or a Court exercising Small Cause Jurisdiction to attach before judgment moveable property and to arrest before judgment the defendant for proper cause shown, has never been questioned.

The question is whether under the present Code, the Court of Small Causes or a Court exercising Small Cause Jurisdiction has power to attach before judgment immoveable property. According to the present C. P. C., O. XXXVIII, is applicable to all Courts, unless the jurisdiction under O. XXXVIII has been specifically taken away by the C. P. C. or any other enactment. There is nothing in the C. P. C of 1908 to show that O. XXXVIII, r. 5 is not applicable to a Court of Small Causes or Court exercising Small Cause Jurisdiction. Under the C. P. C., 1882, the Small Cause Court was not given jurisdiction to attach immoveable property before judgment. Schedule II of that Code specifically took away the jurisdiction of the Court of Small Causes to attach immoveable property before judgment. It made Ch. XXXIV corresponding to O. XXXVIII applicable to the Court of Small Causes with a reservation that it was not to apply to the attachment of immoveable property. Under s. 5 of the Code of 1882, only certain specified portions were made applicable to Courts of Small Causes constituted under Act XI of 1865 and to all other Courts except the Presidency Towns Small Cause Courts exercising the jurisdiction of a Court of Small Causes. There seems to be a distinct departure in the present C. P. C. from the policy of the Code of 1882. Under the Code only certain specified portions of the C. P. C. were applicable to Small Cause Courts and Courts exercising Small Cause Jurisdiction. The present Code is made applicable to all Courts of Civil Judicature except such portions of the Code as are specifically stated to be not applicable to any Court or to the jurisdiction of any Court.

Where the terms of an enactment are quite clear, it is unnecessary to enquire into the reasons for the change. It cannot be suggested that the Legislature overlooked the provisions of the previous Code as to the jurisdiction of the Court of Small Causes or Courts exercising Small Cause Jurisdiction as regards the attachment before judgment of immoveable property, when it enacted the present Code.

In the present C. P. C. the provision in Sch. II of the previous Code as regards the attachment before judgment of immoveable property by Courts of Small Causes is deliberately omitted. When the terms of an enactment are quite clear; it is not proper for the Courts to consider what the previous law on the subject was in order to interpret the existing law. Where it is doubtful as to what the Legislature meant by a certain provision of a new enactment, the Court could refer to the previous state of the law in order to interpret what is not clear. But where the law is clear, it is not proper for the Court to consider whether there has been a change in the policy of the law or whether there the Legislature overlooked the pre-

vious law on the subject; [*vide Bank of England* v. *Vagliano* (1).]

This point has been decided quite recently by the Calcutta High Court on a reference similar to the present one. In *Kedarnath Paramanik* v. *Hem Nath Karmakar* (2), a Bench of the Calcutta High Court held that the Provincial Small Cause Court had power to attach immoveable property before judgment. The learned Judges referred to a previous case decided by them as regards the power of the Small Cause Court to attach moveable property before judgment. In *Kumud Behary Pal* v. *Hari Charan Sardar* (3), the same learned Judges held that the Court of Small Causes had power to attach immoveable property before judgment. In that case, the District Munsif who referred the question was of opinion that a Small Cause Court had no power to pass interlocutory orders under s. 94 of the C. P. C., and that an attachment before judgment was an interlocutory order and, therefore, such an order could not be passed by the Court of Small Causes. Section 7 (*b*) does not extend ss. 94 and 95 so far as they relate to injunctions and interlocutory orders. If the intention of the Legislature was not to extend ss. 94 and 95, it could have said so. But only certain orders under ss. 94 and 95, *i.e.*, orders coming under s. 94 (*c*) and (*d*) are exempted from the Jurisdiction of the Small Cause Court or Court exercising Small Cause Jurisdiction. That is no reason for saying that the powers given by s. 94 (*a*), (*b*) or (*d*) could not be exercised by a Court of Small Causes. So far as our Presidency is concerned, as I have already observed, the Jurisdiction of the Small Cause Court to attach moveable property before judgment and to arrest the defendants before judgment for proper cause shown, was never questioned.

In the case of *Ibrahi Rowthen* v. *Sangaram Chetty* (4), the power of the Small Cause Court to award compensation under s. 491 of the old Code corresponding to s. 95 of the present Code was recognized. The Calcutta High Court in this respect has come into line with the Madras High Court.

(1) (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.
(2) 70 Ind. Cas. 841; 49 C. 994; (1923) A. I. R. (C.) 176.
(3) 53 Ind. Cas. 814; 46 C. 717; 31 C. L. J. 179.
(4) 26 M. 504.

The District Munsif refers to an old case reported as *Marthamma* v. *Kittu Sheregara* (5) in which it was held on a reference by the Principal Sadir Amin of Mangalore that a Small Cause Court had no jurisdiction to attach immoveable property before judgment. The reason given by the learned Judges is that "The Court which cannot attach primarily in execution of its decree cannot attach in anticipation of it."

With due respect to the learned Judges, it is not easy to follow the reasoning. The attachment before judgment is only a preventive remedy so as to enable the plaintiff to reap the fruits of his decree if he is able to obtain one, by preventing the defendants from making away with the property and thereby rendering the decree nugatory. It does not follow that a Court which has the power to attach immoveable property before judgment, should necessarily have the power to execute the decree against immoveable property; for the attachment before judgment is not in execution of its decree, but for preventing the defendants from making away with the property before the Court passes its decree. If the suit is dismissed the attachment will *ipso facto* cease. The decision in *Marthamma* v. *Kitta Sheregara* (5) cannot be said to be wrong in the state of the law as it then was. Under s. 5 of Act X of 1877, certain Chapters and sections of the Code specified in the Second Schedule thereto annexed were extended to Courts of Small Causes constituted under Act XI of 1865. It was specially enacted in that section that "nothing herein contained shall be deemed to enlarge the powers which such Courts now possess for the purpose of effecting attachments or executing decrees." By s. 5, the Small Cause Court was not given additional or enlarged powers by reason of the Code of 1877, *i.e.*, the powers which such Court had not, before the Act of 1877 was passed. By the amending Act XII of 1879, the third sentence of s. 5 was repealed. The Second Schedule was amended by the insertion of the words "except as regards immoveable property." This amendment was embodied in the Act of 1872 which put the matter beyond doubt. In 1871 when the decision in *Marthamma* v. *Kittu Sheregara* (5) was passed, the Court of Small Causes had no power to execute its decrees against immoveable property. By Act XI of 1865, s. 20, it was provided that for the purpose

(5) 6 M. H. C. R. 91.

of executing a Small Cause decree an application had to be made to the Court exercising general jurisdiction in which the immoveable property was situate. There is nothing in Act XI of 1865 to show that a Small Cause Court could attach before judgment immoveable property. Under Act VIII of 1859, a Civil Court had jurisdiction to attach before judgment both immoveable and moveable property (*vide* s. 83). Section 388 of that Code extended the Act to all Civil Courts but there is nothing in the Act itself to show that the Act was extended to Small Cause Courts or Courts exercising Small Cause Jurisdiction. Under the Small Cause Courts Act of 1865, therefore, the Small Cause Court had no jurisdiction to attach immoveable property. The decision in *Marthamma* v. *Kutti Sheregara* (5) is, therefore, correct with regard tothe law as it then stood.

But as the law stands at present, it cannot be said that the Small Cause Court has no jurisdiction to attach before judgment immoveable property. As we have already observed, the present Code is quite clear on the point and, therefere, the decision in *Marthamma* v. *Kutti Sheregara* (5) cannot apply to the present state of the law.

We, therefore, answer the question referred to us in the affirmative.

We are very much indebted to the learned Government Pleader for assisting us by arguing the point fully as *amicus curiae*.

V. N. V.
Z. K.

Reference answered, in the affirmative.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 383 AND 384 OF 1922 AND 590 TO 595 OF 1920.

September 24, 1924.

Present:—Mr. Justice Wallace.

CHUNAUGHAT KALLIAM KUTTI AMMA—PETITIONER

versus

KALLINGAL TARVAD KARUNAWAN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 146, O. XXII, rr. 3, 10—Death of plaintiff—Legal representative not brought on record—Assignee from legal representative, whether entitled to continue suit.

Rule 10 of O. XXII of the C. P. C. contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant, upon some one else, and applies only to cases not covered by r. 3 of the Order. [p. 403, col. 1.]

Where on the death of a plaintiff his legal representative does not bring himself on the record within the time prescribed by law, an assignee from such representative is not entitled to make an application under O. XXII, r. 10, of the C. P. C., to be allowed to continue the suit. Section 146 of the Code cannot be availed of in support of such an application inasmuch as the applicant is not claiming under any one who might himself have put in a valid application under r. 10 of O. XXII. [*ibid.*]

Petitions, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the District Judge, South Malabar, dated the 20th December 1920, in C. M. As. Nos. 7 and 10 of 1920, preferred against those of the Court of the Subordinate Judge, South Malabar, in M. P. No. 263 of 1919.

Mr. *C. V. Ananthakrishna Aiyar*, for the Petitioner.

Mr. *T. S. Narayana Iyer*, for the Respondents.

JUDGMENT.

CIVIL REVISION PETITIONS NOS. 383 AND 384 OF 1922.

These petitions relate to two suits Original Suits Nos. 17 and 18 of 1919, on the file of the Subordinate Judge, Calicut. They are suits by Stanithamma Mootha Panikkar to redeem property demised on *kanom* to the 1st defendant. The plaintiff died on 24th February 1919 and the suit would, in the ordinary course, have abated on 24th August 1919, under the law then in force. The plaintiff's successor Vibekerana Mootha Panikkar made no application to be brought on record to continue the suits. He granted *melcharths* to the present petitioner authorizing him to take such steps as were necessary to recover the property. The petitioner on 19th August 1919 filed petitions, Miscellaneous Petitions Nos. 263 and 264 of 1919, in the lower Court under O. XXII, r. 10, to be brought on record and continue the suits. These were dismissed both in the First Court and in the Appellate Court and the petitioner seeks for revision of that order.

It is clear that petitioner is not claiming under the original plaintiff. She is not, therefore, his legal representative within

the present definition of that term in the present C. P. C. She is not also a person intermeddling with the estate of the deceased, but one who derives wholly from the deceased's heir and is not *qua* the estate in a position of opposition to the legal heir. Now this legal heir under whom she claims is not a party to the suit. She contends that this does not prevent the operation of r. 10, but I think this contention cannot be supported. She can only claim to be subrogated to the existing rights of her assignor and if that right does not include the right to continue the suit, I do not see how she can be subrogated to such right which does not exist at present in her assignor. The assignor, who has as yet not been brought on in the suits, has no *locus standi* therein and *a fortiori*, his assignee can have none.

I am not referred to any authority in support of the petitioner's contention. The language used in *Lakshmi Achi* v. *Subbarama Aiyar* (1): "The words 'assignment' and 'creation' indicate that it is the person suing that assigns and creates the interest which enables the assignee to continue the suit" and in *Manindra Chandra Nandi* v. *Ram Kumar Lal Bhagat* (2): "The order contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant upon someone else", are opposed to this contention.

The petitioner calls in aid s. 146 of the C. P. C., but that does not seem to me to apply. Her assignor could not have put in an application under O. XXII, r. 10 to continue the suit, since he was clearly the legal representative of the deceased, a person who, in law represented his estate and, therefore, he could apply only under r. 3. Rule 10 only applies to cases not covered by r. 3. Section 146 will not avail to validate an application by the petitioner, because the petitioner is not claiming under any one who might himself have put in a valid application under r. 10. The ruling in *Sundaram Chettiar* v. *Viswanatha Pandarasannadhi* (3) does not affect this view, since there the application was by a person entitled to put in an application under O. XXII, r. 10. It is not necessary to consider here whether under s. 146, the petitioner might in law have put in an application under r. 3 to be herself brought on as legal representative since no such application was put in by her.

There is no suggestion in this case of collusion between the petitioner's assignor and the defendants in the suits. There is no reason, therefore, why the assignor should not have himself applied within time to be brought on record. He did apply after the dismissal of the petitioner's applications, but his petitions were, after he had died and his legal representative had applied to be brought on in these petitions, dismissed in an order which held *inter alia* that the petitions were out of time and no valid excuse for the delay had been shown. I am, therefore, of the opinion that the lower Court's decision in these civil revision petitions is correct.

Civil Revision Petitions Nos. 594 and 595 of 1920 are against the refusal of the First Court, to grant the petitions by the petitioner on 21st August 1919 to bring on the stranger Vikkarava Panikkar as a party defendant in the suits. They purport to have been put in under O. XXII, r. 3. That does not say that an application of this sort cannot be put in by a stranger, but it is obvious that such applications in the present case are futile, since even if granted they would leave the suits without a plaintiff and would not stop the running of time within which the plaintiff must be brought on, if abatement is to be avoided. The suits have now abated and any order in revision will not have the effect of setting aside that abatement. It is, therefore, no use considering whether there is any case for revision of these petitions.

Civil Revision Petisions Nos. 590 and 591 of 1920 are to revise the orders of the First Court declaring that the suits have abated. On my findings on Civil Revision Petitions Nos. 383 and 384 of 1922 those orders are correct, and in any case the proper procedure was an application under O. XXII, r. 9, in the First Court itself.

Civil Revision Petitions Nos. 592 and 593 of 1920, are to implead the legal representative of the 1st defendant in the suits. As the suits have abated, the order

(1) 29 Ind. Cas. 142: 39 M. 488 at p. 493: 2 L. W. 403; 28 M. L. J. 491; (1915) M. W. N. 327; 17 M. L. T. 385.

(2) 68 Ind. Cas. 973; 49 I. A. 220 at p. 225; 31 M. L. T. 131; 4 U. P. L. R. (P. C.) 83; 43 M. L. J. 589; 1 Pat. 581; 27 C. W. N. 29; 24 Bom. L. R. 1251; (1922) A. I. R. (P. C.) 304; 20 A. L. J. 988; 16 L. W. 905; 36 C. L. J. 542; 4 P. L. T. 1 (P. C.).

(3) 72 Ind. Cas. 103; 45 M. 703; 31 M. L. T. 66; 16 L. W. 83; 43 M. L. J. 147; (1922) M. W. N. 444; (1922) A. I. R. (M.) 402.

of the First Court declining to bring him on record is correct.

I. therefore, dismiss all these Civil Revision Petitions with costs. (One Pleader's fee in all the petitions).

V. N. V. *Petitions dismissed.*

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 85 OF 1923.

July 3, 1924.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Hugh Walmsley, KT.,

INDUBALA DEBI—DEFENDANT—APPELLANT

versus

MANMATHA NATH ROY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Succession Act (X of 1865), ss. 173, 174, 175, 176—Evidence Act (I of 1872), s. 115—Will—Statement that certain property belonged to testator, admissibility of—Election by legatee—Estoppel.

A Will made by a Hindu testator contained the following caluse:—"I do hereby direct that all properties moveable and immoveable standing in the name of my wife including the house No. 45, G. P. C. Lane Calcutta, and all household furniture and articles of domestic use shall remain in the possession of my said wife who shall during her life enjoy all the income and profits arising therefrom. But my said wife shall have no power to sell, mortgage or dispose of any such property. After the death of my said wife the same shall form a part of the residue and remainder of my estate and shall be divided equally amongst my sons." After the death of the testator his widow sold one of the houses standing in her name and the executors of the Will of her husband joined in the sale. With the sale-proceeds and certain moneys paid to the widow by the executors which represented the share of the widow in the income of a certain business which was being carried on in the name of the testator, the widow purchased another house in her own name. Subsequently she sold this house also representing herself to be its real owner stating that she had purchased it with her *stridhan* money and that it was not included in her husband's estate. The executors of her husband's Will and her sons joined in this sale-deed also. Disputes subsequently arose as to whether the house mentioned specifically in the testator's Will and certain other houses were the property of the widow or of the testator:

Held, (1) that the statement in the Will that the house mentioned in the Will and certain other property standing in the name of the widow belonged to the testator was not admissible in evidence as a statement with regard to the title to the houses, but that the fact that the testator had treated the house specifically as being his to dispose of by Will was admissible as conduct on his part in regard to the ownership of the houses which showed what his attitude was shortly before his death, and that the Court was entitled to draw an inference from it as to his intention when he supplied the purchase-money; [p 410, col. 2.]

(2) that the widow and her representatives were not estopped from setting up their ownership of the houses by virtue of any declaration or act of the widow, unless she had done or said anything which had caused the executors to believe something to be true and to act on such belief, which would operate as an estoppel under s. 115 of the Evidence Act; [p. 408. col. 2.]

(3) that the widow being a *pardanashin* lady of slight education and there being no evidence that the Will was ever explained to her, and the executors never having called upon her as they were required to do under s. 176 of the Succession Act to make her election under the Will, no case of an election had been made out. [p. 413, col. 1.]

Under s. 173 of the Succession Act acceptance of a benefit given by a Will constitutes an election by the legatee to take under the Will if he has knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances. Under s. 174 of the Act such knowledge or waiver of enquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the Will without doing any act to express dissent. [p. 412, col. 2.]

Appeal against the judgment of Mr. Justice Greaves, dated the 20th March 1923.

Mr. *N. Sircar*, for the Appellant.

Mr. *S. N. Banerjee*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal by Sm. Indubala Debi, the wife of Mohendra Nath Roy, one of the defendants in the suit against the judgment of my learned brother Mr. Justice Greaves dated the 20th of March 1923. The suit was brought by Manmatha Nath Roy.

The plaintiff and Mohendra are sons of G. B. Roy and Girijamoni Debi. The pedigree of the family of G. B. Roy is set out in the plaint. Kuntala Debi, the defendant No. 6, is the daughter of Bimalabala. The 2nd defendant Mohendra is an insolvent, and the Official Assignee was joined as a defendant.

In the suit the plaintiff claimed that the shares and rights of the parties in the estate of the testator and in particular in the properties set out in Ex. B annexed to the plaint be ascertained and declared.

A further prayer was for a declaration that the defendants Nos. 3, 4 and 5 have no interest or right in the estate of the testator and in particular in the properties set out in Ex. B annexed to the plaint.

There were other reliefs asked for, such as partition, etc.

The question in this appeal relates to 3 houses: *viz.*, 45, Guru Prosad Chowdhury Lane, 1, Raghu Nath Chatterjee Street and 46, Guru Prosad Chowdhury Lane.

The issues were as follows:—

"(1) Did the premises No. 45, Guru Prosad Chowdhury Lane No. 1, Raghu Nath Chatterjee Street belong to Ganga Bishnu or to his wife Girijamoni?

"(2) Is the plaintiff estopped from questioning the title of Girijamoni to No. 45, Guru Prosad Chowdhury Lane.

"(3) Were premises No. 46, Guru Prosad Chowdhury Lane purchased by the executors of Ganga Bishnu on the 1st October, 1894, out of funds of Ganga Bishnu's estate in their hands?

"(4) Did Girijamoni elect to take under her husband's Will?"

—Strictly speaking the 3rd issue should be confined to a portion of 46, Guru Prosad Chowdhury Lane.

The learned Judge held that No. 45, Guru Prosad Chowdhury Lane, and 1, Raghu Nath Chatterjee Street, belonged to G. B. Roy: that on the 2nd issue no case of estoppel was made out. The 3rd issue was answered in the affirmative: and, the learned Judge said that if it were necessary to deal with the 4th issue he should answer that in the affirmative.

Indubala has appealed against this decision. Her interest in the premises arises under the Will of Girijamoni, which was dated 18th May 1919. By this Will Girijamoni devised the two houses mentioned in paras. 1 and 3 of the schedule of the Will to Indubala.

These two houses are Nos. 45 and 46, Guru Prosad Chowdhury Lane. Girijamoni devised No. 1 Raghu Nath Chatterjee Street to Sukritibala for her life and after her death to Mohendra's sons, who are the defendants Nos. 4 and 5. Sukritibala is dead.

The plaintiff's case was that though No. 45, Guru Prosad Chowdhury Lane and No. 1, Raghu Nath Chatterjee Street stood in the name of Girijamoni at the time of G. B. Roy's death, these premises were the property of his father G. B. Roy, and consequently neither Indubala nor the sons of Mohendra have any interest in the premises.

As to No. 46, Guru Prosad Chowdhury Lane the plaintiff's case was that the premises were purchased by the executors of G. B. Roy on 1st October 1894.

The appellant's case was that these premises were purchased by Girijamoni and that under Girijamoni's Will she was entitled to Nos. 45 and 46, Guru Prosad Chowdhury Lane and the sons of Mohendra were entitled to 1, Raghu Nath Chatterjee Street. G. B. Roy died on the 27th April, 1890 having executed a Will dated the 2nd April 1890.

The material paragraphs of the Will are:

1. "I do hereby nominate, constitute and appoint my eldest brother Babu Nritto Gopal Roy my cousin Babu Radha Nath Bagchi son of Srikristo Bagchi of Santipore in District of Nadia but at present of No. 44, Guru Prosad Chowdhury Lane in Calcutta and my father-in-law Babu Bhuban Mohan Dhole of Serampore executors of this my Will.

3. I do hereby direct that all properties moveable and immoveable standing in the name of my wife Girijamoni Devi including the house No. 45 Guru Prosad Chowdhury Lane in Calcutta and all house-hold furniture and articles of domestic use shall remain in the possession of my said wife who shall during her natural life enjoy all the income and profits arising therefrom. But my said wife shall have no power to sell, mortgage or dispose of any such property. After the death of the said Sm. Girijamoni Devi the same shall form a part of the residue and remainder of my estate and shall be divided equally amongst my sons.

6. "I do hereby declare that my said executors will have full discretion, power and authority to sell let mortgage or otherwise dispose of all or any portion of my properties moveable and immoveable for the benefit of my estate.

7. "I further dictate that my wife Sm. Girijamoni Devi shall during her natural life receive a share equal to the share of a son and in all the income and profits of the residue of my estate."

It was argued by learned Counsel on behalf of the plaintiff-respondent that it was not necessary for the Court to investigate the question whether the two properties 45, Guru Prosad Chowdhury Lane, and 1, Raghu Nath Chatterjee Street belonged to G. B. Roy or to Girijamoni, because even assuming that they were the property of Girijamoni, she had elected to confirm the disposition of these premises in the Will of G. B. Roy by the acceptance of benefits which had been provided for her by G. B. Roy's Will. Reliance was placed

upon ss. 167, 173, 174, 175 and 176 of the Indian Succession Act, 1865.

It was urged that the executors had made certain payments for Girijamoni: Among other payments reference was made to sums amounting to Rs. 1,300 or Rs. 1,500 which were paid for the purchase of certain premises called 6, Brindaban Mullick Lane on the 12th January 1891.

In the first place it is to be noticed that the payments were made out of the profits of the business, in which G. B. Roy had a share, and which the executors were carrying on, and that they were debited to G. B. Roy's estate.

This house was purchased in Girijamoni's name for Rs. 6,000.

Part of the purchase-money was provided by the sale of 218, Cornwallis Street on the 7th January, 1891, as is proved by the number and amounts of the Government Currency Notes. 218, Cornwallis Street had been purchased on the 5th April, 1889, *i. e.*, before the death of G. B. Roy. But the deed shows that Girijamoni was the purchaser.

The deed of the 7th January, 1891 by which Girijamoni sold 218, Cornwallis Street was the subject of much comment during the course of the argument.

The learned Counsel for the respondent contended that the recitals were consistent with Girijamoni being merely the *benamidar* of the property.

On the other hand, the learned Counsel for the appellant contended that they were inconsistent with that position, and that by this sale Girijamoni was asserting her own title to the property, and she was thereby dissenting from the disposition of the property by the Will of G. B. Roy.

The executors of G. B. Roy's Will were parties to the deed, and they thereby made themselves responsible for the statement contained therein that the property was purchased by Girijamoni.

If in fact this property was held by Girijamoni as *benamidar*, I see no reason why it should not have been so stated in the deed; instead of this being done the executors of G B. Roy's Will agreed that the property belonged to Girijamoni herself.

The joinder of the executors as parties, may be explained by the fact that Girijamoni was a *pardanashin* widow and the purchaser's advisers would not unreasonably insist upon the executors of G. B. Roy's Will being added as parties so as to avoid any question in the future as to Girijamoni's title.

No. 6 Brindaban Mullick Lane was sold by Girijamoni on the 1st April, 1903.

The deed recited that she was the real owner of the property having purchased it with her *stridhan* money, that she had no co-sharers and that the property was not included in her husband's estate.

The executors of G. B. Roy's estate, the plaintiff in this suit, and Girijamoni's other sons were witnesses to the deed.

In my judgment these deeds and the explicit statements made therein shew that 218, Cornwallis Street, and No. 6, Brindaban Mullick Lane were purchased by and were the property of Girijamoni herself and the evidence obtained from these formal deeds, should not be displaced by the verbal evidence given in this case so many years after the event.

No. 218, Cornwallis Street was one of the properties standing in the name of Girijamoni at the time of G. B. Roy's death, and by selling the property, by asserting her right as the owner of the property, by using the proceeds for the purchase of No. 6. Brindaban Mullick Lane, and by subsequently selling No. 6 Brindaban Mullick Lane as her own property with the consent of the executors and the plaintiff, in my judgment, Girijamoni dissented from the disposition of 218, Cornwallis Street by the Will of G. B. Roy.

The executors of G. B. Roy's estate had no power under the Will to purchase property; the Rs. 1,300 or Rs. 1,500 alleged to have been advanced for the purchase of 6 Brindaban Mullick Lane could not have been made by the executors in pursuance of the provisions of the Will.

One entry in the book shows the payment as having been made out of the funds of the business to the estate of G. B. Roy as earnest money for purchasing a house belonging to R. C. Roy.

In my judgment it has not been proved that by reason of the advance of the Rs. 1,300 or Rs. 1,500, Girijamoni accepted a benefit under the Will of G. B. Roy.

In my judgment the other matters on which the respondent relied as shewing an election by Girijamoni to confirm the dispositions under G. B. Roy's Will are in the same position. It has not been shown that any of the payments prior to 1901, when some profits of the business were divided,

was made in pursuance of the Will of G. B. Roy.

Further, even if they were, it has not been shown that Girijamoni was aware of the provisions of the Will: She was a *purdanashin* lady and no evidence has been given that the Will of her husband was explained to her; and, in my judgment, it has not been proved that she knew that she was accepting any benefit under the Will.

In my opinion, therefore, the point that Girijamoni elected to confirm the disposition of the properties made by G. B. Roy's Will has not been made out.

On the contrary, as I have already said, by her sale of 218 Cornwallis Street, if she knew of the provisions of the Will, she shewed her dissent from them.

I have had an opportunity of reading the judgment about to be delivered by my learned brother; and I agree with his conclusion that the premises No. 45 Guru Prosad Chowdhury Lane belonged to G. B. Roy; the facts relating to the purchase of this property seem to me, for the reasons given by my learned brother, to be sufficient to support the plaintiff's case in respect of this property.

The position as regards No. 1 Raghu Nath Chatterjee Street is different.

All the documents go to show that Girijamoni was the purchaser.

The receipt for the earnest money dated 4th July 1888, and the conveyance were in the name of Girijamoni.

That of course is not conclusive when the question is whether the transaction was *benami*. But it appears that the bill of costs in respect of this purchase was made out to Girijamoni as the debtor.

The Attorney's letter of the 10th September, 1888, returning the title deeds and the conveyance was sent to Girijamoni.

The notice under the Land Registration Act recites that Girijamoni had applied for registration of her name as owner of the premises, and notice was given that all persons who disputed the character and extent of the interest claimed by Girijamoni must state their objections by the date specified therein.

It is to be noted that the date of the notice is December 12th, 1906, long after the death of G. B. Roy.

Further, the plaintiff took no objection to this application for registration by Girijamoni, on the contrary it appears from the evidence that he concurred in it.

I am by no means satisfied that the plaintiff has discharged the onus of shewing that Girijamoni was not the real owner: and with much respect to the learned Judge who tried the case I am unable to agree with his conclusion in respect of this property, *viz.*, No. 1, Raghu Nath Chatterjee Street.

No. 46 Guru Prosad Chowdhury Lane was purchased on the 1st October, 1894.

At this time G. B. Roy was dead. The agreement for purchase dated the 4th July, 1894, was in the name of Girijamoni.

The conveyance dated the 1st of October 1894 also was in the name of Girijamoni, the purchase price was Rs. 2,550 which the deed recited was paid by Girijamoni.

It was alleged by the plaintiff that this property was purchased by the executors of G. B. Roy's Will.

The first question which naturally arises is, why should the executors enter into the transaction in the name of Girjiamoni? In my opinion, no satisfactory answer was given to this question.

It is further to be noted that the executors had no power under the Will to purchase immoveable property; and it ought not to be assumed that they would commit a breach of trust.

It was alleged, however, that the entries in the cash-book and the ledger F. 1 and E. 1 showed that the purchase price was paid out of the estate.

The entry in the cash-book shows that the Rs. 2,500 was paid "to the estate of G B. Roy."

It was agreed that the entry meant that the money came from the business which was still being carried on and the money was debited to the estate of G. B. Roy. The accounts seemed to have been kept on the principle that the business was regarded as a kind of banker for the estate of G. B. Roy, and any money which was paid out of the business to any member of the family seems to have been debited to the estate of G. B. Roy.

Therefore, although it may be that the Rs. 2,500 came out of the business, it does not show that the property bought with the money, belonged to the estate of G. B. Roy.

These entries are, in my opinion, consistent with the case of both sides.

As far as the evidence shewn by the entries goes,—it may be that the money was advanced to Girijamoni to enable

her to purchase the property; or it may be that the money was used by the executors for the purchase of the property—these entries at any rate, in my opinion, are not enough to displace the evidence contained in the agreement and the conveyance, especially when it is the fact that no sufficient reason has been given why the executors of G. B. Roy's estate should make the purchase of the property in the name of Girijamoni.

I have already said that in my judgment it has been established that it was Girijamoni who purchased with her own *stridhan* money No. 6 Brindaban Mulliok's Lane. The deed of sale, when that property was sold on the 1st April, 1903, recites that fact: Yet the entries in the book show that the estate of G. B. Roy was debited on the 2nd December, 1890, with Rs. 1,000 as earnest money for purchasing the house, which must have been an advance to Girijamoni for the purpose of the purchase.

It seems to me that the Rs. 2,500 may well have been on the same footing as the Rs. 1,000 to which I have referred.

The document Ex. K which Girijamoni was induced to sign, seems to have treated the Rs. 29,100 as if Girijamoni had merely a life interest therein, which was of, course, not correct:—that sum belonged to her.—Yet Girijamoni is made to declare that the plaintiff was entitled to $\frac{1}{4}$th share of that sum after Girijamoni's death.

In the same way in the document Ex. L the plaintiff stated that his interest in this property was $\frac{1}{4}$th and that this share remained.

I am by no means satisfied that Girijamoni appreciated what she was doing by these documents. These documents show that plaintiff in 1915 was anxious to make it clear that he would claim one quarter's interest in the properties. The Will of Girijamoni is inconsistent with the allegation that she recognized the plaintiff's right in this respect.

The learned Counsel for the plaintiff in this Court based his case as regards the property No. 46 Guru Prosad Chowdhury Lane on estoppel. He argued that Girijamoni and her representatives were estopped from denying that the property belonged to G. B. Roy's estate, by reason of the fact that Girijamoni had accepted the sum of Rs. 2,500 from the executors of G. B. Roy's estate for the purchase of the property.

I am unable to accept this argument. In the first place, as already stated, it has not been proved that the payment was anything more than an advance to Girijamoni in order that she might purchase the property.

In the second place, I find no evidence of any declaration or act of Girijamoni which can be said to have caused the executors to believe something to be true and to act on such belief which would prevent her and her representatives from denying the truth of that thing so as to bring the case within s. 115 of the Evidence Act.

In my opinion, therefore, the appeal should be allowed so far as it concerns the two properties No. 1, Raghu Nath Chatterji Street and 46 Guru Prosad Chowdhury Lane and the decree of the Trial Court should be varied accordingly.

The result will be that as regards the immoveable properties the decree will stand in respect of No. 45 Guru Prosad Chowdhury Lane, and the suit will be dismissed as regards No. 1 Raghu Nath Chatterji Street and 46 Guru Prosad Chowdhury Lane.

No question in the appeal has been raised as regards the moveables, the shares of the respective parties or the decree for partition.

The decree, therefore, with regard to these matters will stand.

As regards costs the result of our judgment is that the plaintiff has succeeded as regards one property, namely, No. 45 Guru Prosad Chowdhury Lane, and the defendant has succeeded as regards two of the properties, mentioned in the plaint. It is desirable that this Court should make an order as to costs which will not give rise to any further enquiry. Both the parties agree to that: and, the only question is what would be the proper order to make with regard to the costs of the suit and of the appeal. It is true that the plaintiff has succeeded as regards one property only, out of the three. On the other hand, the plaintiff had to bring his suit in order to establish his case *in respect of that property*. In the ordinary course, I should have thought that he would have been entitled to the general costs of the suit and the costs as regards the issue with reference to that property. But in this case it would

be impossible for the Taxing Officer to ascertain the costs which should be allocated to the different issues.

As regards the costs of the suit my learned brother and I have come to the conclusion that the fair and proper order to make is that each party should pay his or her own costs of the suit. As regards the costs of the appeal we are of opinion that the appellant is entitled to 4/5ths of her taxed costs.

The sum of Rs. 750 deposited with the Registrar as security for the costs of the appeal under order dated the 23rd of July 1923, will be paid to the appellant's Attorney.

Walmsely, J.—This appeal is directed against a judgment of my learned brother Mr. Justice Greaves by which he decreed the plaintiff's suit. The appellant is the 3rd defendant, Indubala Debi sister-in-law of the plaintiff.

The suit relates to a family dispute. One Ganga Bishnu Roy died in April 1890, and his widow Girijamoni outlived by him by more than thirty years and died in October 1921. They had six sons; the eldest is Manmatha the plaintiff: the third is Mohendra himself the 2nd defendant, and husband of the appellant. Two other sons Jogendra and Rajendra were alive when their father died, but they died some years ago without issue. The other two sons Surendra and Jitendra died before their mother, leaving daughters, defendants Nos. 7 and 6. Ganga Bishnu was a successful contractor, and at the time of his death he was carrying on a profitable brick-making business with his cousin Radha Nath Bagchi. He made a Will, appointing this Radha Nath Bagchi and his brother Nritya Gopal as executors; and they obtained Probate. They continued to carry on the brick-making business and their administration did not end until 1907.

Mohendra the appellant's husband, was adjudicated insolvent in 1916, and that accounts for the presence of the Official Assignee as the 1st defendant. Manmatha bought the insolvent's interest in the immoveable property said to belong to the deceased Ganga Bishnu's estate in 1917, and in March 1921 at a Sheriff's sale he bought the interest that had devolved on his brother Surendra.

Manmatha thus claims to have acquired one-half of the immoveable property during his mother's lifetime and to have succeeded to another sixth on her death. The other one-third is divided between Mohendra, on his mother's death, and Jitendra's daughter.

The plaint set out also the manner in which the moveable property descended but we are not directly concerned with that.

The immoveable property mentioned in the plaint consists of three items (1) 45 Guru Prosad Chowdhury Lane, (2) 1 Raghunath Chatterjee Street and (3) 46 Guru Prosad Chowdhury Lane. The reason for the suit is contained in the seventeenth paragraph of the plaint, and is that Mohendra and his wife assert that this property was the property of Girijamoni the widow, and not of her husband Ganga Bishnu, and that Girijamoni has bequeathed them by Will to Mohendra's sons.

The plaint contained numerous prayers. So far as the immoveable property is concerned they were for a declaration that plaintiff's share was two-thirds, that Indubala the appellant and her sons have no share in it, and for partition.

The appellant in her written statement asserted that the three items of immoveable property belonged to Girijamoni, and that she made a Will bequeathing them to Indubala and her sons. The executors named in this Will were afterwards added as defendants, and I may say here that they have proved the Will although they have not actually taken out Probate.

The issues raised in the trial were (1) Did the premises No. 45 Guru Prosad Chowdhury Lane and No. 1 Raghunath Chatterji's Street belong to Ganga Bishnu or to his wife Girijamoni?

(2) Is the plaintiff estopped from questioning the title of Girijamoni to No. 45 Guru Prosad Chowdhury Lane?

(3) Were premises No. 46 Guru Prosad Chowdhury Lane purchased by the executors of Ganga Bishnu on October 1, 1894, out of funds belonging to Ganga Bishnu's estate in their hands?

(4) Did Girijamoni elect to take under her husband's Will?

The learned Judge answered the first and third issues in the affirmative, and said that if it were necessary to deal with the fourth he would answer that also in the affirmative. Of the second issue he said that no case of estoppel had been made out. That finding is also in plaintiff's favour, for the plea of estoppel raised in the Trial Court

was that the plaintiff was estopped in regard to the house, No. 45 Guru Prosad Chowdhury Lane.

It is to be regretted that the learned Judge has framed his judgment in such a way that we cannot ascertain the reasons for his findings.

I shall deal first with the plaintiff's contention that the properties No. 45 Guru Prosad Chowdhry Lane and No. 1 Raghu-Nath Chatterjee Street really belonged to Ganga Bishnu and not to his wife, although the documents of title are in the name of the wife.

The facts about the purchase of No. 45 Guru Prosad Chowdhury Lane need a few details about the family. Ganga Bishnu had three brothers, and they all lived in their family dwelling house at No. 44. Ganga Bishnu was an enterprising young man, and by 1875, he was well-to-do. In that year the adjoining piece of land, premises No. 45 Guru Prosad Chowdhury Lane was bought for the sum of Rs. 1,200 The document is in favour of Girijamoni. In 1882 Ganga Bishnu and his brothers came to an agreement, which was embodied in reciprocal deeds, by which Ganga Bishnu gave up all claim to his inherited share in No. 44 while the brothers in return gave up all claim to any interest in No. 45, and also to all claims in regard to Ganga Bishnu's business. Both these documents allude to the purchase of No. 45 as made from money given by Ganga Bishnu to Girijamoni out of his own earnings. The premises remained vacant for a few years longer, and then a house was built on it. Ganga Bishnu lived in that house until his death and his family after him, and in the Will which he made a few weeks before his death he mentioned the house specifically.

This is the evidence bearing on No. 45 Guru Prosad Chowdhury Lane and the learned Judge has held that it is enough to discharge the burden that lay upon the plaintiff of showing that Girijamoni was not the real owner. I thihk we should agree with him and the reasons which weigh with me are these. In the first place when the purchase was made Ganga Bishnu was a very young man; he had not inherited wealth so far as we know; he was prospering, but in a business involving great risks; he wanted to be free to carry on his business without interference from his brothers: he had no house of his own. t was unlikely, therefore, that so early in his career he would make an unusually large gift to his wife: and on the other hand it was likely that he should buy land close to his home, and likely too that he should try to place it beyond the reach of possible disaster.

Secondly the statements in the deeds of release seem to me to point to a desire to accumulate evidence of Girijamoni's title. As between the brothers there was no need to say that the purchase was by Girijamoni and not by Ganga Bishnu, but having at the outset put the property in his wife's name it was natural enough that he should have these statements introduced.

Thirdly there is the disposition in the Will. There was some discussion about the admissibility of this piece of evidence. The words are in the third paragraph "I do hereby direct that all properties moveable and immoveable standing in the name of my wife Girijamoni Devi including the house No. 45 Guru Prosad Chowdhury Lane in Calcutta and all household furniture and articles of domestic use shall remain in the possession of my said wife, who shall during her natural life enjoy all the income and profits arising therefrom. But my said wife shall have no power to sell, mortgage or dispose of any such property. After the death of the said Sm. Girijamoni Devi the same shall form a part of the residue and remainder of my estate and shall be divided equally amongst my sons." As a statement these words are not admissible, but the fact that Ganga Bishnu treated this property specifically as being his to dispose by Will, is admissible as conduct on his part in regard to the ownership of the house. Viewed as conduct, it shows what his attitude was shortly before his death, and we may draw an inference as to his intention when he supplied the purchase-money.

For these reasons I accept the Judge's finding in regard to the first item of property.

The facts with regard to No. 1 Raghu Nath Chatterjee Street are different. It was bought in 1888. The receipt for the earnest money dated July 4, is granted to Girijamoni: the conveyance is in her name: the Solicitor's bill for costs is made out against her; and his letter forwarding the conveyance and the original title deeds is addressed to her, and it was she who applied for registration of her name as

owner under the provisions of Act VII B. C. of 1876. This application it may be noted was not made until 1906, long after Ganga Bishnu's death, and while the executors were in possession of the estate, Manmatha, the plaintiff, himself went to the Collector's office to support the application, not to oppose it, and I do not think it matters whether he went before or after the executor had been released. In the case of this property it seems that there is no evidence at all to show that Girijamoni was not the real owner, except the words that I have already quoted from the Will. The inference drawn from Ganga Bishnu's claim to dispose of property standing in his wife's name must be weaker in the case of property not described specifically. It was the duty of the plaintiff to show that Girijamoni was not the real owner, and in this state of the evidence I think it must be held that he has failed to discharge the onus.

As the issues show, the plea of *benami* did not include the third property. The plaintiff did assert in the eighth paragraph of his plaint that this property was bought by the executor in lieu of.....No. 218 Cornwallis Street and that, as the latter was really the property of Ganga Bishnu, although the document of title was in the name of Girijamoni, No. 46 Guru Prosad Chowdhury Lane succeeded to the same *benami* character. That argument, however, was not pressed before us, and I may mention one very good reason. A *benamidar* implies a real owner, and if Girijamoni was only the *benamidar* when the property was bought in 1894 who was the real owner? That is a question to which the plaintiff could not give an answer.

The plaintiff's second argument was that Girijamoni had elected to take under her husband's Will, and, therefore, she was debarred from setting up claims in opposition to the provisions of the Will. Here it is necessary to give the main features of the Will, and a brief account of the executor's proceedings.

The third paragraph of the Will directed that all properties moveable and immoveable standing in the name of GirijamoniDebi including the house No. 45 Guru Prosad Chowdhury Lane and all household the furniture and articles of domestic use should remain in possession of his wife who should during her natural life enjoy all the profits and income arising therefrom. The fifth paragraph gave the executors' power to carry on the brick-making business or to wind up the partnership. The seventh directed that Girijamoni should during her lifetime receive a share equal to the share of a son in all the income and profits of the residue of the estate.

The executors lost no time in taking out Probate of the Will, and in their application they mentioned the three houses in suit. They then carried on the brick-making business, first on the terms of the existing partnership and then on rather different terms. Accounts were kept at the brick-field and in them appear frequent entries to the debit of G. B. Roy's estate; some are of payments for some specific purpose, others are of large sums for maintaining the family. In 1901 the first distribution of profits was made, and the widow received Rs. 18,000, and each of the five surviving sons Rs. 9,000, and in 1907 the surviving executor Radha Nath handed over to the widow and her sons the sum of Rs. 15,851, as the balance due to them and they in turn executed a deed of release in his favour. The account attached to this document contains a reference to a transaction by the executors, which lay outside the directions of the Will and outside the duties of executors. It appears that they bought a house and sold it at a profit, and credited the profit in the account. The document does not speak of any division of the Rs. 15,851 or say into whose hands it was given. All we know is that in the documents exchanged by Girijamoni and the plaintiff in 1915, she said that she had received Rs. 29,100 from the executors.

The transactions in regard to No. 218 Cornwallis Street and No. 46 Guru Prosad Chowdhury Lane are as follows. It was bought in 1889 for Rs 3,200 and the purchaser is Girijamoni. That was shortly before Ganga Bishnu's death, when he was well off. Apart from the implication in the Will there is nothing to show that it was he, and not his wife, the ostensible purchaser who bought it. Girijamoni sold it on January 5, 1891—shortly after her husband's death, and for the better security of the purchaser, the executors joined in the sale. The identical notes received from the purchaser were paid on January 12 to the owner of No. 6 Brindaban Mullick Lane which was sold to Girijamoni alone for Rs. 6,000. This house in turn was sold in

April 1903, for Rs. 6,600. The conveyance recited that Girijamoni had bought the property with her *stridhan* money, that it was her own property that she was selling and not part of her husband's estate, and that her sons and the executors were signing the document as witnesses in recognition of her assertions. Meanwhile in October 1894, Girijamoni bought No. 46 Guru Prosad Chowdhury Lane in her own name for Rs. 2,550.

Reference has been made to some entries in the accounts in regard to these transactions. The earnest money of Rs. 51 paid by the purchaser of 218 Cornwallis Street is entered on December 1890 as "received from the estate of G. B. Roy (from Lakshmimani Bewa, *bania* for a piece of land) as per bill," and on the same day there is an entry of payment of Rs. 1,000 as earnest money for purchasing a house belonging to R. C. Roy (husband of the vendor of 6 Brindaban Mullick Lane). On the 8th January there is an entry of Rs. 60 for buying a stamp for the purchase of a house and on the 16th of Rs. 300 through R. C. Roy for purchase of a house, on the 30th of some minor charge possibly connected with the purchase, and on June 4th of Rs. 250 paid to the estate of G. B. Roy—(To R. C. Roy for value of a house purchased from him).

Then in October, 1894 there are entries in the cash-book and Ledger of Rs 2,500 paid to the estate of G. B. Roy for the purchase of a part of house No. 46 Guru Prosad Chowdhury Lane, and there is an earlier entry in August of Rs. 2,290 "Received back from N. B. Roy as per sheet No. 11," regarding which it is suggested that the money was taken out to complete the purchase arranged, but returned as the transaction could not be completed until later.

Here it is convenient to refer to four other entries in the accounts: three are of payments of Rs. 15 as Baidya Nath's mother's allowance (*i. e.*, Girijamoni) for September and October 1890, and an earlier month, and the other is of Rs. 32-6-0 for house tax. Assuming that the consolidated rate was 19½ per centum in 1890, as it is now, this sum represents what would be a quarter's rate on No. 45 Guru Prosad Chowdhury Lane and No. 1 Raghu Nath Chatterjee Street. I must add, however, that these charges do not re-appear.

I have already said that we are not asked to hold on these entries that in respect of No. 46 Guru Prosad Chowdhury Lane Girijamoni became only a *benamidar*. Learned Counsel for the only plaintiff puts his case regarding this property on the ground that Girijamoni allowed the executors to invest money belonging to her husband's estate in real property and she and her successors are precluded by the principle of estoppel from saying that the property thus bought belongs to her and not to her husband's estate. To this argument the obvious answer is that Girijamoni did not in the words of section 115 of the Evidence Act cause or permit the executors to believe something to be true and to act on such belief, and, therefore, there is no question of allowing or forbidding her and her successors to deny the truth of that thing.

There remains the question whether Girijamoni can be said to have 'elected' to take under the Will. The rules relating to election are contained in Ch. XXVII of the Succession Act (Act X of 1865). The argument is that by the Will Ganga Bishnu gave his widow a life-estate in his immoveable properties standing in his name, and a share equal to son's share in the income of his business, and that as Girijamoni has received her share in the income in accordance with the Will, she cannot claim the immoveable property in opposition to the Will.

According to s. 173 acceptance of a benefit given by the Will constitutes an election by the legatee to take under the Will, if he has knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances, and in the following section it is said "such knowledge or waiver of enquiry, shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the Will without doing any act to express dissent." Now Girijamoni undoubtedly knew that there was a Will, but there is no evidence that she knew anything about its contents beyond the fact that it appointed certain executors. But it is argued that she took the benefits for two years, and, therefore, under s. 174 we must presume that she had the necessary knowledge or waived enquiry. It is true that Girijamoni received benefits at the hands of the executors, but I feel very doubtful as to whether they can be referred

to the Will, as benefits provided by the Will. The executors treated the widow very generously, but the distribution of 1901 seems to be the only act which can be said to be dictated by the Will. Further I think we can say that the presumption is rebutted by the circumstances. Girijamoni was a *pardanashin* lady of slight education. There is no evidence that the Will was ever explained to her, and the executors never called upon her as they are required to do under s. 176 to make her election. I think, therefore, that Girijamoni did not have the knowledge that is essential to election.

Counsel for respondent, however, relies on the provisions of s. 175 which runs, "Such knowledge or waiver of enquiry may be inferred from any act of the legatee which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done." This section differs from s. 174 in that it only *permits* an inference. Apart from that, I do not think that the receipt of money at any time rendered it impossible to place the parties in the same condition as if the money had not been taken. Further there is the fact that in 1915 the surviving sons made effective arrangements for depriving her of all power to deal with anything more than the interest arising from her investments.

My conclusion, therefore, is that the principle of election is of no avail to the plaintiff.

To sum up, my findings are (1) that the property No. 45 Guru Prosad Chowdhury Lane really belonged to Ganga Bishnu Roy at the time of his death although the title deed was in the name of Girijamoni; (2) that it has not been proved that Girijamoni was not the real owner of No. 1 Raghu Nath Chatterjee Street, and that she and her successors are not precluded from claiming it as her property by the principle of election; (3) that so far as No. 46 Guru Grosad Chowdhury Lane is concerned no question of *benami* arises, and that neither election nor estoppel debars the defendants from resisting the plaintiff's claim to it.

I would, therefore, agree with the learned Chief Justice in the modification of the decree which he proposes.

Z. K. *Decree modified.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 17 OF 1923.

December 4, 1924.

Present:—Mr. Justice Madhavan Nair.

KAMANA VENKATASWAMI—PETITIONER—DEFENDANT No. 2—APPELLANT

versus

GODAVARTI NAGAYYA—COUNTER-PETITIONER AND DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 66, 90—Execution of decree—Sale, application to set aside—Notice of sale proclamation—Under-valuation—Appeal, second, whether lies.

An application by a judgment-debtor to set aside a Court sale on the ground that he had no notice of the proclamation of sale and that there was an under-valuation of the property falls under O. XXI, r. 66, C. P. C., and a second appeal lies against an order therein, although the application purported to have been filed under r. 90 of O. XXI.

Thekkedath Neelu Neithiar v. *Subramania Moothan*, 53 Ind. Cas. 809; (1919) M. W. N. 897; 11 L. W. 59, followed.

Appeal against an order, dated the 15th November 1922, of the Court of the Subordinate Judge, Narasapur, in Mis. A. S. No. 20 of 1922, preferred against that of the Court of the Principal District Munsif, Narasapur, in C. M. P. No. 752 of 1921 in E. P. No. 148 of 1921 in O. S. No. 480 of 1919.

Mr. *P. Somasundaram*, for the Appellant.

Mr. *P. Bapirazu*, for the Respondent.

JUDGMENT.—The 2nd defendant is the petitioner. This Civil Miscellaneous Second Appeal arises in connection with an application made by him to set aside a sale under O. XXI, r. 90, C. P. C. A preliminary objection is taken that no second appeal lies in such a case. In reply, it is pointed out by Mr. Somasundaram for the appellant that though the petition is filed as one under O. XXI, r. 90, in substance the objections which he intends to press here are really objections which come under O. XXI, r. 66 and, therefore, there is a right of second appeal as the application is really one under s. 47, C. P. C. The objections put forward are two in number, namely, that the petitioner had no notice of the proclamation of sale and that there is an undervaluation of the property. Both these objections fall under O. XXI, r. 66 and according to the decision in *Thekkedath Neelu Neithiar* v. *Subramania Moothan* (1), the petitioner has got the right of prefer-

(1) 53 Ind. Cas. 809; (1919) M. W. N 897; 11 L. W 59.

ring a second appeal. I, therefore, overrule the preliminary objection.

On the merits, I find that no question of law arises in this second appeal. The lower Appellate Court has found that, though the petitioner was not personally served, he has been served in the manner provided by the C. P. C. The Court ordered substituted services on the petitioner and the finding of the Court amounts to this, namely, that in the circumstances of the case, such service was sufficient. The petitioner is one of the members of an undivided joint Hindu family. His father and mother were also parties to the suit. The father was personally served and the others were served by the notices affixed to the outer door of their house. Apart from the fact that the petitioner was properly served, I think that the family interests in the property would have been properly looked after by the judgment-debtors.

Then it is argued that the property has been undervalued. This, like the other point, is also purely a question of fact. The lower Court has recorded a finding against the appellant and I am bound by it. I must, therefore, dismiss the second appeal with costs.

V. N. V. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 76 OF 1925.

February 12, 1925.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

Syed OON MOHAMMAD—APPELLANT

versus

Musammat BINT ZOHRA AND ANOTHER—RESPONDENTS.

Agra Pre-emption Act (XI of 1922), ss. 14, 15—Evidence Act (I of 1872), s. 115—Pre-emption—Notice to person entitled to pre-empt—Refusal to pre-empt—Estoppel.

It is not compulsory for a vendor to give a notice under s. 14 of the Agra Pre-emption Act. He may, by word of mouth, or in any other way, inform a person having a right of pre-emption of his intention to sell. If the person to whom that communication is made states there and then that he refuses to purchase the property, he is disqualified from subsequently maintaining a suit for pre-emption. The case is really one of estoppel under s. 115 of the Evidence Act. A person to whom a notice has been given having intimated his refusal and the sale having been made after that refusal, he cannot be allowed to turn round and seek to enforce his right of pre-emption through the Court. Section 15 of the Agra Pre-emption Act has nothing to do with such a case.

Second appeal from a decree of the Subordinate Judge, Muzaffarnagar, dated the 10th October 1924.

Mr. *K. C. Mital*, for the Appellant.

JUDGMENT.—We think the decision of the lower Appellate Court in this case is correct. The case is a case under the Agra Pre-emption Act (XI of 1922). One of the pleas which was raised by the defendant-purchaser was that the plaintiff pre-emptor had been told about the proposed sale and had intimated that he did not desire to purchase the property.

It was argued in the Court below and it is argued here that the terms of ss. 14 and 15 of the Agra Pre-emption Act ought to be applied to this case and that it ought to be held that a notice under s. 14 should have issued to the plaintiff as being a person who was entitled to a right of pre-emption. As regards this argument it is sufficient to say that s. 14 does not make it obligatory on the vendor to give a notice to a person who has a right of pre-emption.

Reference is also made to s. 15 which deals with the extinction of the right of pre-emption of any person to whom a notice has been given under s. 14. It is argued before us that when a notice is issued under s. 14 the person who receives the notice is allowed a month to make up his mind as to whether he will or will not take the property, and so it is said that if this period is given to a person with a right of pre-emption in order to determine whether he will purchase the property, similarly a right should be given to a person in the position of the present plaintiff to whom no registered notice was given under s. 14. We cannot agree with this contention either. Section 15, as we have said, merely lays down that when a notice has been issued to any person under s. 14 his right of pre-emption is extinguished unless he communicates his intention to purchase the property within one month.

We think the learned Judge of the Court below was right in saying that it is not

compulsory for a vendor to give a notice under s. 14. He may, by word of mouth or in any other way, inform a person having a right of pre-emption of his intention to sell. If, as is found in the present case, the person to whom that communication is made states there and then that he refuses to purchase the property, then we think he is disqualified from maintaining a suit for pre-emption. There is no need to refer to any special procedure laid down in Ch. III of the Agra Pre-emption Act. As the learned Judge of the Court below observes the case is really a case of estoppel under s. 115 of the Evidence Act. The person to whom a notice has been given having intimated his refusal and the sale having been made after that refusal, he cannot be allowed to turn round and seek to enforce his right of pre-emption through the Court. The doctrine of estoppel applies to all sorts of cases including pre-emption cases and we think it was properly applied in the Court below. We uphold the judgment of the Court below and dismiss the appeal under O. XLI, r. 11.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1327 OF 1922.

February 12, 1925.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

KHUDAYAR KHAN—DEFENDANT—APPELLANT

versus

RAHAT KHAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Partition, effect of—Wajib-ul-arz *prepared in partition proceedings—Minor co-sharer, whether bound.*

A custom of pre-emption recorded in a *wajib-ul-arz* is not necessarily abrogated by the partition of the village. It is open to the co-sharers to adopt that custom in its entirety or to modify it in order to adapt it to the altered constitution of the village. [p. 415, col. 2.]

It must be presumed that a minor co-sharer was duly represented during partition proceedings by some lawful guardian, who looked after his interests, and a *wajib-ul-arz* prepared in the partition proceedings must, therefore, be held to be binding on all the parties to the partition proceedings. [p. 416, col. 1.]

Second appeal from a decree of the Distract Judge, Ghazipur, dated the 24th July 1923.

Dr. *S. N. Sen* and Mr. *S. N. Verma*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This appeal is without force. The plaintiff sued to pre-empt certain property situated in certain *mahals* in which he was a co-sharer. The plaintiff claimed that he was entitled to preference by reason of his being a near kinsman of the vendor. The defendant-vendee was also a co-sharer in the *mahal*, and his defence was that he was also related to the vendor. The plaintiff relied on an alleged custom recorded in the *wajib-ul-arz* of 1882 and that prepared after the partition of the village in question in 1911. Both these *wajib-ul-arzes* gave a preferential right to a near kinsman of the vendor who was also a co-sharer in the *mahal* or *patti* in which the property sold was situated. The Court of first instance found that the custom recorded in the *wajib-ul-arz* of 1882 ceased to be enforceable after the partition and that the plaintiff could only succeed on the ground that there was a contract of pre-emption entered in the new *wajib-ul-arz* which was prepared at the time of partition. The lower Appellate Court upheld that view.

We have examined the *wajib-ul-arzes* produced in the case, and have no doubt that the view taken by the Courts below in regard to the effect of the partition on the custom recorded in the previous *wajib-ul-arz* is erroneous. As observed by their Lordships of the Privy Council in *Digambar Singh* v. *Ahmed Sayeed Khan* (1), a custom recorded in the *wajib-ul-arz* is not necessarily abrogated by the partition of the village. It is open to the co-sharers to adopt that custom in its entirety or to modify it in order to adapt it to the altered constitution of the village. The co-sharers in the present instance appear to have adopted the former course, for the *wajib-ul-arz* recorded at the time of the partition of the village in question stated that the right of pre-emption shall continue to belong, in spite of the par-

(1) 28 Ind. Cas. 34; 37 A. 129; 13 A. L. J. 236; 19 C. W. N. 393; 17 M. L. T. 193; 2 L. W. 303; 21 C. L. J. 237; 28 M. L. J. 556; 17 Bom. L. R. 393; (1915) M. W. N. 581; 42 I. A. 10; 22 L. W. 303 (P. C.).

tition of the village, to the co-sharers who were near kinsmen of the vendor and that it would extend, subject to the limitations therein recorded, to co-sharers of one *mahal* as against co-sharers of the other *mahals*. The plaintiff, being a nearer kinsman of the vendor, was, therefore, rightly granted a decree for pre-emption.

It is urged on behalf of the defendant-vendee that the vendor was a minor at the time of the partition and that he was not bound by any contract entered into by the co-sharers at the time. Even assuming that he was a minor co-sharer at the time it must be presumed that he must have been duly represented in the partition proceedings by some lawful guardian who looked after his interests, and the *wajib-ul-arz* prepared in partition proceeding must, therefore, be held to be binding on all the parties to the partition proceedings. It is not open to the vendor, if he was a co-sharer at the time, to go behind the partition proceeding and raise pleas inconsistent with what was then recorded as one of the conditions on which the partition was effected. That being so, this appeal fails and is dismissed with costs, including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 304 OF 1923.

October 13, 1924.

Present:—Mr. Wazir Hasan, A. J. C.

BHAWANI PRASAD DUBE—DEFENDANT—APPELLANT

versus

BAIJNATH SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Jurisdiction of Civil and Revenue Courts—Partition—Allotment of lands, whether can be questioned in Civil Courts.

Where in a partition the directions given in the *tarz taqsim* are not complied with in the actual carrying out of the partition, the party aggrieved has a right of appeal. Subject to that, however, the final proceedings of the partition Court in the matter of the allotment of lands are conclusive and cannot be challenged in a Civil Court.

Second appeal against a decree of the Suborbinate Judge, Fyzabad, dated the 18th July 1923, preferred against that of the Munsif, Amethi at Sultanpur, dated the 29th March 1923.

Mr. *Moti Lal Saksena*, for the Appellant.

Mr. *Khaliquzzaman*, for the Respondents.

JUDGMENT.—This is the defendant's appeal. It arose out of a suit by the plaintiffs-respondents for possession of 2 *bighas* 1 *biswa* 1 *biswansi* land in village Raipur in the District of Fyzabad. The title on which the claim was laid was stated to be that the land was allotted to the plaintiff No. 1 in the partition of the village in the year 1912 affected under the provisions of the U. P. Land Revenue Act. The defendant-appellant was a party to that partition proceeding. The Courts below have concurrently found that the land in suit was allotted to the plaintiff No. 1 in the partition mentioned above. They have further shown that if the land in suit were thrown into the defendant's share the share would exceed the proportion to which he is entitled. The argument at the hearing of this appeal was that the defendant held the land in suit under a sale-deed from the plaintiff No. 1 and according to the directions in the *tarz taqsim* this land should have been thrown into the *chitti* of the vendor. But it has been thrown into the *chitti* of the vendor, that is, the plaintiff No. 1, and as his own property. If the directions given in the *tarz taqsim* were not in any manner complied with in the actual carrying out of the partition the defendant had a right of appeal. As it is, the final proceedings of the partition Court in the matter of the allotment of lands are conclusive and cannot be challenged in a Civil Court.

The appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISIONS NOS. 668 AND 684 OF 1924.

January 1, 1925.

Present:—Mr. Justice Ryves.

DAULAT RAM—APPLICANT

versus

Seth KANHAIYA LAL—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 12, Sch. I, Art. 154 —Criminal Procedure Code (Act V of 1898), s. 476— Application for order directing prosecution, dismissal of—Appeal—Limitation—Time spent in obtaining copy of order appealed against, whether can be excluded.

Petitioner was plaintiff in a civil suit which was decreed. He subsequently made an application under s. 476 of the Cr. P. C. for an order to prosecute the defendants. The Trial Court rejected the application. Petitioner filed an appeal under s. 476 (B) of the Code, and attached a copy of the order of the Trial Court rejecting his application to the appeal. His appeal was dismissed on the ground that it was barred by time and that he was not entitled to deduct from the period of limitation prescribed, the time spent by him in obtaining a copy of the order appealed against:

Held, that under the rules of the Court the petitioner was bound to file along with his appeal a copy of the order appealed against and that, therefore, under s. 12 of the Limitation Act he was entitled to deduct the period spent by him in obtaining a copy of that order from the period of limitation prescribed for the appeal and that consequently his appeal was within time and must be decided on the merits.

Criminal revision from an order of the Sessions Judge, Meerut, dated the 1st August 1924.

Messrs. *Panna Lal* and *K. C. Mital*, for the Applicant.

Messrs. *Nehal Chand* and *Saila Nath Mukerji*, for the Opposite Party.

JUDGMENT.—These applications in criminal revision arise under the following circumstances :—

The plaintiff in a suit in the Munsif's Court at Meerut applied to that Court under s. 476 of the Cr. P. C. to prosecute the two defendants. The learned Munsif rejected the application. The plaintiff thereupon filed an appeal in the Court of the Sessions Judge of Meerut under s. 476 (B) of the Cr. P. C. The order of the Munsif was passed on the 21st of May 1924. The appeal was filed in the Court of the Sessions Judge on the 24th of July 1924. The learned Sessions Judge held that the appeal was time-barred and declined to hear it. He says: "In a case of this nature I hold that limitation begins to run from the date of the order appealed against. There was no need to file a copy of the final order in this matter. I, therefore, hold that the appeal is time-barred."

Article 154 of the First Schedule of the Limitation Act applies to an appeal of this kind and under that Art. 30 days are allowed from the date of the sentence or order appealed from.

The application by the plaintiff under s. 476 of the Cr. P. C. was treated as a separate miscellaneous civil case, and given a separate number and was quite distinct from the civil suit which had been decided. When the Court passed its order, according to the practice approved of by this Court, a formal order was drawn up on the printed form which is provided for such formal orders in miscellaneous cases, embodying the result of the judgment passed in the case.

The plaintiff before presenting his appeal in the Court of the Sessions Judge applied for and obtained a copy of this formal order and filed it along with his memorandum of appeal.

According to the rules of this Court an appeal filed from a miscellaneous order of this kind on the civil side, at any rate, must be accompanied by a copy of the formal order which the Courts are directed to draw up.

If the time taken for obtaining a copy of this formal order can be deducted under the provisions of s. 12 of the Indian Limitation Act, then admittedly the appeal was within time.

The question is whether the learned Judge was right in holding that in this case limitation began to run from the date of the order and that there was no necessity to file a copy of the formal order.

Section 12, cl. (2) of the Indian Limitation Act provides: "The time requisite for obtaining a copy of the. . . . . order appealed from shall be excluded."

I think, therefore, that the Court below should have held that the appeal was filed within time.

It is argued that it was unnecessary to make a final order in such a case and, therefore, it was unnecessary to file a copy of such an order, if made, in a case reported as *Mahesh Kant Choudhury* v. *Ram Prasad Rai* (1) it was held that in a case in which it was not necessary to prepare a

(1) 54 Ind. Cas. 630; 1 P. L. T. 33; (1920) Pat. 75; 2 U. P. L. R. (Pat.) 26.

decree but where one is actually prepared the time for obtaining a copy of the decree should under s. 12 of the Limitation Act be excluded in computing the period of limitation for appeal. In principle I agree with that ruling. Here under the rules a formal order was drawn up embodying the decision of the Munsif. A copy of that formal order was promptly applied for and when obtained, an appeal was promptly lodged. I think the plaintiff was quite justified in thinking that it was necessary for him to file a certified copy of the formal order against which in fact, he was appealing. I think, therefore, that the lower Court should have heard the appeal.

The learned Sessions Judge has gone on leave and his successor is as ignorant of the merits of the case as I am. As the record is here, instead of sending the case back I propose to decide the matter myself.

16*th January* 1925.

I have heard the learned Counsel on behalf of the applicant and have examined the record and the order of the Munsif.

The plaintiff sued for the removal of a tin shed which it was alleged had been partly inserted into the western wall of the plaintiff's house.

The two defendants verified a written statement in which it was in the first place denied that the shed penetrated into the wall of the plaintiff at all and secondly it was stated that the wall did not belong to the plaintiff alone but was the joint property of the plaintiff and the defendants. Neither of the two defendants gave evidence in the case.

The suit was heard and decreed and on appeal that decree was upheld.

Thereafter the plaintiff applied to the Munsif for an order under s. 476, Cr. P. C., to prosecute the two defendants for having falsely verified their written statement with reference to the two matters above mentioned.

The learned Munsif issued notice to the defendants and examined them. He also inspected the locality and he found that from external appearances it was impossible to say that the shed in any way penetrated into the wall. On removal of the plaster, however, it was found that in some places the tin penetrated into the wall for about two inches. This was only here and there. On that ground he held that nobody could say what really was the position of affairs until the plaster had been removed as nothing was visible from the outside.

On the second point I am told that there is strong evidence to prove that the statement in the written statement that the wall was a party wall was false and must have been false to the knowledge of the defendants. It is stated that they did not produce when called upon the sale-deed of their house and if they had done so this would have shown conclusively that the western boundary of their house was the plaintiff's house and that this proves conclusively that no part of that wall belonged to the defendants. This may be so but after all the written statement is drawn up by legal practitioners on instructions received and it may be really that the mistake was made by them and possibly the defendants were not careful enough to verify the accuracy of the statement before signing it. But the learned Munsif has found that this was not done deliberately in order to deceive the Court. Had this been the case I would have expected the defendants to have come into the witness-box and sworn in support of their statements. I am not prepared to hold to that the Munsif was wrong in his opinion. I think that under the circumstances if the defendants have been guilty of carelessness and I do not think it can be said that it is proved that they have been guilty of much more, they have already been sufficiently punished by having to defend this case in three Courts. I, therefore, reject the applications.

Z. K. *Applications rejected.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 630 OF 1924.
CASE REFERRED No. 62 OF 1924.
November 3, 1924.

Present:—Mr. Justice Madhavan Nair.

In re MUTHU GOUNDAN—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 195 (1)—Penal Code (Act XLV of 1860), ss. 182, 211—Charge under s. 211—Alteration into one under s. 182—Complaint, absence of—Conviction, legality of.

The essence of an offence under s. 182 of the Penal Code is not the falseness of the information, as it is the essence of an offence under s. 211 of the Code, but the contempt of the lawful authority of the public servant, and unless and until the public servant

concerned chooses to move in the matter, the Court has no authority to do so *suo motu*, by whatever process it reaches that result.

A Court taking cognisance of an offence under s. 211 of the Penal Code, does not *ipso facto* take cognisance of one under s. 182 of the Code.

Where, therefore, a charge against an accused person is altered from one under s. 211, Penal Code, into one under s. 182 a conviction under the latter section is bad in the absence of a complaint by the public servant concerned.

Case referred for the orders of the High Court, under s. 438 of the Cr. P. C., by the Sessions Judge, Salem, in his letter, dated the 1st September 1924.

Mr. *N. Rajagopalan*, for the Accused.

The Public Prosecutor, for the Crown.

ORDER.—Without going into the question of whether this Court in revision can go into the question of the *bona fides* of the accused's plea of guilty, we prefer to base our order on the legal point taken by Mr. Rajagopalan for the accused, *viz.*, that the Sub-Divisional Magistrate had no jurisdiction to convict accused for an offence under s. 182, Indian Penal Code, as he had not a complaint under that section of the public servant concerned, *vide* s. 195 (1) (*a*) of the Cr. P. C. We do not think that the difficulty of the absence of such a complaint is got over by arguing that an offence under s. 182, Indian Penal Code, is contained in an offence under s. 211, Indian Penal Code, and that, therefore, the Court taking cognisance of an offence under the latter section *ipso facto* takes cognisance of an offence under the former.

The essence of an offence under s. 182 is not the falseness of the information, as it is the essence of an offence under s. 211 but the contempt of the lawful authority of the public servant and unless and until the public servant concerned chooses to move in the matter, the Court has no authority to do so *suo motu*, whatever process it reaches that result. We must, therefore, hold that the conviction of accused under s. 182, Indian Penal Code, is bad and set it aside. The result in our opinion is that the proceedings from the time of alteration of the charge are without jurisdiction and that the Magistrate must start again from the original charge sheet under s. 211, Indian Penal Code, if the Police are still prepared to proceed with the prosecution of that charge. We order accordingly.

V. N. V. *Order accordingly.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 28 OF 1925.

January 15, 1925.

Present :—Mr. Justice Walsh.

BHIMMI—APPLICANT

versus

PERSHADI—OPPOSITE PARTY.

Procedure—Hearing of case concluded—Delivery of judgment, date fixed for—Accused, absence of—Complainant, whether can be required to deposit process fees—Acquittal of accused, legality of.

After the hearing of a summons case was concluded a date was fixed for delivery of judgment. On that date the complainant appeared but the accused did not appear and the Court made an order directing the complainant to deposit process fees to secure the attendance of the accused and the case was adjourned to another date. On the next date it appeared that the complainant had failed to deposit process fees as directed and the Court made an order that the case may be dismissed for default of prosecution and that the accused be acquitted:

Held, (1) that the order of the Court directing the complainant to deposit process fees for securing the attendance of the accused was entirely illegal and without jurisdiction;

(2) that the accused having failed to appear on the date fixed for the delivery of the judgment the Court should have cancelled his bond and should have issued a warrant for his arrest;

(3) that the order dismissing the complaint and directing the acquittal of the accused was consequently also illegal and without jurisdiction;

(4) that the case must, therefore, be remanded to the Trial Court with the direction that it should fix a fresh date for delivery of judgment and should deliver a judgment on that date on the evidence already before it.

Criminal reference by the Additional Sessions Judge, Bareilly, dated the 6th January 1925.

REFERRING ORDER.—This is an application for revision of an order of the Bench Magistrates of Aonla, dated the 3rd October 1924.

The facts of the case are as follows:—On the 31st June 1924 Bhimmi, the applicant, in this case filed a complaint against Pershadi under s. 352 and s. 323 of the Indian Penal Code. The complaint was instituted in the Court of the Sub-Divisional Magistrate of Aonla. The Magistrate recorded the evidence of some witnesses under s. 202 of the Cr. P. C. He then transferred the case to the Court of the Bench Magistrates of Aonla for disposal. The Bench Magistrates examined the accused and then asked the parties to adduce all their evidence. The complainant examined a certain number of witnesses and the accused also examined a certain number of witnesses. The hearing of the case was concluded

on the 24th September 1924. On that date they passed an order that judgment would be delivered on the 30th September 1924. They directed the accused to be present on that date. On that date it was discovered that the complainant was present but the accused was absent. Then the Bench Magistrates ordered the complainant to file a process fee to secure the attendance of the accused on the 3rd October. The complainant did not file the process fee required. The case came on for hearing on the 3rd October 1924. The following order was recorded on the order sheet on that date:—

"The case came up for hearing. The complainant has not filed the process fee in spite of an order to this effect. It is hereby directed that the case be dismissed for default of prosecution, and Pershadi accused be acquitted, and the papers be consigned to records."

Against this order Bhimmi, the complainant, has filed this application for revision. This application has been sent to this Court for disposal.

Pershadi has entered appearance in this Court in response to the notice issued to him. It is contended on behalf of the applicant that the order of the Court below was absolutely illegal. It is contended that the Magistrates ought to have recorded a judgment in this case and if, as they found, the accused was absent on the date fixed for delivery of judgment they ought to have secured the attendance of the accused in the manner laid down in the Cr. P. C. On behalf of Pershadi it is contended in reply that the order of the Court below was not illegal.

The question is if the order of the Court below was illegal. Now there can be no doubt that the 30th September 1924 was fixed for pronouncing the judgment in this case. The Magistrates ought to have recorded a judgment and if as they found the accused was absent they should have enforced his attendance in a manner laid down in Cr. P. C. They should have cancelled his bonds and should have issued a warrant for his arrest. But the Magistrates did not do this. They did not record any judgment. In my opinion they were not justified in ordering the complainant to file a process fee to enforce the attendance of the accused. Such an order was absolutely illegal. The complainant is generally ordered to file process fee when he wishes that a process should issue to the accused to attend the Court and answer the charge in a summons case as this particular case happened to be. But it is nowhere laid down in the Code that the complainant must file a process fee to enforce the attendance of the accused not on the date of trial nor on the date of arguments, but on the date fixed for delivery of judgment. It is thus clear that the order directing the complainant to pay process fee is absolutely unwarranted by law.

It follows then that the order dismissing the complaint for default of prosecution of the complainant is equally unwarranted by law. And the order of acquittal also is equally invalid.

It is contended on behalf of Pershadi that this Court cannot take cognisance of this petition for revision as it is a case of acquittal and the only Court that can revise an order of acquittal is the Hon'ble High Court. But this is not a case of acquittal on merits. In fact the order of acquittal is in the eyes of law no order at all. Under s. 435 of the Cr. P. C. this Court is entitled to send for the record of a case and to examine whether the order passed was improper and illegal. As I have already said the order is absolutely illegal. It cannot be allowed to stand and since it is not an order of discharge or an order under s. 203 of the Cr. P. C. no action can be taken under s. 436 of the Cr. P. C. I am, therefore, of opinion that this is a fit case to report to the Hon'ble High Court with a recommendation that the order in question be set aside and the case sent back to the Bench Magistrates for recording a proper judgment in the case and then to pronounce it. The record shall be sent through the District Magistrate to the Bench Magistrates asking them to submit such explanation as they like in regard to the order passed by them. On receipt of the explanation the record shall be submitted to the Hon'ble High Court for such action as the Hon'ble Court thinks fit.

JUDGMENT.—I agree with the District Magistrate that it would be a pity to give the case a new lease of life, but the Sessions Judge is correct

in his view that the proceedings of Magistrates on the 30th September, the date fixed for judgment, were entirely illegal, and their order on the complainant was without jurisdiction. They ought to have disposed of the case on the merits. I accept the Reference, without issuing notice to the parties as no question on the merits is before me, and remit the case to the Bench Magistrates, with a direction to fix a date for delivering judgment, and to deliver a judgment on that date, on the evidence already before them. Notice of the date fixed must be given to the parties, and the Magistrates may use their discretion as to hearing arguments before judgment. They are not obliged to do so, and they must not allow any further evidence but deliver judgment on the case as it stands.

Z. K. *Reference accepted.*

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 64 OF 1924.

August 29, 1924.

Present:—Mr. Justice Kulwant Sahay.

GOURI SHANKER AND OTHERS—SECOND PARTY—PETITIONERS

versus

THE COLLECOR OF MUZAFFERPUR —FIRST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 426—Dispute relating to immoveable property—Sale by one of the parties of his interest, effect of—Jurisdiction of Magistrate—Stay of proceedings by High Court—Matter brought to notice of Magistrate—Duty of Magistrate—Procedure.

Once proceedings pending in the Court of a Magistrate are stayed by the High Court and the matter is brought to the notice of the Magistrate before whom the proceedings are pending it is his duty to stay his hands and stop further proceedings. If in spite of such notice the Magistrate proceeds with the matter any order passed by him must be treated as passed without jurisdiction and cannot stand. [p. 423, col. 2]

Where in a proceeding under s. 145 of the Cr. P. C. proper opportunity is not given to one of the parties to represent his case and to cross-examine the witnesses examined on behalf of the opposite party or to produce his documentary evidence, he is entitled to have the proceedings transferred to the Court of some other Magistrate. [*ibid.*]

Where a Magistrate receives information from any source that there is a likelihood of a breach of the peace relating to the possession of immoveable property, he is entitled to initiate proceedings under s. 145 of the Cr. P. C., even although it appears that one of the parties has already sold the property provided he has not delivered possession to the purchaser and still claims to be in possession of the property. [p. 424, col. 1.]

Application against an order of the Sub-Divisional Magistrate, Hajipur, dated the 22nd July 1924.

Messrs. *Nirsu Narayan Singh* and *Bhuvaneshwar Prasad Sinha*, for the Petitioners.

Mr. *L. N. Singh*, Government Pleader, for the Opposite Party.

JUDGMENT.—The petitioners were the second party in a proceeding under s. 145 of the Cr. P. C. initiated by the Sub-Divisional Magistrate of Hajipur. The proceedings were initiated on an application made by the Collector of Muzafferpur under the following circumstances. Certain plots of land which had been acquired by Government under the Land Acquisition Act for the purpose of B. & N. W. Railway had been relinquished by the Railway Company on the ground that they did not require the land any longer. After such relinquishment those plots of land were resumed by the Government in September 1923. In April 1924 the Collector sold those lands by auction to one Khobari Choudhury, but when the Kanungo was deputed to deliver possession to the purchaser he was resisted by the petitioners who claimed those lands as their lands and not the lands belonging to the Railway Company. The Kanungo found certain structures on portions of the land and upon his report the Collector of Muzafferpur applied to the Sub-Divisional Magistrate of Hajipur for institution of proceedings under s. 145, Cr. P. C. On receipt of this application the learned Sub-Divisional Magistrate of Hajipur initiated proceedings under s. 145 of the Cr. P. C., by his order dated the 26th May 1924, which runs thus:—

"The Collector's petition perused. Draw up proceedings under s. 145, Cr. P. C., at once for 16th June 1924".

In these proceedings the Collector of Muzafferpur was the first party and the second party were the petitioners. On the 16th June 1924 Gauri Shanker of the second party appeared and represented before the Sub-Divisional Magistrate that copy of the proceedings had not been served upon him or upon the other members of the second party and he wanted time to file written statement and to be ready to go on with the case. The learned Sub-

Divisional Magistrate rejected the application with the following order:—

"Only Gauri Shanker is represented. In the case of others the copy of the proceedings was served by hanging the same on their residential houses on the 1st June. They and Gauri Shanker had enough time to be ready. Petition of Gauri Shanker for time rejected".

After rejecting the application for time the learned Sub-Divisional Magistrate at once proceeded to examine witnesses for the first party. He examined five witnesses and called upon Gauri Shanker to cross-examine them; Gauri Shanker expressed his inability to cross-examine them as he was not ready. The learned Sub-Divisional Magistrate refused to grant him time to cross-examine the witnesses and in the order-sheet he recorded the following order:—

"Examined five witnesses for the first party. Cross-examination by Gauri Shanker declined. These witnesses are, therefore, discharged.

"To 2nd July 1924, for evidence of second party."

On the 17th June 1924 the second party filed an application in which they stated that on the previous day they were not ready to go on with the case inasumch as the proceedings were not served upon them and no written statement had been filed and no documents had been produced and they prayed that the witnesses for the first party who had been examined on the previous day might be re-called for cross-examination. The learned Magistrate rejected this application without assigning any reason whatsoever. On the same day, namely, the 17th June the second party filed another application giving a list of witnesses whom they wanted to be summoned on their behalf. Amongst the witnesses named in this application were two witnesses, Babu Jogeshwar Prasad, Sub-Deputy Magistrate of Samastipur, and Maulavi Ishaq, Sub-Inspector of the Railway Police, whom they wanted to be summoned through the Superintendent of Police of the Railway Police at Samastipur. It was necessary to call these two witnesses in order to prove certain reports and enquiries made by them in a proceeding under s. 144 between the second party in the present proceedings and others in which proceedings the second party were found to be in possession of the land in dispute. The order passed upon this petition by the learned Sub-Divisional Magistrate was. "Issue summons on payment of travelling allowance of the Sub-Deputy Magistrate".

Now the amount of the travelling allowance was not stated and the petitioners were not told as to what amount was necessary for them to deposit in order to issue summons upon the Sub-Deputy Magistrate. The case was called on on the 2nd July 1924. On that day the second party filed another petition to re-call the witnesses of the first party for cross-examination. This was rejected on the ground that the second party had already had an opportunity to cross-examine the witnesses for the first party. On that day the second party filed another petition to summon Babu Jogeshwar Prasad, Sub-Deputy Magistrate, and Maulavi Ishaq, Sub-Inspector of the B. & N. W. Ry. Police. The learned Sub-Divisional Magistrate rejected this application also on the ground that the second party were asked on the 17th June to deposit the travelling allowance of the Sub-Deputy Magistrate which they had failed to do. As regards the Sub-Inspector Maulavi Ishaq, the reason given for not summoning him was that he had been summoned on the previous application but the second party had given wrong address and the summons was returned unserved and even on the 2nd July when fresh application for summoning him was made no address was given of the Sub-Inspector. Having rejected this application of the second party the learned Sub-Divisional Magistrate proceeded at once to examine three witnesses of the second party who were present in Court and after cross-examining them these witnesses were discharged. He thereafter thought fit to make a local inspection and he fixed 6th July for a local inspection. Later on on the same day after recording that he will hold a local inspection on the 6th July the learned Magistrate passed the following order:—

"The Assistant Government Pleader prays for an immediate local inspection. I will do it this evening. Inform parties".

He accordingly held the local inspection on that day and he postponed the case to the 23rd July 1924 for order.

On the 22nd July the second party filed the application giving rise to the present revision case in this Court in which they prayed for quashing the proceedings or in

the alternative for transfer of the case from the file of the Sub-Divisional Magistrate of Hajipur and a Division Bench of this Court admitted the application and ordered the issue of the usual notice and directed further procedings to be stayed pending the disposal of this application. This order was passed by the Division Bench of this Court on the 22nd July 1924 and from the affidavit file to day on behalf of the petitioners, it appears that on the same day Amir Singh the *karpardaz* of the second party, who had come to Patna to move that application, went back to Hajipur with a certificate given to him by Mr. Nirsu Narain Sinha, the Vakil who had moved the application, stating that the application had been moved by him and that this Court had admitted the application and had ordered the stay of further proceedings. The certificate of Mr. Nirsu Narain Sinha was filed before the Sub-Divisional Magistrate with an application in the first hour of the 23rd July 1924 and it was stated that the petitioners had moved the High Court for quashing the proceedings and for the transfer of the case to some other Court and that a Division Bench of this Court had issued a Rule and had directed further proceedings to be stayed and they prayed that further proceedings might be stayed, and that the learned Magistrate should refrain from hearing the arguments and deciding the case The affidavit of Amir Singh filed to-day stated that this application was presented before the Sub-Divisional Magistrate on the 23rd July in the first hour before the case was called on. But it appears that the learned Sub-Divisional Magistrate took absolutely no notice of this application and of the fact that this Court had stayed further proceedings pending the disposal of the application, and, without hearing the arguments on either side, he proceeded to pronounce his final order in the case declaring possession of the first party. Notice of this affidavit filed to-day was given to the Government Pleader on 20th August, and the correctness of the facts therein stated is not denied.

At the hearing of this application a preliminary objection is taken by the learned Government Pleader that this petition has become infructuous inasmuch as the proceedings had terminated in a final order declaring the first party to be in possession. Having regard to the circumstances of the case I am clearly of opinion that the action taken by the Sub-Divisional Magistrate was wholly irregular and unwise, and he has laid himself open to grave censure. His attention may be drawn to the observations of Mookerjee, J., in the case of *Satinath Sikdar* v. *Ratanmani Naskar* (1). Once proceedings are stayed by this Court and the matter is brought to the notice of the Magistrate or the Court in which the proceeding is pending, it is his duty to stay his hands and stop further proceedings. In the present case an application was filed before him in the first hour before the case was called on supported by a certificate given by the Vakil who had moved the application in this Court and the matter was brought to his notice that this Court had stayed the proceedings. Under these circumstances it was his menifest duty to stay his hands and not to pass any order in the case. In spite of his being apprised of the fact that further proceedings had been ordered to be stayed by this Court he did proceed to dispose of the case and to pass final orders. This order cannot stand and must be treated as passed without jurisdiction. He had no power to pronounce the final order or to proceed with the case once the proceedings had been stayed by this Court. Courts have gone to the length of holding that whether orders of stay are communicated to the Court below or not, the moment such orders are made by the High Court, the Court in which the proceedings are pending has no jurisdiction to make any further order in the case. However, the fact that the learned Sub-Divisional Magistrate had thought fit to proceed with the case and to make a final order will in no way affect the decision of the present case. Having regard to the circumstances stated in the petition and to the fact that no proper opportunity was given to the second party to represent their case and to cross-examine the witnesses examined on behalf of the first party, or to produce their documentary evidence, it is clear that they were greatly prejudiced in the present proceedings.

As regards the Sub-Deputy Magistrate whom the second party wanted to examine in order to prove his report in a previous case, the second party were never informed as to the amount that was necessary for them to deposit, and when on the 2nd July

(1) 14 Ind. Cas. 808; 15 C. L. J. 335.

they renewed their prayer, it was evidently the duty of the Sub-Divisional Magistrate to give them an opportunity to deposit the travelling allowance and to summon the Sub-Deputy Magistrate. As regards the Sub-Inspector of the Railwey Police Maulavi Ishaq, the prayer of the second party was that the summons might be served through the Superintendent of Police of Samastipur. That is the way in which summonses are served upon Government servants and that is the provision in s. 72 of the Cr. P. C. and I do not see how the address given by the second party in their application of the 17th June was incorrect or why the summons was not served on the Sub-Inspector when it was sent to the Superintendent of Police at Samastipur.

As regards the ground taken by the learned Vakil for the petitioner that the proceeding should be quashed inasmuch as the Collector had already sold the land to a third person and, therefore, had no interest left in the land and that, therefore, he cannot be made a party to the proceedings, I am clearly of opinion that this contention cannot be sustained. The Collector has no doubt sold the land to a third party, but he has not delivered possession to the third party and claims to be still in possession and the Sub-Divisional Magistrate was entitled to initiate proceedings if he received information from any source that there was a likelihood of a breach of the peace relating to possession of the immoveable property. Therefore, the prayer for quashing the proceedings cannot be granted. But in the circumstances of the present case it is desirable that the proceedings should be transferred from the Court of the Sub-Divisional Magistrate of Hajipur to some other competent Court.

The orders of the Sub-Divisional Magistrate passed by him after the 2nd July 1924 are all set aside. The case will be transferred to the District Magistrate of Patna which is the nearest place from Hajipur and he will make it over to a Magistrate at Patna competent to hear and decide this case. The second party will be given proper opportunity to cross-examine the witnesses produced by the first party and produce their own documentary and oral evidence.

Z. K. *Rule made absolute.*

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 439 OF 1924.

December 17, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

MANGAL NARAN—ACCUSED —APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 423, 439—Penal Code (Act XLV of 1860), s. 302—Appeal, admission of—Enhancement of sentence, notice of, when to be given—Practice—Murder—Death sentence not inflicted by Sessions Judge—Revision—Interference by High Court.

Where a case comes to the knowledge of the High Court by an appeal being filed against a conviction it is not desirable, if the appeal is admitted, to issue a notice at the same time for enhancement of the sentence under s. 439 of the Cr. P. C. It is incongruous that the Court in the same breath should admit the appeal of the accused, and should issue notice calling upon him to show cause why the sentence should not be enhanced, especially where the sentence proposed to be inflicted in the notice to enhance is the sentence of death. The proper procedure is to deal first with the appeal and then to consider whether a notice to enhance should be issued. [p. 425, col. 1.]

If after an appeal has been heard on its merits and dismissed, a notice to enhance the sentence is issued, the accused has still the right under sub-s. (6) of s. 439 of the Cr. P. C. to show cause against his conviction, but any attempt to set aside the conviction would not have much chance of success. [p. 425, col. 2.]

It is only in very rare cases that the High Court will interfere with the order of a Sessions Judge sentencing a man convicted of murder to transportation for life because the circumstances of the case appear to him not to demand the sentence of death. The High Court will interfere only in cases in which the sentence of death is the only possible sentence to be inflicted. [*ibid.*]

Criminal appeal from the conviction and sentence passed by the Additional Sessions Judge, Ahmedabad.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Macleod, C. J.—The accused in this case was found guilty of (1) kidnapping a girl in order to commit murder under s. 364, Indian Penal Code, and (2) having murdered the girl and so having committed an offence under s. 302, Indian Penal Code. For the first offence he was sentenced to three years' rigorous imprisonment, and for the second he was sentenced to transportation for life.

The accused filed a petition of appeal from the Jail and when it came before the Court for admission the Court was of opinion that the accused ought to have been

sentenced to death. Consequently the following order was made :—"Admit and issue notice to enhance the sentence, *i. e.*, to sentence of death."

The order would at first sight seem to be strange, although it may be justified by the addition to s. 439 of the Cr. P. C. contained in sub-s. 6. The Court exercising the powers conferred on a Court of Appeal by the relative section of the Cr. P. C. has no power to enhance the sentence. But under s. 439 :—

"In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, enhance the sentence."

Then under sub-s. 6 :—

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-s. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

The previous practice has been to dispose of the appeal first before considering the question whether the sentence should be enhanced in the event of the appeal being dismissed. Generally the cases in which the powers of the Court to enhance the sentence under s. 439 have been exercised are those in which the record has been called for by the High Court, or which have been reported to the High Court, or which otherwise come to the knowledge of the High Court on a perusal of the returns from the Subordinate Courts, and in such cases the High Court may, if it thinks fit, issue notice to the accused under s. 439, Cr. P. C., to show cause why the sentence should not be enhanced. Then it is in accordance with justice that the accused should be entitled to show cause, not only against the sentence being enhanced but also against the conviction. But when a case comes to the knowledge of the Court by an appeal having been filed against a conviction it is not desirable, in my opinion, if the appeal is admitted to issue a notice at the same time under s. 439. It seems to me absolutely incongruous that the Court in the same breath should admit the appeal of the accused, and issue notice calling upon him to show cause why the sentence should not be enhanced, and especially it seems incongruous in a case of this kind, where the sentence proposed to be inflicted in the notice to enhance is the sentence of death. If, after an appeal has been heard on its merits and dismissed, a notice to enhance the sentence is issued, the accused has still the right to show cause against his conviction, but any attempt to set aside the conviction would not have much chance of success. However that may be, speaking for myself, I prefer to retain the old practice, namely, first to deal with the appeal, and then to consider whether a notice to enhance should issue. In this case there can be no doubt that the accused was guilty of murder, so the appeal is dismissed.

We have now to consider whether we should proceed with the notice to enhance. If we decide to proceed we should have to send for the accused to be present in Court. Now it is only in very rare cases that we interfere with the order of a Sessions Judge sentencing a man convicted of murder to transportation for life, because the circumstances of the case appeared to him not to demand the sentence of death. I can only remember myself one case in which the sentence of transportation for life was enhanced to sentence of death by the High Court. The facts proved in that case were so shocking that it appeared to the Court that the sentence of death was the only sentence that could be imposed on the accused. There are many murder cases which come on appeal to this Court in which it has been evident that the Sessions Judges were too lenient, and had exercised the discretion which they are given by law too much in favour of the accused. But, as I have already stated, we do not like to interfere except when we think that the sentence of death is the only possible sentence to be inflicted. In this case, although we think that the Sessions Judge ought to have sentenced the accused to death, we are not disposed to proceed with the notice to enhance the sentence.

Crump, J.—I agree in this case that the Sessions Judge would have exercised a wider discretion had he sentenced this accused person to the extreme penalty for the case was extremely bad of its kind. At the same time I do not think that it is of such an exceptional nature that we should exercise the powers that we possess to enhance the sentence of transportation for life to a sentence of death. I should be most unwilling to do so in any but most exceptional

cases. I also agree as to the practice in such matters. To make the admission of the appeal of an accused person the occasion for calling upon him to show cause why his sentence should not be enhanced is, in my opinion, undesirable. It is likely to produce an impression on the mind of an illiterate accused in Jail that it is proposed to enhance the sentence because he has appealed. Further, my own experience is that this practice is likely to lead to an inconvenient result because it confounds two matters which should be kept separate. The first point on an appeal is to consider whether the conviction is right or not, and that is one matter. When that matter has been disposed of, the further question that arises is as to whether the sentence imposed is not inadequate. But that is entirely a separate question, which speaking for myself, I prefer to keep distinct. Although I do not say that the procedure followed in the present case is in any way contrary to law, I do say that it is not a desirable practice. I agree, therefore, with the remarks of the learned Chief Justice.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 656 OF 1924.
January 26, 1925.
Present:—Mr. Justice Mukerji.
RAMESHWAR—APPLICANT
versus
GOBIND PRASAD AND ANOTHER—OPPOSITE-PARTIES.

Penal Code (Act XLV of 1860), s. 417—Criminal Procedure Code (Act V of 1898), s. 439—Debtor inducing creditor fraudulently to grant time for payment—Cheating—Acquittal—Revision—Procedure.

Accused owed a sum of money to the complainant. The complainant served the accused with a notice requiring immediate payment. Accused thereupon approached the complainant and induced him to grant 15 days' time to pay up. During the time granted the accused removed their goods from their shop with the intention of escaping the payment of their debt to the complainant. Complainant prosecuted the accused for the offence of cheating and the accused were convicted. On appeal the Sessions Judge held that the prosecution evidence showed that the accused fraudulently induced the complainant to grant them time but that the fraud was inchoate and inconsequential, and on this finding the accused were acquitted. On an application for revision being made on behalf of the complainant:

Held, (1) that on the finding arrived at by the Sessions Judge there was a clear case of cheating and that the order of acquittal was, therefore, erroneous; [p. 427, col. 1.]

(2) that the order of acquittal must, therefore, be set aside and the case remanded to the Sessions Judge for re-hearing of the appeal. [*ibid.*]

Criminal revision from an order of the Additional Sessions Judge, Cawnpore, dated the 16th August 1924.

Messrs. *G. P. Boys* and *Saila Nath Mukerji*, for the Applicant.

Mr. *G. W. Dillon*, for the Opposite Parties.

JUDGMENT.—This is revision filed at the instance of the complainant asking this Court to set aside an order of acquittal passed by the learned Additional Sessions Judge of Cawnpore and to restore the order of the learned Magistrate convicting the opposite parties.

It appears that the complainant's masters were whole-sale merchants of cloth and the opposite parties were retail traders. The opposite parties owed money to the complainant's firm. The complainant's masters gave the opposite parties 24 hours' time to pay up. This time was granted by means of a telegram, although the parties were residing at the same place, *viz.*, Cawnpore. The object of sending a telegram was evidently to show the urgency of the matter. The prosecution case is that the opposite parties approached the creditor firm and induced them to grant 15 days' time to pay up. It is further said that the object was that within the time granted, the opposite parties would remove their goods from their shop and would thereby escape the payment of just dues of the creditors. This object was carried out. The telegram was sent on the 19th of May 1924 and the Civil Courts closed for the usual vacation on the 1st of June 1924. It is clear that on the closing of the Civil Courts it was not open to the creditors to seek any remedy in the Civil Court. The creditors went to the Criminal Court and brought a charge of cheating against the opposite parties. The learned Magistrate who heared the case was of opinion that cheating had been committed and he, convicting the opposite parties, sentenced them. An appeal was taken to the learned Additional Sessions Judge. He found that, to quote his own words, "All that the prosecution evidence shows is that the appellants fraudulently induced the complainants to give them some time, but the fraud it

seems, was inchoate and inconsequential." The learned Sessions Judge remarks that there was no guarantee that the Civil Court at the instance of the creditors would have granted an order for attachment before judgment. But the question is not what the Civil Court would have granted or not granted. The main question is whether the creditors could have moved the Court to grant their prayer or not, if the time of 15 days had not been obtained. On the finding of the learned Sessions Judge that the time was obtained fraudulently a conviction ought to have followed.

Mr. Dillion, who has appeared for the opposite parties, has argued that the learned Sessions Judge did not really mean to hold that there was any fraudulent intention when 15 days' time was asked for. He argued that it was not expected that a Sessions Judge of Mr. Banerji's standing would make a mistake like that.

I do not think I should express any opinion of my own on the facts. It would be the duty of the learned Sessions Judge to find on the facts and to apply the law: On the judgment, as expressed by the learned Additional Sessions Judge, there would be a clear case of cheating. In my opinion the appeal has not been adequately dealt with and it should be re-heared.

I may point out that this Court was really asked to do what it was not authorised to do, *viz.*, to convert a finding of acquittal into a finding of conviction. In the view which I take of the matter and in the course which I propose to take, the law would be respected.

I accept the petition in revision, set aside the judgment of the learned Additional Sessions Judge and remand the appeal to him with the direction that it will be re-heard with proper notice to the opposite parties and disposed of according to law. If there be no Additional Sessions Judge exercising jurisdiction at Cawnpore the appeal will be heard by the learned Sessions Judge himself.

Z. K. *Petition accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.
FULL BENCH.

CRIMINAL APPEAL No. 38-B OF 1924.

September 5, 1924.

Present:—Mr. Baker, J. C., Mr. Prideaux, A. J. C., and Mr. Kinkhede, A. J. C.

LOCAL GOVERNMENT—APPELLANT

versus

MARIA—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 256, 257, 342—Examination of accused, when to be made —Cross-examination after charge, whether part of examination of prosecution witnesses:

The examination of a witness means his examination-in-chief, cross-examination and re-examination, and the expression "after the witnesses for the prosecution have been examined", which occurs in s. 342 of the Cr. P. C., includes any cross-examination of the witnesses for the prosecution after the charge has been framed. It is, therefore, imperative for a Magistrate under this section to examine an accused person after the prosecution witnesses have been, if so desired by the accused, further cross-examined after the charge. [p. 430, col. 2.]

The prosecution case does not close until all the prosecution witnesses have been discharged after their examination, cross-examination, further cross-examination, if so desired by the accused, and re-examination and it is only after the prosecution witnesses have been discharged that the stage for the obligatory examination of the accused under s. 342 of the Cr. P. C. arrives. [p. 430, col. 1.]

Case-law referred to.

Appeal against a judgment of the Additional Sessions Judge, Akola, dated the 21st May 1925, in Criminal Appeal No. 119 of 1924.

Mr. *P. Lobo*, for the Appellant.

Mr. *M. B. Niyogi*, for the Accused.

JUDGMENT OF THE FULL BENCH.

Baker, J. C.—This is an appeal by the Local Government against an order of acquittal by the Additional Sessions Judge, West Berar, Akola. The point of law involved which has been referred to a Full Bench is:

"Whether s. 342, Cr. P. C., renders it imperative for a Magistrate to examine the accused afresh after the prosecution witnesses have been further cross-examined after the charge?"

As neither the other High Courts nor the Judges of this Court are agreed on this question, I do not feel myself bound by any authority, in giving my opinion.

A large number of cases have been quoted, but I will at once rule out those cases

which do not deal directly with the particular point under consideration, which is whether if the accused after all the prosecution witnesses have been examined and a charge framed re-calls any prosecution witnesses for further cross-examination after the charge, it is necessary that his statement should be taken again, after it has once been taken before the framing of the charge. We are not, therefore, concerned with cases in which the accused has not been examined at all, or in which after his examination fresh witnesses have been called by the prosecution. In such cases the accused's statement admittedly must be taken at the close of the prosecution case. We are also not concerned with Sessions cases in which the procedure is different.

This will rule out the following cases:—

Fernandez v. *Emperor* (1), which refers to a summons case in which the accused was not examined at all. The point in that case was whether s. 342, Cr. P. C., applied to summons cases. *Gulabjan* v. *Emperor* (2) and *Basapaningapa* v. *Emperor* (3) are also not relevant as in those cases accused was not examined at all. *Bechu Chaube* v. *Emperor* (4) is a case in which a fresh prosecution witness was examined after the accused's statement had been recorded. So also in *Hamid Ali* v. *Srikissen Gossain* (5), two witnesses for the prosecution were examined, then the accused's statement was recorded and then several more witnesses for the prosecution were examined and a charge framed without any further statements being taken from accused, while in *Haro Nath Malo* v. *Ala Bux* (6) the accused's statement was recorded after the prosecution witnesses had been examined-in-chief, but before their cross-examination, and no further statements of accused were recorded.

(1) 59 Ind. Cas. 129; 45 B. 672; 22 Bom. L. R. 1040; 22 Cr. L. J. 17.

(2) 64 Ind. Cas. 669; 46 B. 441; 23 Bom. L. R 1203; 23 Cr. L. J. 45; (1922) A. I. R. (B.) 290.

(3) 31 Ind. Cas. 365; 17 Bom. L. R. 892; 16 Cr. L. J. 765.

(4) 71 Ind. Cas. 115; 45 A. 124; 20 A. L. J. 874; (1923) A. I. R. (A.) 81; 24 Cr. L. J. 67.

(5) 75 Ind. Cas. 367; 28 C. W. N. 118; 37 C. L. J. 413; 24 Cr. L. J. 943.

(6) 76 Ind. Cas. 961; 28 C. W. N. 119; 38 C. L. J. 281; (1924) A. I. R. (C.) 182; 25 C. L. J. 289.

Section 342 of the Cr. P. C. lays down that the accused shall be questioned generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. The point, therefore, put shortly is what is meant by the words "after the prosecution witnesses have been examined." Does it mean after they have been examined and cross-examined before the charge or, if they are re-called for further cross-examination after the charge does it mean after such cross-examination. On this point we have directly conflicting rulings of the Madras and Calcutta High Courts, and one ruling of the Lahore High Court to the same effect as that of the Madras High Court.

In the case of *In re Varisai Rowther* (7), it was held by a majority of the Full Bench (Venkata Subba Rao, J., dissenting) that in a warrant case, the examination of the accused directed by the latter part of s. 342, cl. (1), should be made after the prosecution witnesses have been examined, which means when the prosecution has finished calling evidence; and if the accused has been once so examined, it is not obligatory on the Court to question him again after the cross-examination and re-examination of the prosecution witnesses re-called at the instance of the accused under s. 256 of the Code.

If new and material matter is elicited in the cross-examination and re-examination of prosecution witnesses re-called under s. 256 of the Code, it is desirable, and, if fresh evidence on material matters in support of the prosecution case were elicited in such re-examination, it is probably obligatory on the Court to question the accused generally on the case: and if the prosecution calls fresh evidence after the charge is framed, the accused *must* be questioned generally after this further examination of prosecution witnesses.

The last proposition will not be disputed and is not relevant to the point now in question. In his dissenting judgment Venkat Subba Rao, J., held that the examination of the accused under the latter part of s. 342, cl. (1), should be made after the entire evidence for the prosecution mentioned in s. 256 has been given and before the accused called upon to enter on

(7) 73 Ind. Cas. 163; 46 M. 449; 44 M. L. J. 567; 17 L. W. 722; 32 M. L. T. 385; (1923) M. W. N. 477; (1923) A. I. R. (M.) 609; 24 Cr. L. J. 547 (F. B.).

his defence. In *Byrne* v. *Emperor* (8) it was held in similar circumstances that although it may often be desirable that the accused should be asked, after the further cross-examination of witnesses for the prosecution re-called after the charge has been framed, whether he wishes the Court to record any additional explanation, s. 342 of the Cr. P. C., cannot be interpreted as conveying a peremptory direction to that effect, if the Court has already questioned the accused before the charge, when the case for the prosecution has been closed and the witnesses for the prosecution have been cross-examined.

The Calcutta High Court has taken a contrary view in three cases reported in I. L. R 50 Cal.

In *Mazahar Ali* v. *Emperor* (9)] it was held that under s. 342 of the Cr. P. C. it is obligatory on the Magistrate to question the accused generally on the case after the close of the prosecution case, that is when all the prosecution witnesses have been examined-in-chief, cross-examined and re-examined, although the accused has stated that he intends to file a written statement and has done so.

In *Jummon Christian* v. *Emperor* (10) though the point was not the same as in the present case, as the witnesses had not been cross-examined at all before the accused's examination, it was held that the examination of the witnesses cannot be held to have been concluded until they have also been cross-examined.

In *Pramatha Nath* v. *Emperor* (11) it was held that a Magistrate is bound to examine the accused, under s. 342 of the Cr. P. C., after the examination, cross-examination and re-examination of all the prosecution witnesses. In this case the accused was not examined at all.

In *Dibakanta Chatterjee* v. *Gour Gopal Mukerjee* (12) it was held that the word "examined" in s. 342 of the Code includes cross-examination and re-examination. The omission to examine the accused after the cross-examination and re-examination of all the prosecution witnesses vitiates the trial and conviction. The examination of the accused only after the examination-in-chief of the prosecution witnesses is not a compliance with s. 342.

It may perhaps be said that in none of the Calcutta cases was the question of examination of the accused after the further cross-examination of the prosecution witnesses after the charge considered, and, therefore, they do not lay down a rule contrary to that in the Madras case.

The Calcutta cases, however, definitely lay down that the examination of a witness means his examination-in-chief, cross-examination and re-examination. The cross-examination and re-examination may take place at different stages and often after the charge has been framed.

I am myself unable to see any ground for making a distinction between various portions of the evidence of the same witness. His deposition must be taken as a whole and I am not in favour of the theory that it is possible to say that up to a certain point his evidence should be taken as evidence for the prosecution and after that as evidence for the defence.

The wording of s. 342, Cr. P. C., is that the accused shall be questioned "after the witnesses for the prosecution have been examined, and before he is called on for his defence." Section 256, after dealing with the accused's right to re-call and cross-examine such prosecution witnesses as he desires after the charge has been framed, goes on to say: "The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence." The plain meaning of this wording appears to me to be that the defence of the accused commences after the prosecution witnesses have been discharged, that is to say, after they have been cross-examined and re-examined, and, therefore, the stage at which the compulsory examination of the accused must take place is after the prosecution witnesses have been discharged and before he enters upon his defence; and that implies that if any prosecution witnesses have been re-called for cross-examination after the framing of the charge, the examination of the accused must take place

(8) 81 Ind. Cas. 337; 4 L. 61; 1 P. W. R. 1923 Cr.; (1924) A. I. R. (L.) 84; 25 Cr. L. J. 801.
(9) 71 Ind. Cas. 662; 50 C. 223; 36 C. L. J. 417; 27 C. W. N. 99; 24 Cr. L. J. 198; (1923) A. I. R. (C.) 196.
(10) 81 Ind. Cas. 319; 50 C. 308; (1923) A. I. R. (C.) 668; 25 Cr. L. J. 799.
(11) 71 Ind. Cas. 792; 50 C. 518; 27 C. W. N. 389; (1923) A. I. R. (C.) 470; 24 Cr. L. J. 248.
(12) 75 Ind. Cas. 715; 50 C. 939; 27 C. W. N. 743; (1923) A. I. R. (C.) 727; 25 Cr. L. J. 27.

after that. Section 257, which has been referred to both by Hallifax, A. J. C., in *Gangadhar* v. *Bhangisao* (13) and by the learned Chief Justice of the Madras High Court in his judgment in *In re Varisai Rowther* (7) has, in my judgment, nothing to do with the prosecution case. Section 257 refers entirely to the evidence which is produced by the accused in his defence. It is true that the second paragraph refers to the Magistrate's powers to refuse to compel the attendance of any witness who has been cross-examined or whom the accused had an opportunity to cross-examine after the charge was framed, but the meaning of that, in my opinion, is only that if the accused wishes to call as a witness in his defence a witness who has already been examined by the prosecution and whom he had an opportunity of cross-examining, he shall not, except in special circumstances, be allowed to do so. Every matter referred to in s. 257 is a matter after the accused has entered on his defence, and, therefore, after his obligatory examination under s. 342, and we must look to s. 256 to see the stage at which that obligatory examination is also to take place, and the wording of that section, which I have already referred to, leaves no doubt, in my mind, that the prosecution case does not close until all the prosecution witnesses have been discharged, and that their discharge does not take place till they have been cross-examined after the charge, if the accused so desires.

With great respect, I am unable to follow the reasoning of the learned Chief Justice of the Madras High Court. He states at page 458* of *In re Varisai Rowther* (7) that an examination of s. 257 shows that "the Magistrate may on the application of the accused have the prosecution witnesses re-called for examination. The questioning of the accused under s. 342 has to take place before the accused is called on for his defence; and it follows that if this cross-examination of re-called prosecution witnesses is examination of prosecution witnesses within the meaning of s. 342, it would be impossible to comply with the Statute, because the questioning would then be taking place after the accused had been called on for his defence and not before as the section requires."

With the greatest respect I would venture to say that any witnesses called under s. 257 whether they were witnesses previously examined by the prosecution or not, are called as part of the defence and that has nothing to do with their cross-examination under s. 256.

I see no warrant for confining the examination of the prosecution witnesses to their examination-in-chief. All witnesses are examined-in-chief; then, if the adverse party so desires, cross-examined; then, if the party calling them so desires, re-examined. It seems to me impossible to divide the evidence of a witness in an artificial manner; his deposition must be taken as a whole, even supposing that he was cross-examined on numerous occasions on different dates.

It may further be pointed out that under s. 256 it is contemplated that after the prosecution witnesses, who have been examined before the charge, have been cross-examined, re-examined and discharged, "The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination (if any), they also shall be discharged." This leads to the conclusion that the Code contemplates that the prosecution case shall continue after the charge has been framed, and that it is only after all the prosecution witnesses have been discharged that the accused shall be called upon to enter upon his defence.

In these circumstances I am of the same opinion as the Calcutta High Court that the examination of a witness means his examination-in-chief, cross-examination and re-examination, and that the expression "after the witnesses for the prosecution have been examined", used in s. 342 of the Code, includes any cross-examination of them after the charge has been framed. I am, therefore, of opinion that the obligatory examination of the accused must be made after the witnesses for the prosecution have been cross-examined after the charge, if the accused has re-called them for such examination.

This would appear to be the view taken by this Court also. I find in Criminal Circular Memorandum No. 63, dated 1st March 1923, instructions regarding the examination of the accused. In para. 4 it is laid down that "the accused should invariably be questioned after the last

(13) 81 Ind. Cas. 976; 25 Cr. L. J. 1152.

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cross-examination of the prosecution witnesses."

The practice, therefore, which has given rise to the present appeal of not examining the accused after the last cross-examination of the prosecution witnesses is in direct disregard of the provisions of the Circular Memorandum in question which was issued for the guidance of all Criminal Courts in the Province.

Prideaux, A. J. C.—I agree.

Kinkhede, A. J. C.—The learned Judicial Commissioner has set forth the point which the Full Bench had to decide, in the beginning of his judgment. He has very exhaustively dealt with it and in face of the elaborate discussion contained therein, I do not think I can add anything useful to it. He has summed up his conclusions towards the end of the judgment in the following terms:—

"In these circumstances I am of the same opinion as the Calcutta High Court that the examination of a witness means his examination-in-chief, cross-examination and re-examination, and that the expression "after the witnesses for the prosecution have been examined" used in s. 342 of the Code includes any cross-examination of them after the charge has been framed. I am, therefore, of opinion that the obligatory examination of the accused must be made after the witnesses for the prosecution have been cross-examined after the charge, if the accused has re-called them after such examination."

In these conclusions I entirely agree.

Z. K. *Order accordingly.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 399 OF 1924.

January 14, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

DAVID SASSOON—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance of wife and children—Neglect to maintain—Offer to maintain children, effect of.

With regard to the maintenance which can be directed to be paid to a wife under s. 488 of the Cr. P. C. in case of her husband's negligence or refusal to maintain her, there is a special proviso to the section that if the husband offers to maintain his wife on condition of her living with him, and she refuses to live with him, the Magistrate may consider any grounds of refusal stated by her and may make an order under the section notwithstanding such offer if he is satisfied that there is just ground for so doing. [p. 432, col. 2.]

With regard to the maintenance of children, however, it is sufficient under sub-s. (1) of s. 488 of the Cr. P. C. if neglect or refusal to maintain them is proved. On such proof the Magistrate can make an order for the payment of a monthly allowance for the maintenance of each child to such person as the Magistrate from time to time directs. An offer to maintain the children in future is not sufficient of itself to debar the Magistrate from making the order. The Magistrate will be entitled to consider the circumstances in which the offer is made, and whether it is right and proper that the children, if not in the custody of the father, should be handed over to him. [p. 432, col. 2.]

Criminal application against an order of the Additional Presidency Magistrate, Bombay.

Mr. *G. N. Thakor*, (with him Messrs. *I. J. Sopher* and *S. G. Shertukde*), for the Applicant.

Mr. *Daphtary* instructed by Messrs. *Dixit* and *Maneklal*, for the Wife.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Macleod, C. J.—The complainant in this case was one Mrs. David Sassoon who presented an application under s. 488, Cr. P. C., for maintenance for herself and her four sons against the respondent David Sassoon, her husband and the father of the children. The defence to the application, as set out in the respondent's statement, was, that the complainant was misbehaving herself with a certain person, and had gone to Calcutta without his permission. With regard to the maintenance of the four sons, the respondent said that he was willing to have the children with him.

On the facts the Magistrate came to the conclusion without any hesitation that the defence was not proved in any of its material particulars. Consequently the charge of misconduct was proved to be false. The Magistrate further considered that the complainant had satisfied him that the respondent having sufficient means was neglecting to maintain his wife and his four sons who were unable to maintain themselves. The ages of the children varied from seven to eleven. The Magistrate then considered the contention of the res-

pondent that he was willing to keep the children with himself, and, therefore, no order under s. 488 could be made against him. He said:—

"The point is not free from difficulty. It is not covered by any Bombay authority, so far as I know. There are conflicting rulings of the Punjab Court, supporting respondent's contention, on the one hand [*viz.*, *Man Singh* v. *Dharmon* (1) and *Sardar Muhammad* v. *Nur Muhammad* (2)] and the decisions of the Burma Court, supporting the complainant on the other hand *Murgesar Mudaliar* v. *Sodiamma* (3). Considering the object underlying s. 488, Cr. P. C., I prefer to follow Burma rulings rather than Punjab ones. Otherwise in those cases where children are very young, as in this case, a man knowing full well that no mother would part with such children, has simply to make an ostensible offer to keep the children with him and he can thus defeat the object of s. 488, which is to secure provision for helpless children."

The Magistrate then made an order that the respondent should pay in the aggregate Rs. 90 a month to the complainant for the maintenance of herself and the children.

On November 26, a rule was granted on the application of the respondent in order that this question might be decided by this Court. Thereafter an application was made on the Crown side by the respondent under s. 491, Cr. P. C., asking that the custody of the sons should be given to him. The application was heard by Mr. Justice Mirza who came to the conclusion that the petitioner's allegation that for some time past his wife had led an unchaste life and that he was afraid that if his children were to continue to reside with her they would be contaminated, was absolutely without foundation. The learned Judge was satisfied on the evidence that Mrs. Sassoon had looked after the children very well. She had sent the elder boys to school and had educated them at her own expense. He was also satisfied that the children would be much better looked after by the mother than they would be if they were thrown to the tender mercies of their father.

(1) 18 P. R. 1894 Cr.
(2) 41 Ind. Cas. 331; 22 P. R. 1917 Cr.; 16 P. W. R. 1917 Cr.; 18 Cr. L. J. 811.
(3) 30 Ind. Cas. 480; 16 Cr. L. J. 656; 8 Bur. L. T. 134.

We can now consider the proper construction of s. 488 of the Cr. P. C., in the light of the respondent's contention.

We think that with regard to the maintenance of children, it is sufficient under sub-section (1) of s. 488 if the neglect or refusal to maintain them is proved. On such proof, the Magistrate can make an order for the payment of a monthly allowance for the maintenance of each child to such person as the Magistrate from time to time directs. An offer to maintain the children in the future is not sufficient of itself to debar the Magistrate from making the order. The Magistrate will be entitled to consider the cirumstances in which the offer was made, and whether it was right and proper that the children, if not in the custody of the father, should be handed over to him.

With regard to the maintenance which can be directed to be paid to a wife in case her husband neglects or refuses to maintain her, there is a special proviso to the section that if the husband offers to maintain his wife on condition of her living with him, and she refuses to live with him, the Magistrate may consider any grounds of refusal stated by her, and may make an order under the section notwithstanding such offer, if he is satisfied that there is just ground for so doing. There was a very good reason in our opinion why the Legislature did not include children in that proviso, namely, so that the onus should not be thrown on them of stating grounds of refusal which would have to be considered by the Magistrate before making an order for their maintenance. It could not have been intended that the father by stating his willingness to maintain the children could deprive the Magistrate of his jurisdiction to make an order under the section. It seems to us that once the Magistrate is satisfied that a father has neglected or refused to maintain his children, he is entitled to make an order for their maintenance, though he may consider any offer by the father to maintain them in the future on its merits. In this case, agreeing entirely with the remarks of the learned Judge who heard the application under s. 491, Cr. P. C., we are satisfied that the children ought to remain with the mother. The Rule will, therefore, to discharged.

Coyajee, J.—I agree.

Z. K. *Rule discharged.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 610 OF 1922.

November 3, 1924.

Present:—Mr. Justice Devadoss.

A. RAMA RAO—PLAINTIFF—APPELLANT

versus

A. THIMMAPPA—DEFENDANT—RESPONDENT.

Landlord and tenant—Lease deed, construction of Kayamgeni chit*– Provision as to surrender—Lease, whether permanent or terminable—Clause providing for re-entry, whether void for remoteness.*

Where under the terms of a lease deed styled a "*kayamgeni chit*," the lessee was to enjoy the land from generation to generation and the rent was a fixed one, with a clause providing that if the landlord required the property, the lessee was to take the value of the trees and surrender the property to him :

Held, (1) that on a construction of the document the lease was not a permanent one notwithstanding it was styled a *kayamgeni chit* ; [p. 433, col. 2.]

In re Dugdala Dugdale v. *Dugdale*, (1888) 38 Ch. D. 176; 57 L. J. Ch. 634; 58 L. T. 581; 36 W. R. 462, distinguished.

(2) that the clause as to surrender was neither void nor bad for remoteness ; [p. 434, col. 1.]

Maharaj Bahadur Singh v. *Balchand Chowdhury*, 61 Ind. Cas. 702; 6 P. L. J 163; (1921) M. W. N. 157; 2 P. L. T. 131; 25 C. W. N 770; 3 U. P. L. R. (P. C.) 29; 14 L. W. 254; 48 I. A. 376 (P. C), relied on.

(3) that the lessor was bound to pay the lessee compensation for the trees as provided for in the deed. [p. 434, cols. 1 & 2.]

Second appeal against a decree of the District Court, South Kanara, in A. S. No. 181 of 1921, preferred against that of the Court of the District Munsif, Mangalore, in O. S. No. 122 of 1919.

Mr. *B. Sitarama Rao*, for the Appellant.

Mr. *Venkatachala Iyer*, for the Respondent.

JUDGMENT.—The plaintiff sues for possession of the plaint land on the ground that he terminated the lease granted to the defendant. The District Munsif gave a decree in favour of the plaintiff, but the District Judge dismissed the suit on the ground that the clause with regard to the right of re-entry was repugnant to the nature of the document.

Mr. Sitarama Rao's contention on behalf of the appellant is that though the lease is called *kayamgeni chit*, yet the body of the document shows that it was not intended by the lessor that the lease should be permanent. No doubt the document is headed. "*Kayamgeni chit*" and begins with the words "*kayamgeni chit* executed on the 10th *Pushuabhahula*" etc., and the counter part is similar in terms and in the body of the document there is a recital that the lessee is to enjoy from generation to generation. But in the end of the document, there is a clause "When we require the property, you should take half the value of the improvements for the trees planted by us and full value for the plants planted by you out of the value fixed by wise persons for the improvements and surrender the property to us." Does this clause give the landlord the right to terminate the lease?

For the respondent, Mr. Venkatachala Iyer who appears for Mr. Anantakrishna Iyer contends that the document should be construed as containing the terms of a permanent lease. He relies upon the use of the term "*kayamgeni chit*," and also upon the clause that the lessee was to enjoy the land from generation to generation and upon the fact that the rent is a fixed rent. No doubt in interpreting the document in the absence of clear words to the contrary, these things would be of great value, namely, the nature of the terms used for the description of the document, the clause with regard to the enjoyment of the property from generation to generation and the rent being a fixed rent. But in a lease of this kind, the Court has to see what is the contract entered into by the lessor with the lessee. It is open to the lessee to surrender the land leased to him and it is also open to the lessor to contract with the lessee that the land should be available for him whenever he requires it. The mere use of the word "*kayamgeni chit*" would not take away the force of the recital in the document that the lessee should surrender the land whenever required by the landlord. In construing a document of this kind, the whole of the document should be taken into consideration. If there are clear words in the body of the document that the landlord was not to enter upon the land at any time, then the clause in question would be considered repugnant to the general tenor of the document. But so far as I can see, there is nothing in the body of the document itself to show that the landlord contracted with the lessee that the lessee should have a perpetual or a permanent lease without the right of re-entry on the part of the landlord.

For the respondent several cases were quoted. But I think they are not applicable to the case of a lease of this kind. For instance the case of *In re Dugdale Dugdale*

v. *Dugdale* (1) was a case of bequest; and the Court held that the legatee took an absolute interest under the gift, and that the attempted executory gift over was void for repugnancy.

It is also contended by Mr. Venkatachala Iyer that this clause is bad for remoteness. I fail to see how it can be said that this clause is bad for remoteness. As I have observed, it is open to two persons to contract to do or not to do a certain thing; the only question is whether the contract is one which offends against any rule of law. The decision in *Maharaj Bahadur Singh* v. *Balchand Chowdhury* (2) does not apply to this case. In that case a body of *Jains* were given by a Rajah the right to build on a hill belonging to him, whenever they wanted, a place for their people. The Privy Council held that there was no covenant running with the land and the observation at page 166* is "Further, if the case be regarded in another light—namely, an agreement to grant in the future whatever land might be selected as a site for a temple —as the only interest created would be one to take effect by entry at a later date, and as this date is uncertain, the provision is obviously bad as offending the rule against perpetuities for the interest would not then vest *in præsenti*, but would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period."

It is not necessary to notice in detail the other cases such as *Banamali Chowdhury* v. *Ram Kinkar* (3), *Mohim Chandra Pal* v. *Pradyat Kumar Tagore* (4) and *Chandi Churn Baru* v. *Sidheswari Debi* (5). The agreement in Exs. A and A-1 is one which does not offend against any rule of law. On a proper construction of the document, I have no hesitation in holding that the parties did agree that the land leased should be surrendered whenever required by the landlord and that they so contracted is clear from the fact that the landlord agreed to pay half of the value of the improvements for trees planted by himself. This evidently is in consideration of the fact that at some future time the lessee may be required to surrender the land to the lessor. I, therefore, hold that the learned District Judge was wrong in construing that the last clause of the document was repugnant to the rest of the document.

Mr. Sitarama Rao's next contention is that his client should not be asked to pay for the value of the buildings of the land. I do not think the landlord is entitled to re-enter upon the land without paying for the value of the improvements. In the document, itself the expression is "full value for plants planted by you out of the value fixed by wise persons for the improvements and surrender the property to us." I think this clearly shows that the lessor contracted to pay for the improvements on the land whatever be the nature of the improvements. I do not think the lessor is entitled to re-enter without paying compensation for the value of the building and other improvements effected by the tenant.

In the result the decree of the District Judge is set aside and that of the District Munsif restored.

Each party will bear his costs in this Court. Appellant will have his costs in the lower Appellate Court.

V. N. V. *Appeal allowed.*

(1) (1888) 38 Ch. D. 176; 57 L. J. Ch. 634; 58 L. T. 581; 36 W. R. 462.
(2) 61 Ind. Cas. 702; 6 P. L. J. 163; (1921) M. W. N. 157; 2 P. L. T. 131; 25 C. W. N. 770; 3 U. P. L. R. (P. C.) 29; 14 L. W. 254; 48 I. A. 376 (P. C.).
(3) 15 Ind. Cas. 575.
(4) 45 Ind. Cas. 651.
(5) 16 C. 71; 15 I. A. 159; 12 Ind. Jur. 329; 5 Sar. P. C. J. 231; 8 Ind. Dec. (N. S.) 47 (P. C.).

*Page of 6 P. L. J.—[*Ed.*]

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1420 OF 1923.
February 12, 1925.
Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

KAMODA SINGH—DEFENDANT—APPELLANT
versus
RAM CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Pre-emption—Wajib-ul-arz, *entry in, construction of—Sale in favour of co-sharer in different* thok—*Co-sharers in same* patti, *whether entitled to pre-empt.*

A *wajib-ul-arz* provided that a co-sharer desiring to sell his property must offer it first to his own brothers, then to his cousins and nephews, then to co-sharers in the same *patti*, then to co-sharers in the *thok* and then to co-sharers in the village, and that if none of these persons were desirous to take the property, the vendor would then be at liberty to sell to a stranger. A sale was effected by a co-sharer in favour of a co-sharer in a different *thok*, and a suit was brought to pre-empt the sale by persons who were co-sharers in the same *khewat* and *patti* with the vendor:

Held, that the entry in the *wajib-ul-arz* provided for pre-emption *inter se* between the various classes of pre-emptors specified therein and that the plaintiffs were, therefore, entitled to a preferential right of pre-emption as against the vendee.

Mathura Singh v. *Ram Lal Singh*, 64 Ind. Cas. 486; 19 A. L. J. 903, dissented from.

Dhanraj Misir v. *Rameshwar Misir*, 78 Ind. Cas. 904; 21 A. L. J. 928; 46 A. 170; (1924) A. I. R. (A.) 227, referred to.

Second appeal against a decree of the Subordinate Judge, Muttra, dated the 8th August 1923.

Mr. *N. P. Asthana*, for the Appellant.

Mr. *A. Sanyal*, for the Respondents.

JUDGMENT.—There is no question in this case as to the existence of the right of pre-emption but the question is whether under the custom as recorded, the plaintiffs had a better right to pre-empt than the vendee-appellant.

It appears that the plaintiffs pre-emptors are co-sharers in the same *khewat* and *patti* with the vendor. The vendee on the other hand, is a co-sharer in a different *thok*.

The *wajib-ul-arz* lays down that a claim for pre-emption can be made when a co-sharer proposes to sell his property and it sets out a number of classes of persons in order who will be entitled to claim pre-emption.

The first class entitled to pre-empt consists of own brothers; the second class, of cousins and nephews; the third class, of co-sharers in the same *patti*, the fourth class of co-sharers in the *thok*; and the last class consists of co-sharers in the village. It is not to be doubted that on the language of the *wajib-ul-arz* these classes are set out in order of preference; the strongest claim to pre-emption being awarded to the first class; the second strongest claim to the second class, and so on. After these classes have been mentioned, there is a statement in the *wajib-ul-arz* that if no person in any of the classes desires to take the property then the vendor is to be at liberty to sell to a stranger.

We have not the slightest doubt in our minds that the record as here set out does provide for pre-emption *inter se* between the various classes who are specified. It is only by holding this view that we can give full effect to the words, *awwal, phir, phir*.

The case of *Mathura Singh* v. *Ram Lal Singh* (1) has been referred to. There, on language which had some resemblance to the language which we are now considering, it was held that there was no right of pre-emption *inter se* between the classes of persons who are mentioned in the *wajib-ul-arz*. It was held that a right to pre-empt only arose in case there was a sale to a stranger and that the recital in the *wajib-ul-arz* merely indicated the various grades of persons who could put forward a claim to pre-emption in case the sale was to a stranger.

We could not extend the principle of that decision beyond the facts as they are set out in the judgment of the reported case, and in fact in subsequent cases this judgment has been dissented from. An instance may be found in the case reported as *Dhanraj Misir* v. *Rameshwar Misir* (2).

We think it clear that the judgment of the Court below in this case was correct and that on the terms of the *wajib-ul-arz* the plaintiff was entitled to preference over the defendant. The appeal, therefore, fails and we dismiss it with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 64 Ind. Cas. 486; 19 A. L. J. 903.

(2) 78 Ind. Cas. 904; 21 A. L. J. 928; 46 A. 170; (1924) A. I. R. (A.) 227.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 104 OF 1923.

January 13, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

CHANDULAL SUKLAL SHET AND OTHERS —DEFENDANTS—APPELLANTS

versus

DAGDU MAHADU CHAUDHARI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 99, O. I, rr. 1, 9, O. II, r. 3—Suit by several plaintiffs against same defendant on one cause of action—Suit really arising out of several causes of action—Misjoinder of causes of action—Procedure.

Plaintiffs, five in number, sued to recover a certain sum from the defendant as the balance alleged to be due from the defendant on account of a certain contract for the sale of cotton jointly entered into by the plaintiffs with the defendant. It transpired during the trial of the suit that there was not one contract for the sale of cotton by all the plaintiffs but that each plaintiff had contracted to supply a certain quantity to the defendant:

Held, (1) that the plaintiffs having based their claim against the defendant on a single contract, their suit was liable to be dismissed when it was discovered that the cause of action alleged by them did not exist and that there were five separate

contracts entered into by the plaintiffs with the defendant;

(2) that the case was not one of a misjoinder of parties or of a misjoinder of causes of action and that any one of the plaintiffs could not be allowed to change the suit which was brought in the name of all into a suit brought by one of them.

First appeal from the decision of the First Class Subordinate Judge at Jalgaon, in Suit No. 15 of 1921.

Mr. *D. C. Virkar*, for the Appellants.

Mr. *V. B. Virkar*, for the Respondents.

JUDGMENT.—The plaintiffs sued to recover Rs. 6,369-13-6 with interest and costs being the balance alleged to be due on account of 861 maunds and 29½ seers of cotton jointly sold by all the plaintiffs to defendant No. 1 on or about March 1, 1920, at Rs. 12 per maund. A decree was passed in favour of the plaintiffs for Rs. 1,609 with one-third of their costs. It was proved in the Trial Court that there was not one contract for the sale of 861 maunds of cotton by the plaintiffs to the defendant but that each plaintiff contracted to supply a certain number of maunds of cotton to the defendant, the total amount of the five contracts being 861 maunds. It was quite impossible, therefore, for the plaintiffs to join in one suit five different causes of action on five different contracts made by five different plaintiffs. But they do not seek to do that. They seek to base their claim against the defendants on a single contract, though it is perfectly clear on the evidence that there was not one single contract but five contracts. Consequently the suit must inevitably fail. The provisions of the C.P. C., as regards the misjoinder of parties or the misjoinder of causes of action cannot possibly apply to this case. There is neither a misjoinder of parties nor a misjoinder of causes of action. But it is a case where a number of plaintiffs file a suit on a cause of action which does not exist. Consequently to allow any one of these plaintiffs to change the suit which was brought in the name of all into a suit brought by one of them would not come within the provisions of the Code which provide that no suit shall be defeated on a technical ground by reason of the misjoinder of parties or causes of action. Assuming that we were to accede to the respondents' suggestion that one of them should be allowed to continue the suit as based on his own contract, which of the plaintiffs is to be allowed to do this? There can be no answer to that question, and consequently the decision of the Court below was wrong, the appeal must be allowed and the suit dismissed with costs throughout.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 585 OF 1924.

February 18, 1925.

Present:—Mr. Justice Mukerji and Mr. Justice Boys.

RAM CHARAN SAHU—JUDGMENT-DEBTOR—APPELLANT

versus

SALIK RAM SAHU—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Execution of decree—Assignment of decree—Notice to judgment-debtor—Order declaring that execution can proceed—Objection, subsequent, that decree cannot be executed—Res judicata.

Under O. XXI, r. 16 of the C. P. C., when the assignee of a decree applies for execution of the decree a notice has to be issued to the judgment-debtor to show cause why the execution should not be granted. The Court is directed not to execute the decree till the objection of the judgment-debtor has been heard. If the judgment-debtor has any objection as to why the execution should not be granted, for instance, on the ground that the decree is a nullity, the objection must be put forward at the time when the notice is served upon him. Once the Court holds that the execution can proceed, the matter becomes *res judicata* and the judgment-debtor cannot at a subsequent stage object that the decree is not executable.

Second appeal from a decree of the District Judge, Azamgarh, dated the 8th January 1924.

Mr. *A. P. Bagchi*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—This appeal arises out of execution proceedings under the following circumstances:—

An Insolvency Court, namely, the District Judge of Gorakhpur, passed a decree against the appellant Ram Charan Sahu in order that some money, belonging to the judgment debtor which he had realized, he might re-pay. That decree having been passed, the Receiver Babu Raghubar Prasad transferred the decree to the opposite party Salik Ram. Salik Ram having obtained an assignment applied for execution and obtained an order of transfer of the decree to the Court of the Subordinate Judge of Azamgarh. In that Court, for the first time, Ram Charan Sahu raised the objec-

tion that the decree that had been passed by the Insolvency Court was a nullity. That objection having failed, he preferred an appeal to the District Judge.

The District Judge held that the Court which passed the decree had recognized the title of Salik Ram to execute the decree and that it was not open to the Court at Azamgarh to go behind that order.

In this Court in the memorandum of appeal not a word has been said as to why this view of the learned District Judge was unsound. The appellant in the memorandum of appeal reiterates his objection to the validity of the decree as it was passed.

Under O. XXI, r. 16 of the C. P. C., when a transferee applies for execution of a decree a notice has to be issued to the judgment-debtor to show cause why the execution should not be granted. The Court is directed not to execute the decree till the objection of the judgment-debtor has been heard. Evidently it was the order which allowed execution, that is mentioned by the learned District Judge in his judgment. According to a ruling of this Court, namely, *Taj Singh* v. *Jagan Lal* (1), the order allowing execution operates as *res judicata*.

In our opinion so long as the order allowing execution of the decree at the instance of Salik Ram stands, the appellant cannot be heard to say that the decree is not executable. When the notice was sent to him, that was the time when the appellant should have raised the objection as to why the execution should not be granted.

The appeal fails and is hereby dismissed with costs which will include Counsel's fee in this Court on the higher scale.

Z. K. *Appeal dismissed.*

(1) 35 Ind. Cas. 234; 14 A. L. J. 370; 38 A. 289.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 448 OF 1922.

November 14, 1924.

Present:—Mr. Justice Srinivasa Iyengar.

PECHIAYEE—PETITIONER

versus

VALLAMUTHU VELAN—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Execution of decree—Sale—Deposit of decretal amount—Application to set aside sale, absence of, effect of.

An application either in writing or oral for setting aside the auction sale is necessary before the Court can be called upon to act and set aside the sale under the provisions of O. XXI, r. 89 of the C. P. C. The mere deposit of the required amount unaccompanied by an application is not sufficient to enable the Court to set aside the sale.

Petition under s. 115 of Act V of 1908 praying the High Court to revise an order, dated the 30th November 1921, of the Court of the District Munsif, Madura Taluq, and made in M. P. No. 450 of 1921, in E. P. No. 179 of 1921, in S. C. S. No. 623 of 1920 (on the file of Madura, Sub-Court.)

Mr. *P. S. Narayanasami Iyer*, for the Petitioner.

Mr. *K. Rajah Iyer*, for the Respondent.

JUDGMENT.—I very much regret I cannot interfere with the order of the lower Court in revision. The petitioner who was the judgment-debtor paid the required amount according to the rules under the provisions of O. XXI, r. 89, apparently with a view to enable her to apply for setting aside the sale under the terms of that section. But it is now clear that there was no application made by her to the Court either in writing or by parol. A few days after this, the Court confirmed the sale, and more than 90 days thereafter the petitioner applied for a review of the order of confirmation. The lower Court has held that the review petition was barred by limitation and dismissed it. Assuming that the lower Court erred in its view of the law with regard to the limitation to be applied to the review petition, I do not see what jurisdiction I have to interfere. However, that may be, in view of the fact that no application was made by the petitioner to set aside the sale, I see no substance even in the application for the review and no use even if I should direct the lower Court to consider the application of the petitioner for review of the order. Three learned Judges of this Court have held that an application either in writing or oral for setting aside the sale is necessary before the Court can be called upon to act and set aside the sale under the provisions of O. XXI, r. 89. In the case of *Papooru Venkata Narasimma* v. *Jayanti Lakshmi Narasiham* (1), Sadasiva Aiyar and Moore, JJ., held that an application oral or written made within 30 days was necessary for the purpose of s. 310 (A) of the C. P. C., corres-

(1) 32 Ind. Cas. 783; 3 L. W. 174.

ponding to O. XXI, r. 89. Mr. Justice Krishnan has also taken a similar view in the case of *Rayapati Venkatasubba Rao* v. *Kalapatra Narayana Rao* (2). The Bombay case in *Mathuji* v. *Kondaji* (3) has been expressly dissented from and refused to be followed by this Court. It is no doubt a hard case, but after all the provisions of the C. P. C. are meant to be observed; and in view of the decisions of this Court, I feel I cannot do anything to help the petitioner. The civil revision petition is accordingly dismissed, and I do not see why costs should not follow the event, and I accordingly award costs against the petitioner to the respondent.

V. N. V. *Petition dismissed.*

Z. K.

(2) 66 Ind. Cas. 44; (1922) M. W. N. 171; 15 L. W. 450; (1922) A. I. R. (M.) 83.

(3) 7 Bom. L. R. 263.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 45 OF 1924.

September 26, 1924.

Present:—Mr. Dalal, J. C., and Mr. Neave, A. J. C.

SITAPAT RAM—JUDGMENT-DEBTOR—APPELLANT

versus

Lala MAHABIR PRASAD—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. IX, r. 9—Execution of decree, application for—Dismissal in default—Restoration, grounds for—Duty of Court.

An application for execution of a decree was dismissed in default and the decree-holder put in an application for restoration under s. 151 of the C. P. C. Without issuing any notice to the judgment-debtor and without considering the merits of the case the Court granted the application and restored the application for execution. On revision:

Held, that the order of restoration could not be maintained and that the case must be remanded to the lower Court for a proper trial after issuing notice to the judgment-debtor.

Where a Court acts under s. 151 of the C. P. C., in restoring execution proceedings dismissed in default, it ought to state in what manner the ends of justice require the revival of the proceedings and at least as strong grounds should be required to justify an application under s. 151 as would be required on an application for review.

Appeal against an order of the Subordinate Judge, Fyzabad, dated the 7th July, 1924.

Messrs. *Ram Bharose Lal* and *Ali Mohammad*, for the Appellant.

Mr. *S. N. Sinha*, for the Respondent.

ORDER.—This was wrongly registered as an appeal by the office. An application for execution of a decree was dismissed in default by the Court of the Subordinate Judge of Fyzabad and on 7th July the decree-holder put in an application for restoration under s. 151 of the C. P. C. This procedure was adopted because the provisions of O. IX, do not apply to execution proceedings. Without issuing any notice to the judgment-debtor and without considering the merits of the case the Court granted the application the next day the 8th of July. The order of the lower Court is very summary. It is in these words:—"As the application is supported by an affidavit, I grant it. Let the execution case be restored." We do not believe that the learned Judge had any idea of what he was doing or under what section of the law he was proceeding in the matter. Such an order cannot be maintained. We shall treat this petition of appeal as an application in revision.

We set aside the order of the lower Court dated 8th July 1924 and remand the proceedings to it for a proper trial after issuing notice to the judgment-debtor. We would draw the attention of the lower Court to a Bench decision of this Court in execution of decree [*Nageshwar Prasad* v. *Jai Narayan* (1)] where one of the learned Judges observed that if the lower Court acted under s. 151 of the C. P. C., it ought to have stated in what manner the ends of justice required the revival of the proceedings. The other Judge observed that at least as strong grounds should be required to justify an application under s. 151 as would be required on an application for review. The learned Judge of the lower Court is desired to dispose of this matter bearing in mind the observations of the two learned Judges of this Court.

We set aside the order as stated above and remand the proceedings. Costs here and heretofore shall abide the result.

The property shall remain attached as before until the conclusion of the proceedings.

Z. K. *Order set aside. Case remanded.*

(1) 73 Ind. Cas. 73; (1922) A. I. R. (O.) 201.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 192 OF 1924.
February 3, 1925.
Present:—Mr. Justice Mukerji.
RAM SARUP CHAUBE—PLAINTIFF—PETITIONER
versus
RAM DULAR PANDE—DEFENDANT—OPPOSITE-PARTY.

Transfer of Property Act (IV of 1882), s. 68—Mortgage of occupancy holding—Sub-mortgage, legality of—Sub-mortgagee not put in possession—Suit to recover mortgage money, maintainability of.

Where a mortgagee of an occupancy holding purports to make a sub-mortgage of his mortgagee rights, he is doing nothing forbidden by law and the sub-mortgagee is entitled to enforce his sub-mortgage by any of the means which are open to him in law. For instance, if his mortgagor fails to put him in possession of the mortgaged property, the sub-mortgagee may bring a suit to recover the mortgage money under s. 68 of the Transfer of Property Act.

Civil revision against an order of the Judge of the Small Cause Court dated the 15th September, 1924.

Mr. *Mushtaq Ahmad*, for the Applicant.

Mr. *S. C. Das*, for the Opposite Party.

JUDGMENT.—This is an application to revise a judgment of the Court of Small Causes under the following circumstances:—The applicant obtained a document, said to be a sub-mortgage, from the respondent on the 3rd of August, 1923, for a consideration paid by him of Rs. 300. It appears that the respondent was in possession of certain plots of land as mortgagee under a deed, dated the 10th August 1918. The repondent said that he would pay interest till *Jeth* following the execution of the deed, when the plaintiff would take possession of the property mortgaged. The applicant said in the plaint that he had neither been paid interest nor had he been put into possession of the property. He accordingly sued to recover his money with interest.

The respondent pleaded payment of the money which he had borrowed, and also urged that the contract was an illegal one and could not be enforced and the money could not be refunded.

The learned Judge of the Court of Small Causes held that the money borrowed had not been re-paid, but he was of opinion that the mortgage was an illegal one and the money could not be recovered.

In this Court it has been urged that the learned Judge has really mis-applied the law and there is nothing illegal in the transaction and there is no bar to the recovery of the money.

It appears that a Division Bench of two Judges of this Court in the case of *Balgobind Bhagat* v. *Nagina Misir* (1) held that where a mortgagor was himself holding a mortgage of occupancy tenancy and purported to make a sub-mortgage of his right, he was doing nothing forbidden by law. This argument was actually put forward before the learned Judge of the Court below, but was not accepted by him. In view of the ruling of this Court, the transaction was not illegal. I may point out that the mortgagor was quite secure in his possession. He could not be ousted by his mortgagor, the occupancy tenant, without the tenant paying up the money he had taken from his mortgagee. If the respondent had handed over such possession as he did have over the property mortgaged to him, the money advanced by the applicant would have been quite secure to him.

In this view of the case, it is not necessary to consider several other cases that were cited before me.

The learned Counsel for the respondent argued that the remedy of the applicant was whatever may have been provided for in the deed itself and not a suit for money. But I find in the plaint that the plaintiff did allege that not only he was not paid but that he was not put into possession of the mortgaged property. Under s. 68 of the Transfer of Property Act, the mortgagor was bound to put the mortgagee into possession. The applicant, therefore, was entitled to receive back his money.

I allow the application, set aside the decree of the Court below and decree the claim of the applicant, against the respondent with costs in this Court and in the Court below.

Z. K. *Application allowed.*

(1) 19 Ind. Cas. 745; 35 A. 405.

PATNA HIGH COURT.

SECOND CIVIL APPEALS Nos. 212, 213, 216, 241, 242 AND 244 OF 1922.
July 2, 1924.
Present:—Mr. Justice Das and Mr. Justice Ross.
Maharaja Bahadur KESHO PRASAD SINGH—PLAINTIFF—APPELLANT
versus
RAMDEAL KUER AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 60—Cess

Act (IX of 1880), s. 41—Landlord and tenant—Recorded proprietor of mahal*—Suit to recover rent—Tenant, whether can set up right of third person—Third person, whether necessary party—Road-cess—Liability of tenant.*

Under the provisions of s. 60 of the Bengal Tenancy Act a recorded proprietor of a *mahal* is the only person to whom the tenants of the *mahal* are entitled to pay rent for lands lying within the *mahal*, and in answer to a suit by such a proprietor to recover rent from the tenants in respect of such lands, the latter cannot be permitted to set up the title of the proprietor of another *mahal* to recover the rent. The proprietor whose right is set up by the tenants is not a necessary party to a suit by the recorded proprietor to recover rent.

Under the provisions of s. 41 of the Bengal Cess Act every cultivating *raiyat* is liable to pay to the person to whom his rent is payable one-half of the amount of road-cess.

Appeal against a decision of the Subordinate Judge, Shahabad, dated the 25th November 1921, modifying that of the Munsif, Buxar, dated the 26th July 1920.

Messrs. *L. N. Singh* and *N. N. Singh*, for the Appellant.

Messrs. *S. S. Lal*, *S. C. Mitter* and *N. N. Sen*, for the Respondents.

JUDGMENT.

Ross, J.—These appeals are directed against a decree of the Subordinate Judge of Shahabad dismissing the plaintiff's claim for apportionment of rents with respect to certain holdings which are partly in his *Mahal* Naubarar and partly in the adjoining *Mahal* Gang Barar. The ground upon which the learned Subordinate Judge dismissed the claim was that it was proved that the plaintiff had never realized rents from the tenants-defendants for these holdings, and that for more than twelve years the proprietors of Gang Barar, who were made parties to the suit, had realized rents in open assertion that the lands appertained to Gang Barar, it was, therefore, too late for the proprietors of Naubarar to claim the rents as against the proprietors of Gang Barar. The fallacy in this reasoning is that plaintiff has not claimed rent as against the proprietors of Gang Barar but has claimed rent from the tenants-defendants. It was unnecessary to implead the landlords of Gang Barar and they must be dismissed from these actions with costs throughout. But as regards the right of the plaintiff to recover rents from the tenants for the lands in Naubarar, s. 60 of the Bengal Tenancy Act concludes the matter. It is admitted that the plaintiff is the recorded proprietor of Naubarar and that the Commissioner appointed for this purpose has ascertained the extent of the lands of these holdings which lie within Naubarar. Consequently by the provisions of s. 60 of the Bengal Tenancy Act, the plaintiff is the only person to whom the tenants are entitled to pay rent for these lands lying within Naubarar and they cannot be permitted to set up the title of the proprietors of Gang Barar.

The only other question in the appeal is whether the plaintiff is entitled to recover cess from the tenants. Under the provisions of s. 41 of the Cess Act every cultivating *raiyat* is to pay to the person, to whom his rent is payable one-half of the road-cess. It was suggested that the Cess Act does not prevail in the U. P., but this estate is now borne on the Register of the Collector of Shahabad and the Act is in force over this estate.

The result is that the appeals must be decreed with costs with the exception of S. A. No. 213 of 1922, and the cases must be remanded to the Court below in order to assess the proper rent payable by the tenants for the lands found by the Commissioner to be included in Naubarar. At the same time the defendants second party, proprietors of Gang Barar, will be dismissed from these actions with costs in all the Courts. As the Commissioner has not found that in Suit No. 264 any lands are within Naubarar, S. A. No. 213 of 1922 arising out of this suit must be dismissed with costs.

Das, J.—I agree.

Z. K. *Appeals allowed; Case remanded.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 900 OF 1923.

January 21, 1925.

Present:—Mr. Justice Mukerji.

JAMNA DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KUNWAR BAI—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Stridhan, *succession to—Property inherited, whether joint family property—Survivorship.*

When the *stridhan* property of a woman devolves on her sons who form a joint Hindu family at the time of the mother's death, the sons take the property as co-owners or tenants-in-common without benefit of survivorship, and on the death of one of the sons

the property so inherited by him goes to his widow and not to his surviving brothers.

(Case-law referred to.)

Second appeal against a decree of the Subordinate Judge, Banda, dated the 25th April 1923.

Dr. *K. N. Katju*, for the Appellants.

Mr. *K. N. Laghate*, for the Respondent.

JUDGMENT.—The question to be decided in this appeal is a question of Hindu Law and arises under the following circumstances. The property in suit belonged originally to one Piare. He gave it away absolutely to his daughter *Musammat* Sugna, in whose hand, therefore, it was her *stridhan* property. *Musammat* Sugna had three sons *viz.*, Durga Prasad, the husband of the plaintiff-respondent, and Jamna Das and Ganga Prasad, the defendants-appellants. The plaintiff-respondent claimed a third share in the property as being the separate property of Durga Prasad.

The defence was that Durga Prasad died as a member of a joint Hindu family with the defendants and, therefore, the plaintiff inherited nothing.

It has been found, as a matter of fact, that Durga Prasad and his two brothers were living together as members of a joint Hindu family. The question is whether under the circumstances the share which Durga Prasad inherited was his absolute property inheritable by his widow on his death or whether Durga Prasad held the property as any other joint ancestral property inherited from father which would go by survivorship to his brothers.

The learned Judge of the lower Appellate Court has mentioned the authorities quoted before him and has come to the conclusion that the *stridhan* property of mother is inherited by the sons without any right of survivorship attaching to it.

Before the case of *Venkayyamma Garu* v. *Venkataramanayama Bahadur Garu* (1) was decided by their Lordships of the Privy Council, there was no doubt in the proposition that property inherited from a maternal grandfather was inherited without any attachment of the right of survivorship to it. But their Lordships of the Privy Council ruled in the above mentioned case that where three joint brothers inherited their grandfather's property they took it with right of survivorship attaching to the property. The question before me is how far this principle can be applied to the case of the inheritance of the *stridhan* property of their mother by three brothers who lived jointly.

It seems to me that the expression "ancestral property" has nowhere been so applied as to include property inherited from a female. The property inherited from *Musammat* Sugna is, therefore, not likely to be termed as "ancestral." Indeed, there is a direct decision on the point by the Madras High Court in the case of *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (2). This was a decision of five learned Judges and it was held there that "when the *stridhan* property of a woman devolves on her sons, who, with their father, form an undivided Hindu family at the time of the mother's death, the sons take it as co-owners or tenants-in-common without benefit of survivorship."

A similar decision was arrived at by two learned Judges of the Bombay High Court in the case of *Bai Parson* v. *Bai Somli* (3). It is worth mentioning that the Privy Council case of *Venkayyamma Garu* v. *Venkataramanayama Bahadur Garu* (1) was cited and was present in the minds of their Lordships in both the cases.

It is a matter of some conjecture how far the case of *Atar Singh* v. *Thakur Singh* (4) decided by their Lordships of the Privy Council, modified or affected the law as laid down in *Venkayyamma Garu* v. *Venkataramanayama Bahadur Garu* (1). In this latter case, the property as in the case of *Venkayyamma Garu* v. *Venkataramanayama* (1) was inherited from maternal grandfather by one Dayal Singh. Dayal Singh having transferred the property, his sons claimed that the property was ancestral in the hand of their father and sought to set aside the alienation. Their Lordships of the Privy Council remarked that it was for the sons to prove that the property was "ancestral" in the hands of Dayal Singh. It is, however, clear that the case of *Venkayymma Garu* v. *Venkataramanayama* (1) does not directly govern the case before me and that there are at least two cases having the authorities of seven learned Judges of two different Courts which establish the proposition that in the circumstances of

(1) 25 M. 678; 7 C. W. N. 1; 12 M. L. J. 299; 29 I. A. 156; 4 Bom. L. R. 657; 8 Sar. P. C. J. 286 (P. C.).

(2) 27 M. 300; 13 M. L. J. 398.

(3) 15 Ind. Cas. 774; 36 B. 424; 14 Bom. L. R. 400.

(4) 6 Ind. Cas. 721; 35 C. 1039; 12 P. R. 1910; 12 C. W. N. 1049; 35 I. A. 206; 8 C. L. J. 359; 18 M. L. J. 379; 128 P. W. R. 1908; 4 M. L. T. 207; 10 Bom. L. R. 790 (P. C.).

the present case the property is taken by the heirs as tenants-in-common and not as joint tenants with right of survivorship.

In the circumstances I dismiss the appeal with costs which will include Counsel's fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2499 AND 2500 OF 1919.

August 22, 1922.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice B. B. Ghose.

DHIRENDRA CHANDRA RAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Nawab Khaja HABIB-ULLAH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), Ch. X, s. 52—Bengal Alluvial Land Settlement Act (XXXI of 1858), s. 2—Diara proceedings—Settlement of rent for accreted lands—Tenants, whether bound to pay rent settled—Suit to recover rent in respect of lands comprised in lease—Failure to include claim for increased rent in respect of accreted lands, effect of.

A suit to recover rent in respect of lands let out under a lease of which the proper description is given in the plaint is not liable to dismissal owing to the fact that the plaintiff might have asked for increased rent for an accretion to the tenure. [p. 442, col. 2.]

In order to make a tenant liable for additional rent for accretions to his tenure, such rent must be settled under Ch. X to the Bengal Tenancy Act or the landlord must take proper proceedings so as to bring into operation s. 152 of the Act or any other appropriate provision of the law. [p. 443, col. 2.]

Where a *diara* officer does not work under Ch. X of the Bengal Tenancy Act, he is required only to ascertain and record the rights of, and not to settle the rents payable by, under-tenants, and the latter are not bound to pay the rent determined by the *diara* officer under s. 2 of the Bengal Alluvial Land Settlement Act of 1858. [p. 443, col. 2; p. 444, col. 1.]

Appeals against the decrees of the Subordinate Judge, Second Court, Bakarganj, dated the 2nd September 1919, affirming those of the Munsif, First Court, dated the 5th June 1918.

Babus *Surendra Chandra Sen* and *Indu Bhusan Roy*, for the Appellants.

Babu *Surendra Nath Guha*, for the Respondents.

JUDGMENT.

Ghose, J.—These two appeals are by the defendants and arise out of two suits for rent. The suit out of which Appeal No. 2500 arises was for rent for about 213 acres of land comprised in permanent *miras* tenure created in 1864 A. D. in favour of the predecessor of the defendants at a rent of Rs. 359 odd. There has been gradual accretion of some lands contiguous to the lands of the *miras* in the bed of a river and the defendants are entitled to those lands as an increment to their tenure. The plaintiffs did not include these accreted lands in their suit for rent for the *miras*. It is argued on behalf of the appellants that the plaintiffs were bound to give the extent and boundaries of the land in their suit for rent under s. 148 of the Bengal Tenancy Act, and as the accreted lands are an increment to the tenure the plaintiffs were bound to include those in their suit, and as they did not do so the suit ought to be dismissed. We do not think that the contention is sound. The plaintiffs sued for rent for the lands let out under the lease of 1864 A. D. of which a proper description was given in the plaint. The fact that they might have asked for increased rent for the accretion to the tenure does not impose on them the penalty of having their suit for rent for the lands actually dismissed. This appeal, therefore, fails and is dismissed with costs.

The Appeal No. 2499 arises out of a suit for rent for about 98 acres of land at the rate of Rs. 550 odd. These were lands gained by gradual accession from a river and are contiguous to the lands for which the other suit was brought. The lands were brought under *diara* operations and formed into a separate estate of which the plaintiffs took settlement from Government. The liability of the defendants to pay the rent is thus set forth in para. 2 of the plaint:—"The defendants have a *miras taluk* recorded at the annual rent of Rs. 550-3-0, in respect of 98·7 acres of land. . . . . in 5/1 *mouja* Kistakati bearing No. 2436. . . . . and the same was recorded in *khewat* No. 2 and the defendants are in possession thereof." It is not necessary to set out the pleas taken in defence. The lower Appellate Court has overruled the objections taken by the defendants and passed a decree in favour of the plaintiffs affirming that of the Trial Court. It found that the *diara* officer fixed the rent payable by the defendants as claimed, which is fair and equitable and that the

defendants are liable to pay rent at that rate. The grounds urged by the appellants against the decree are (1) The suit of the plaintiffs is barred as *res judicata*. (2) The defendants are not liable to pay the rent fixed by the Revenue Authorities for the lands and the plaintiffs can only claim for increase of rent under s. 52 of the Bengal Tenancy Act. (3) The lands being an increment to the old tenure of the defendants separate suit for the rent of these lands is not maintainable.

The plea of *res judicata* is based on the judgment of the Appellate Court in R. Appeal No. 30 of 1912 arising out of a previous rent suit. The pleadings in the suit have not been filed nor the judgment of the Trial Court. It is not clear from the judgment produced what the issues in the rent suit were and form the materials on the record, so it is not possible to hold, that the present suit is barred by *res judicata*. This ground must, therefore, fail.

In support of the second ground it is urged by the appellants that the *diara* officer was not vested with any authority under the law to settle any rent with regard to the lands in suit so as to fasten liability of the defendants, and all that he was authorized to do was to ascertain the amount of rent capable of being realized from the lands for the purpose of assessment of revenue. The defendants are not consequently bound to pay the rent settled by the *diara* officer. This contention seems to be well-founded. Under cl. (1) of s. 4 of Regulation XI of 1825 these lands are to be considered as an increment to the tenure of the defendants. The last paragraph of that clause which referred to the liability of the under-tenant for payment of increase of rent has been repealed by the Bengal Tenancy Act and s. 52 of that Act has made provisions for increase of rent for increase of area. No additional rent was claimed for increase of area of the tenure under that section or any other provision of the law by the plaintiffs. The learned Vakil for the respondents relies upon the provisions of s. 2 of Act XXXI of 1858 and contends that the tenant is bound to pay the rent determined by the Revenue Authorities under that section. The first paragraph of that section leaves the rights of under-tenants as to alluvial land under cl. (1), s. 4 of Regulation XI of 1825 unaffected. The second paragraph is to the following effect: It shall be the duty of all officers making Settlements of such lands. . . . . to ascertain and record all such rights according to the rules prescribed in Regulation VII of 1822; and to determine whether any and what additional rent shall be payable by the person or persons entitled to any under-tenures in the original estate. It may at first sight seem that this leads to the inference that the under-tenant would be bound to pay the rent so determined, but there does not appear to be any provision in the law under which it would be obligatory on him to do so. The learned Vakil for the respondent referred us to s. 9 of Regulation VII of 1822 as empowering the officer to settle rent. It seems to me, however, that the Collector is not empowered under that section to determine any rent so as to fix the under-tenant with liability to pay the amount fixed to his landlord, but he is only to record existing rights. If proceedings had been taken, under Part II of Ch. X of the Bengal Tenancy Act, by the *diara* officer he might have settled rent under the provisions therein laid down with consequential results. But there is no suggestion that any action was taken under that Chapter. The *diara* proceedings have not been produced nor is there any evidence as to what was actually done by the *diara* officer. In order to make the tenant liable for additional rent for accretions to his tenure such rent must be settled under Ch. X of the Bengal Tenancy Act or the landlord must take proper proceedings so as to bring into operation s. 52 of the Act or any other appropriate provision of the law. Rule 550 of the Bengal Survey and Settlement Manual, 1917, may also be referred to in this connection. The relevant passage runs thus :—"He (the *diara* officer) will ordinarily be working under Ch. X of the Bengal Tenancy Act and will prepare the record under that Chapter. If there be no notification under Ch. X of the Bengal Tenancy Act, the *diara* officer will ascertain the Record of Rights of under-tenants under Regulation VII of 1822 read with s. 2 of Act XXXI of 1858. . . . . The rights of under-tenants ascertained as above will not be affected by the nature of the arrangement made by Government with the proprietor." From this it would appear that where the *diara* officer does not work under Ch. X of the Bengal Tenancy Act, he has been required only to ascertain

and record the rights and not to settle the rents payable by under-tenants. In my opinion, therefore, there is no liability on the defendants to pay the rent settled by the *diara* officer for the lands in dispute. No other ground of liability of the defendants was alleged by the plaintiffs nor was any other argument advanced in support of the decree.

The learned Vakil for the appellants relied on the case of *Assanullah Bahadur* v. *Mohini Mohan Das* (1) in support of his third contention that a separate suit for the rent of the lands is not maintainable. It would appear that at any rate, so long as the plaintiffs are entitled to the lands by virtue of Settlement from Government, these would not constitute a separate tenure held by the defendants under the plaintiffs. But in view of the decision on the second ground it is unnecessary to make any further observations, on this point. In the result the defendants cannot be said to hold any *miras taluk* under the plaintiffs at the rent claimed. The Appeal No. 2499 is decreed and the suit dismissed with costs in all the Courts.

Walmsley, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 26 C. 739; 13 Ind. Dec. (N. S.) 1072.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 948 AND 949 OF 1923.

February 10, 1925.

Present:—Mr. Justice Stuart.

MAHADEO PRASAD—PLAINTIFF—APPELLANT

versus

BASANT LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 167—Mortgagee—Recorded co-sharer—Joint possesssion, decree for—Mesne profits, whether can be recovered—Jurisdiction of Civil Courts.

Where a mortgagee of *zemindari* plots is entered as such in the *khewat*, he is a recorded co-sharer, and if he is obstructed in the collection of rents he is entitled to a decree for joint possession against the other co-sharers but he is not entitled to a decree for mesne profits. Being a recorded co-sharer he can only obtain his share of the profits by a suit in a Rent Court. Section 167 of the Agra Tenancy Act bars the jurisdiction of the Civil Courts in the matter. [p. 444, col. 2.]

Bisheshar Singh v. *Hanuman Singh*, 63 Ind. Cas. 802; 19 A. L. J. 780; 3 U. P. L. R. (A.) 143; 44 A. 1; (1922) A. I. R. (A.) 314 and *Sarbjit Singh* v. *Raj Kumar Rai*, 63 Ind. Cas. 806; 19 A. L. J. 783; 3 U. P. L. R. (A.) 146; 44 A. 5; (1922) A. I. R. (A.) 162, followed.

Second appeal from a decree of the Subordinate Judge, Mirzapur, dated the 15th March 1923.

Dr. *K. N. Katju*, for the Appellant.

Dr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—Mauna and others mortgaged certain *zemindari* plots of an area of about 12 *bighas* in favour of Jhak and Ramnandan Lal. The mortgagors transferred all their rights to Basant Lal. Basant Lal has redeemed half the mortgage and is mortgagor in respect of the remainder. The mortgagee rights in respect of the remainder have been sold to Mahadeo Pande in execution of a decree. Mahadeo Pande's name has been entered as mortgagee in the *khewat*. He is thus a recorded co-sharer.

The situation is now this Basant Lal owns half the property and is mortgagee of the remainder. Mahadeo the present appellant is the mortgagee of the remaining half. These remarks apply only to the area in dispute. That area is recorded as a portion of certain *khata* and in the remainder of the *khata* many other people are co-sharers.

Mahadeo's grievance was this. The area in dispute is cultivated by tenants. When he endeavoured to collect rents from those tenants through the Courts, he was opposed and was unable to collect the rents. He has now come into Court to claim his rights. The lower Appellate Court has given him a decree declaring that he is the mortgagee, but has refused him any other relief. He appeals against this decree.

It appears to me that following the recent Bench decisions in this Court in *Bisheshar Singh* v. *Hanuman Singh* (1) and in *Sarbjit Singh* v. *Raj Kumar Rai* (2), the appellant is entitled to a decree for joint possession. According to the latter decision he is not entitled to mesne profits. As he is a recorded co-sharer he can only obtain his profits in this matter by a suit in a rent Court. Section 167 of the Tenancy Act bars the jurisdiction of the Civil Court in the matter.

(1) 63 Ind. Cas. 802; 19 A. L. J. 780; 3 U. P. L. R. (A.) 143; 44 A. 1; (1922) A. I. R. (A.) 314.

(2) 63 Ind. Cas. 806; 19 A. L. J. 783; 3 U. P. L. R. (A.) 146; 44 A. 5; (1922) A. I. R. (A.) 162.

In the result I modify the decree of the lower Appellate Court by granting the appellant a decree for joint possession. I do not, however, see my way to award him costs and consider that he should pay the costs of the other side for it appears to me that he himself is responsible for unnecessary litigation. As he is a recorded co-sharer there was nothing to prevent his collecting the profits in the ordinary way. Why a recorded co-sharer should wish to come into a Civil Court to ask for a decree for joint possession is a question that can probably only be answered in the eastern Districts. While permitting him modified relief I direct that Mahadeo pay his own costs and costs of the other side on the higher scale.

Z. K. *Decree modified.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 285 OF 1923.

February 2, 1925.

Present:—Mr. Justice Ryves and Mr. Justice Mukerji.

SURJA—DEFENDANT—APPELLANT

versus

Lala JOTI PRASAD—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 11—Suit on mortgage-bond—Plea of minority—Burden of proof.

Where in answer to a suit for sale on foot of a mortgage-bond the defence is that the defendant was a minor at the time of the execution of the bond, the burden lies on him to prove his minority at the date of the execution of the document and not on the plaintiff to prove that the defendant was a major on that date.

Narain Singh v. *Chiranji Lal*, 79 Ind. Cas. 945; 22 A. L. J. 461; 46 A. 568; (1924) A. I. R. (A.) 730; L. R. 5 A. 353 Civ., followed.

Second appeal against a decree of the Additional District Judge, Saharanpur, dated the 14th November 1922.

Mr. *K. C. Mital*, for the Appellant.

Mr. *S. A. Haidar*, for the Respondent.

JUDGMENT.—This is a defendant's appeal in a suit for sale to recover money on a bond executed by him. The main ground is that at the time of the execution of the deed he was a minor.

Both the Courts below have placed the burden of proof that he was a major on the date of the execution of the deed on the plaintiff. Even in this view of the case the lower Appellate Court found that the defendant had made certain admissions which were enough to shift the burden on to the defendant and that the defendant's evidence had failed to rebut the case made by the plaintiff and, therefore, decreed the plaintiff suit. The defendant appeals.

The matter is now set at rest by the decision of a Bench of this Court in *Narain Singh* v. *Chiranji Lal* (1) in which it was pointed out that in a case like the present the burden of proof lies on the person who says that the defendant was a minor at the time of the execution of the document. It is admitted that if the burden of proof lay on the defendant, he has entirely failed.

The result is that the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 79 Ind. Cas. 945; 22 A. L. J. 461; 46 A. 568; (1924) A. I. R. (A.) 730; L. R. 5 A. 353 Civ.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 44 AND 51 OF 1923.

December 15, 1924.

Present:—Mr. Wazir Hasan, A. J. C., and Mr. Ashworth, A. J. C.

AMJAD KHAN—PLAINTIFF—APPELLANT

versus

ASHRAF KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Hanafi school—Gift—Life-interest, whether can be created—Possession, delivery of, what constitutes—Will in favour of heir, validity of—Estoppel—Ignorance of law.

Per *Ashworth, A. J. C.*—There can be no estoppel in favour of a party who was not misled except by his own ignorance of the law. [p. 448, col. 1.]

A family arrangement cannot be effected by mere conduct apart from any explicit agreement. [*ibid.*]

Where a Muhammadan after making a Will gifts away the whole of his property the gift has the effect of operating as a revocation of the Will. [p. 452, col. 1.]

A *Hanafi* Muhammadan cannot make a Will in favour of one of his heirs. [p. 447, col. 2.]

Under the Muhammadan Law the owner of an estate may retain what is virtually a life-estate, but he cannot transfer anything more than a mere use. If he purports to transfer something more than a use, namely

a use, which is not revocable during the term for which it is granted, and which can be lent or leased to another or otherwise alienated, he will be held to have transferred not only the use, but also the *corpus*. A life-estate, therefore, can only, under the Muhammadan Law, be created by reservation after the transfer of the *corpus*. It cannot be created by transfer to another whether the *corpus* is retained or not by the donor. [p. 450, col. 2.]

The requirements of the Muhammadan Law that a gift must be perfected by delivery of possession negatives the possibility of a life-estate being conferred by gift under that law. [p. 451, col. 1.]

Under the Muhammadan Law delivery of possession may be given in such a way as the nature of the gift permits but this does not mean that delivery of the *corpus*, either constructive or actual, can be entirely absent in the case of a gift. [*ibid.*]

The word "construction" used with reference to a document may mean the meaning which the person executing the document expressed, and it may also mean the effect which the law allows the deed to have. The Muhammadan Law does not in fact require that a deed giving a life-estate should be construed against the intention of the donor as having meant that he gives an absolute estate, but it requires that whatever his intention was, the deed is to be treated as giving an absolute estate. [*ibid.*]

Under the Muhammadan Law there must be evidence produced by the person claiming under a gift that the donor did all in his power to enable the donee to exercise his possession over the property gifted. It is necessary for a gift by a husband to a wife, who is not a minor, to be completed by some act of delivery of possession other than a mere declaration in the deed of gift that possession has been transferred to the donee. [p. 454, col. 1.]

Per *Wazir Hasan, A. J. C.*—In order to construe a deed of gift it is necessary to ascertain the intention of the donor and this must be done primarily with the help of the language used by him. For this purpose it is permissible to derive such assistance as can be derived from the surrounding circumstances. [p. 457, col. 1.]

Under the Muhammadan Law proof of the intention of a donor to create a life-interest is permissible. The giving of interest in a certain property is different from, and is not the same thing as, the gift of the *corpus*, and such an interest may be supported on the basis of a trust resulting from an agreement for valuable consideration. Where the manifest intention of the donor is to give the *corpus* of, and the absolute interest in, the property gifted to one person and such gift is accompanied with a reservation of a limited estate in the same property in favour of another, both the gift and the reservation are valid. [p. 462, col. 2.]

There is no rule of Muhammadan Law to the effect that where a donor in a transaction of a simple gift merely creates a life-interest in the property gifted in the donee and reserves the reversion to his heirs-at-law the donee of the interest takes the absolute estate. [*ibid.*]

The argument that where the intention of the donor is to give merely an interest in, and not the whole of, his property the gift must be construed to convey the whole is erroneous. [p. 466, col. 1.]

If the law of the Muhammadans or of any other class of people must keep pace with the progress of society and the multifarious relations arising therefrom, interests in property apart from the property itself must be recognized. [p. 465, col. 1.]

Mutation of names in the Collector's office is not actually necessary to complete a transfer of possession under a deed of gift. The reason of the rule of the change of possession will be fully satisfied where in the circumstances of a particular case such a change may only be constructive. [p. 470, col. 2.]

A Muhammadan executed a deed of gift in favour of his wife who was a *pardah nashin* lady, the subject-matter of the gift being merely a life-interest in the property dealt with by the deed and not the *corpus* of it. The deed contained a recital that possession of the property gifted had been transferred to the donee. The donor continued to live for a year after the execution of the deed of gift and continued to collect the rents and profits of the property, the wife living in the same house with him:

Held, that, under the circumstances, the collection of the rents and profits by the husband after the execution of the deed must be taken to have been made in the capacity of an agent of his wife and it must be held that possession of the interest gifted had been transferred to the wife so as to satisfy the requirements of the Muhammadan Law. [*ibid.*]

Texts and authorities discussed.

Appeal against a decree of the Sub-Judge, Bara Banki, dated the 30th May 1923.

Messrs. *M. Wasim* and *Khaliquzzaman*, for the Appellant.

Messrs. *Niamatullah* and *E. R. Kidwai*, for Respondents Nos. 1, 2 and 21.

JUDGMENT.

Ashworth, A. J. C.—[*December 2, 1924.*]—These first civil appeals arise out of a suit brought by one Salar Khan for the recovery of certain property, which it was alleged had belonged to his deceased sister, *Musammat* Waziran, in virtue of a deed of gift executed on the 17th January 1905 by her husband, Ghulam Murtaza Khan. The suit was brought against the nephews of Ghulam Murtaza, defendants Nos. 1 and 2; and against persons to whom they had transferred the property, defendants Nos. 3 to 18.

[In para 3 of the plaint, there is also a claim for 3 *bighas*, 3 *biswas*, which it is stated that *Musammat* Waziran purchased, during the lifetime of her husband, on the 30th July 1901. The defence of the defendants as to this was that it was purchased *benami* really by her husband, in which case it would be part of the property included in the alleged deed of gift by the husband to *Musammat* Waziran. The Subordinate Judge framed an issue as to whether this sale-deed in favour of *Musammat* Waziran was a *benami* transaction, but did not decide the issue on the ground that the point was not pressed. Accordingly, he decreed the claim in respect of this small area, and against this part of the decree there is no appeal. By an oversight, how-

ever, he appears to have omitted this area in his decree.]

The Subordinate Judge decided that the deed of gift of the 17th January 1905, Ex. 5, read along with a Will, Ex. A. 13, and an agreement, Ex. A. 14, both executed by Ghulam Murtaza and dated the 18th January 1894, should be construed as in the nature of a family arrangement, and as such, it gave *Musammat* Waziran an absolute interest in one-third of the property mentioned in it, and a life estate in the remaining two-thirds. Accordingly, he passed a decree in favour of the plaintiff for one-third of the property mentioned in the deed of gift. It may also be mentioned that the Subordinate Judge, under Issue No. 4, decided that Ghulam Murtaza was a *Hanafi* Musalman, and that he did not belong to the *Shia* sect. This decision has been impugned in ground No. 4 of Appeal No 51 but this ground has not been pressed. The questions involved, therefore, must be decided on the basis that the Muhammadan Law applicable is the *Hanafi* and not the *Shia* Law.

From this decree of the Subordinate Judge the defendants have appealed in Appeal No. 51, contending that the deed of gift along with the attendant circumstances constituted a family arrangement that *Musammat* Waziran should only hold her husband's property during her life-time, and that thereafter, the nephews, namely, defendants Nos. 1 and 2, should have the reversion of the *whole* estate. The plaintiffs in Appeal No. 44 impugn the decree of the Subordinate Judge on the ground that the deed of gift of the 17th January 1905 should not have been construed as a family arrangement but as a gift parting with the whole of the property mentioned therein to the widow absolutely, and that the Will and agreement of the 18th January 1894 were inoperative and could not be used to affect the deed of gift.

The first question then which arises in these appeals is whether the lower Court was justified in considering that the deed of gift Ex. 5, read along with the Will Ex. A 13, and the agreement Ex. A 14, constituted a family arrangement. My finding is that he was wrong. The agreement was merely a declaration by Ghulam Murtaza that he executed the Will to obviate mischief and dispute. It could have no effect of any kind and cannot be used, as it was used by the Subordinate Judge, to prove that there was any existing family dispute.

Ghulam Murtaza, his wife, and the nephews were perfectly aware that the disposition of the property, so far as it could be disposed of by Will or gift, rested entirely with Ghulam Murtaza, and the mere fact that he apprehended dissatisfaction on the part of the widow or on the part of the nephews or both, would not show the existence of a *bona fide* family dispute. Reliance has been placed by the defendants on the fact that the deed of gift was signed by the two nephews. This would not make it an agreement by them. Their signatures, at the best, would mean nothing more than that they accepted the reversion of the estate which it purported to give them. The Will was invalid on the ground that a *Hanafi* cannot devise to his heirs, and in any case, it was entirely revoked by the deed of gift executed in respect of the same property at a subsequent date. An attempt has been made by the defendants in the argument of this appeal to show that even if the deed of gift, read with the Will and so-called agreement just mentioned, cannot be considered as constituting a family arrangement, yet in the alternative a family arrangement could be held to have been arrived at between the widow and the nephews on the death of Ghulam Murtaza. This argument is based on the mutation proceedings upon the death of Ghulam Murtaza. Exhibit A 12, (page 97 of the second part of the record) is a copy of a statement of *Musammat* Waziran made in the mutation case in which she claimed on the basis of the deed of gift, and admitted that she enjoyed alienation in respect of one-third of the village and not in respect of two-thirds. Exhibit A 15 (page 98 of the second part of the record) is a copy of the order in the mutation case sanctioning mutation in favour of *Musammat* Waziran. There is also the evidence of Ashraf, defendant, on page 97 of the first part of the record, stating that he filed objections to the mutation proceedings in favour of the widow, on the ground that she had not got possession under the deed of gift during her husband's life time, but that he withdrew his objection after the statement of *Musammat* Waziran just mentioned (Ex. A 12), wherein she admitted that she had no powers of alienation in respect of two-thirds of the property. An attempt to make out that this admission by *Musammat* Waziran accompanied by the withdrawal of

objection by Ashraf, constituted a family arrangement between the widow and the nephews entirely fails for the following reasons:—In the first place, a family arrangement cannot be effected by mere conduct such as this apart from any explicit agreement. In the second place, there is no evidence to show that *Musammat* Waziran's statement, or Ashraf's withdrawal from objection in the mutation proceedings was the result of a settlement of any *bona fide* dispute. It is clear that both parties were under the impression that the deed of gift was valid. Ashraf, until satisfied that *Musammat* Waziran would not claim more than was allowed her in the deed of gift, objected to the mutation, but withdrew his objection when she showed that she did not claim more. So far, then, from there being any dispute, both parties at that time appeared ready to comply with the deed of gift. Nor can anything that they did at that time stop them, or their successors-in-interest, from impugning the deed of gift. Neither party can claim ignorance of the law, and there can be no estoppel in favour of a party who was not misled except by his own ignorance of the law.

This finding is sufficient for dismissal of the defendants' Appeal No. 51 so far as that appeal is based on an alleged family arrangement.

The only question remaining for decision by this Court in respect of the appeal of the plaintiff No. 44 is whether the deed of gift of 17th January 1905 is valid, and if so what interest under it passed to *Musammat* Waziran. It has been contended by the plaintiff that the deed of gift operated as a valid transfer of absolute rights in the estate, and that the execution of the written deed was perfected by the delivery of possession. On behalf of the defendants it is maintained that at the best the deed of gift only gave the widow a life interest in the estate with power of alienation of one-third, and that on her death not only the two-thirds of the property but also so much of the one-third as had not been alienated by her passed to the nephews. It is also maintained that the deed of gift was inoperative for failure of delivery of the property. It is necessary, therefore, to decide:

(1) Assuming that the gift was perfected by delivery of possession what was the interest that passed under it to *Musammat* Waziran?

(2) Was the deed of gift perfected by delivery of possession?

The deed of gift runs as follows:—

"I am Murtaza Khan son of Sarfaraz Khan caste Bhatti resident and *zemindar* of Muhi-ud-dinpur, hamlet of village Jamoli, Pargana Mawai Maholara, Tahsil Ram Sahehighat, District Bara Banki.

"Whereas I am co-sharer of the following shares in the village comprised in Taluqa Mawai, in the above pargana and district, at present valued at Rs. 15,000. Whereas I am in possession and occupation of the same and whereas in respect of the same I have already executed a Will and an agreement dated 18th January 1894, but as I want to avoid any difficulty to my wife in obtaining possession over the willed property after me, I, therefore, by means of this document, have made a gift, without consideration, of my entire property detailed below with all external and internal rights and without the exception of any right or part, to my wife *Musammat* Waziran resident of Muhi-ud-dinpur hamlet of village Jamoli, in the above pargana and district subject to the condition that out of the entire property mentioned in the deed of gift she shall remain in possession of shares worth Rs. 5,000 with power to make at her pleasure any sort of alienation like mortgage, sale or gift in respect thereof and that, as to the rest, worth Rs. 10,000 she shall not possess any power of alienation but she shall remain in possession thereof for life-time. After the death of the donee the entire property gifted away by this document, shall revert to the donor's collaterals, *viz.*, Ashraf Khan, Basharat Khan and their heirs, in equal shares, and those heirs of mine shall become owners with full proprietary powers, and the own heirs of the donee lady shall not inherit the same and the donee and my aforesaid heirs have accordingly agreed and consented to this. I have put the lady donee in possession of the property gifted to her and therefore from to-day I have ceased to possess any right or claim in respect of the gifted property and my wife, *Musammat* Waziran, from to-day, became owner and possessor of the aforesaid property in accordance with the terms of this deed. As to shares worth Rs. 5,000 gifted to the said lady she has power to choose the same from any village she likes, or if she likes, she can take shares worth Rs. 5,000 from all the villages."

That the intention shown in this deed was an intention to give *Musammat* Waziran merely a life-interest in two-thirds of the estate and life-interest along with a power of alienation in the other third, is not seriously disputed, but, on behalf of the appellants, it is contended that a life-interest cannot be given under Muhammadan Law, and that even if it can be given, it cannot be given in a deed expressed, as this one was, by clauses in the latter part of the deed cutting down an absolute interest given by the former part of the deed. It is clear that this latter contention is of no importance, if the former contention is good. For the respondents, on the other hand, it has been contended that there is nothing in the Hedaya, as interpreted by the rulings of the Privy Council, to debar a Muhammadan from giving a life-interest, and that, where the meaning of a deed has to be construed, Muhammadan Law looks at the intention and not at the precise form.

I will deal first with the question, the paramount question in this case, whether Muhammadan Law permits the gift of a life-estate. There has been some suggestion, during the argument of this case, that the law on the subject as expressed in the Hedaya has been modified by rulings of the Privy Council, but, I find no inconsistency between the meaning that I put on the passages of the Hedaya shown to me and the pronouncements of the Privy Council in the various rulings cited. It will conduce to clearness of argument to keep separate as far as possible the discussion whether the gift of a life-estate is forbidden expressly by Muhammadan Law, or whether it is merely impliedly forbidden, because the requirements of that law, as to delivery of possession or seizin cannot be fulfilled in the case of a gift of the life-estate That the Muhammadan Law permits the separation by a donor of the use of property from the *corpus* or substance of the property is clear from the following passage which I quote from Hamilton's Hedaya, Vol. III, page 294:—

"*Objection.*—Analogy would suggest that the gift of a part of an indivisible article is invalid, because, although the donor do not in such a case incur the inconvenience of a division, still he incurs a participation in the property; and this also is a sort of inconvenience.

"*Reply.*—The donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use (of the whole indivisible article), for his gift related to the substance of the article, not to the use of it; hence the necessity of a participation is not incurred by him with respect to the thing which is, properly, the subject of his grant."

This passage was relied upon in *Nawab Amjad Ally Khan* v. *Mohumdee Begum* (1), as authority for holding, that a father might make a gift of Government promissory notes with a stipulation that the donor during his life should have a right to the interest. The gift of the *corpus* of the notes was held to be perfected by delivery of possession of the notes. It was again relied upon in *Mohammad Abdul Ghani* v. *Fakhr Jahan Begum* (2) for upholding the gift of an estate with a stipulation that some villages out of it should be retained by the donor during his life. Here it was held that the necessity of the former gift being perfected by delivery of possession was fulfilled by the fact that there was delivery of the unreserved portion.

It has, however, been urged by the respondents' Counsel that this passage of the Hedaya and the above rulings cannot be held to permit the gift of a life estate in view of the following language in Hamilton's Heyaya, Vol. III, page 308 and 309: "If a person made a gift of a house to another, on condition that the donee give back a part of it, such gift is valid, but the condition annexed is invalid, because it is contrary to the spirit or intendment of the contract; and gifts are not affected by being accompanied with an invalid condition, because the Prophet approved of *amrees* (gifts for life), but held the condition annexed to them by the grantor, namely, the condition of restoration upon the demise of the grantee, to be void." Again, "An *amree*, or life grant, is lawful to the grantee during his life, and descends to his heirs, because of the tradition before quoted. Besides, the meaning of *amree* is a gift of a house (for example) during the life of the donee, on condition of its being returned upon his death. The conveyance of the house, therefore, is valid without any return, and the condition

(1) 11 M. I. A. 517; 10 W. R. P. C. 25; 2 Suth. P. C J. 98; 2 Sar. P. C. J. 315; 20 E. R. 195.

(2) 68 Ind. Cas 254; 49 I. A. 195; 25 O. C. 95; 9 O. L. J. 369; 44 A. 301; 31 M. L. T. 21; 43 M. L. J. 453. 24 Bom. L. R. 1268; 27 C. W. N. 53; (1922) A. I. R. (P. C.) 281; 20 A. L. J. 994; 37 C. L. J. 1 (P. C.).

annexed is null, *because the prophet has sanctioned the gift, in this instance, and annulled the condition, as before mentioned. An* amree, *moreover, is nothing but a gift and a condition and the condition is invalid*; but a gift is not rendered null by involving an invalid condition, as had been already demonstrated." Now it may be conceded that if these passages on pages 308 and 309 are repugnant to that on page 294, the former must prevail, inasmuch as they deal specifically with the question of a life estate, while the former deals generally with that of the severance of use from the substance, but I find no discrepancy, if we give the proper meaning to the word "use." For the ascertainment of this meaning, we must look at the discussion in the Hedaya, pages 277 and 278, Vol. III of *areeat*, or loans. I would quote the following passages as the more important:—

"*Areeat*, according to our doctors, signifies an investiture with the use of a thing without return." Again, "Our doctors, on the other hand, argue that the word *areeat* indicates an investiture, since it is derived from *areeya*, which signifies a grant; and that accordingly, informing the contract the expression investiture is used. The use of a thing, moreover, is capable of being property, in the same manner as the actual thing itself, and as investiture with the latter may take place either with or without a return, so also with respect to the former.....It is also to be observed that investiture is made in four different shapes," and one of them is—"By gift, which is an investiture with substance, without a return," and another of them is "By loan which is an investiture with the use of a thing without return." Again on page 279, "The lender is at liberty to resume the loan whenever he pleases, because the Prophet has said '*Moonha* is liable to be recalled, and a loan must be returned to the proprietor.' *Moonha* is a species of loan, where a person lends another a goat, a cow, or a she-camel, for instance, that he may use their milk; and also *because the produce, or use of the thing lent, becomes property, particle by particle, merely according as it is brought into being: hence, with respect* to such part of the produce as is *not yet brought into being there is merely an investiture, but no seizin: retraction with respect to such* part is, therefore, valid." It is also stated on page 281: "It is not lawful for a borrower to let out a loan, because a loan is inferior to a lease, and an inferior cannot comprehend its superior; and because *the lease would deprive the lender of the power of resuming the loan until the expiration of the lease.*"

These passages in respect of the *areeat* indicate that the complete right of an absolute owner in property may be analysed into three component rights:—

(*a*) the right to the *corpus* or substance,

(*b*) the right to the mere use, and

(*c*) the right to revoke the use.

Right (*a*) can be transferred by *hiba* which requires delivery of possession of the *corpus* Right (*b*) can be transferred by *areeat* which does not require any delivery of the *corpus*. Right (*c*) cannot be transferred at all, as it is inherent in the donor of an *areeat*, and does not belong to owner, for the time being, of the *corpus*. It only comes into existence on the transfer of an *areeat*. When right (*b*) is retained, the fact that the donor has also right (*c*) makes right (*b*) not a mere license revocable and incapable of transfer or lease, but it makes it a right approximating to that known as a life estate. Now the use referred to on page 294 of Hamilton's Hedaya, Vol. III, is a use *reserved* after parting with the *corpus*, while the use described as an *amree* on pages 308 and 309 is a use *transferred*. The law, therefore, must be interpreted to mean that the owner of an estate may retain what is virtually a life estate, but he cannot transfer anything more than a mere use. If he purports to transfer something more than the use, namely, a use, which is not revocable during the term for which it is granted, and which can be lent or leased to another or otherwise alienated, he will be held to have transferred not only the use, but also the *corpus*. A life estate, therefore, can only, under Muhammadan Law, be created by reservation after the transfer of the *corpus*. It cannot be created by transfer to another whether the *corpus* is retained or not by the donor. The passage on page 294 is only inconsistent with the remarks on pages 308 and 309 about an *amree* on the assumption, which I have shown to be unwarranted, that what can be retained by a donor must necessarily be capable of transfer by him. The same Arabic word is used for "use" in this discussion on the *areeat* as in the passage respecting the *amree* or life-estate, namely, "*munafa*,"

It was argued that even if there is nothing in the Hedaya to support the gift of a life estate, still there is nothing to prevent it. I find this passage concerning the *amree* on pages 308 and 309 to be a clear indication that the gift (*hiba*) of a life estate is forbidden in the sense that it will be construed as a gift of an absolute estate. I also find that the requirements of Muhammadan Law that a gift must be perfected by delivery of possession negatives the possibility of a life estate being conferred by gift under that law for the following reasons:—The *corpus* must either go to the life owner or to the owner of the remainder. There is nothing in the Hedaya to support the suggestion that the *corpus* can be split up into different estates of this nature. If the *corpus* goes to the remainderman there is no possibility of the delivery of the *corpus* to the life owner. It is no doubt correct that the delivery of possession may be given in such a way as the nature of the gift permits, but it would not appear that this means that delivery of *corpus*, either constructive or actual, can be entirely absent in the case of gift. The delivery of the *corpus* to the remainder-man would not be even constructive delivery of the *corpus* to the life owner and no such delivery is set up in the case. No attempt has been made to show that a life estate can be granted by means of an *areeat*, and any such attempt would be useless in the face of the provisions of the Hedaya that an *areeat* does not convey the *corpus* that it is liable to be revoked by the donor, and that it does not vest in the donee a power of lease etc.

It has been argued that Muhammadan Law looks at the intention of a document and not at the form, and that to construe a deed of gift for life as an absolute gift is inconsistent with this principle. This argument involves a confusion of thought. The word "construction" used with reference to a document may mean the meaning which the person executing it expressed and it may also mean the effect which the law allows the deed to have. Muhammadan Law does not in effect require that a deed giving a life estate should be construed against the intention of the donor as having meant that he gave an absolute estate, but it requires that whatever his intention was, the deed shall be treated as giving an absolute estate.

So far as rulings have been quoted, all the rulings dealing with Hindus, and all those dealing with estates created by family arrangement, appear irrelevant. Hindu Law, as has been stated by the Privy Council, can afford little analogy in a case depending on the interpretation of the Hedaya. Family arrangements may possibly not be subject to Muhammadan Law, or may be governed by principles not applicable to gifts and Wills. It is not necessary to express any opinion on the matter. The rulings in cases where family arrangements were in question were cited mainly with reference to the contention which I have rejected, that there was a family arrangement in the present case. Confining myself to rulings on gifts and Wills, I find no rulings of the Privy Council giving any countenance to the gift of a life estate, under Muhammadan Law, but several rulings suggesting the contrary. On pages 508 and 509 of Mr. Tyabjee's Principles of Muhammadan Law, 2nd Edition, various suggestions are made by which a gift of a life estate under Muhammadan Law might be defended. They all appear to me to be untenable in the face of the passage as to *amree* on page 294 of the Hedaya. They also appear to ignore the principle that a gift must be perfected by delivery of possession of the *corpus*, and that where there is no *corpus* transferred there can be no gift. They might be excellent arguments otherwise.

In the course of argument it has been urged that if life estates cannot be given or devised under Muhammadan Law, that law is unsuited to modern conditions and requirements, a conclusion which should certainly be founded on very cogent reasoning. Markby in his Elements of Law, 4th Edition, pages 200 and 201 makes the following remarks:—"The term possession, as we have hitherto explained it, clearly assumes some tangible existing thing, over which the party in possession may exercise his physical control but the Roman lawyers extended the idea of possession to abstractions: to things which are not perceptible to the senses, to incorporeal things, as they are usually called by lawyers." Again, "The Roman lawyers contented themselves with extending the legal idea of possession to those rights which the denominated servitudes—a class of rights similar to, but more extensive than, that class of rights which we call easements. And they constructed for the protection of the enjoyment of rights of this class rules

closely analogous to those for the protection of the physical control over things corporeal. Modern lawyers have attempted to give to the idea of possession a much wider extension: and this extension with us is infinite." ....."Whether or no such an extension of the idea of possession is useful, this is not the place to consider." Now it would appear that up to the date when the British took over the government of this country there had been no demand for the extension of the legal idea of possession, in Muhammadan Law, to any right midway between mere use and ownership of the *corpus* or substance. In order to allay any fear that the British Government intended to interfere with personal law, it was declared that the personal law of Hindus and Muhammadans should be governed by their own authorities. This may have stood in the way of the evolution of that law, by the broadening of precedents, so as to make it keep pace with modern requirements. If this is so, the remedy appears to me not to lie in legislation by the Courts under fiction of exposition, but by direct legislation on the part of the Legislature.

I, therefore, hold that Muhammadan Law required the deed of gift of the 17th January 1905, to operate as a gift of the absolute estate, if it was to operate at all.

It has been urged that apart from the consideration of the effect of the deed of gift in favour of *Musammat* Waziran, she must be held to have taken the estate under a trust requiring her heirs to hand it over to the defendants. If it is contended that this trust came into existence under the terms of the deed of gift, then to allow such a trust would be in effect to allow the donor to give a life estate, and would be against what I have held to be the law as expressed in the Hedaya. It has, however, been urged that *Musammat* Waziran's statement at mutation amounted to a declaration of a self-imposed trust. The expression "self-imposed trust" appears to me a contradiction in terms. The only meaning that I could attach to it in this connection would be that *Musammat* Waziran imposed on her existing title some limitation at the time of mutation. Now the imposition on herself of such a limitation would be without consideration, except so far as the imposition was part of a family arrangement. I have already held that there was no family arrangement at the time of mutation. It has been suggested that the reason why the Hedaya forbids a condition which is a clog on the absoluteness of the gift of the *corpus*, is because that condition cannot be enforced by a donor, and that this objection would not apply when the clog was a self imposed one, but I hold that the Hedaya does not merely forbid a donor imposing such a clog because he cannot enforce it, but because it will not recognise any such clog for that clog is inconsistent with the transfer of the *corpus*.

The question is now whether the gift was perfected by delivery of possession. The case of the plaintiff is that from the date of the deed of gift Ghulam Murtaza ceased to make collections, and that they were made on behalf of *Musammat* Waziran by one Ahmed Husain. He has given evidence as P. W. No. 3 (page 38 of the first part of the record), and says "*Musammat* Waziran remained in possession since the execution of the deed of gift. Ghulam Murtaza died about a year after the deed of gift. I used to make collections on her behalf, and those tenants who lived close by made payments to her direct at the direction of Ghulam Murtaza." In cross-examination he says Ghulam Murtaza made collections up to his death, (then says) till the execution of the deed of gift. I do not know whether he signed *patwari siyaha*." This slip of the tongue is somewhat significant, and in any way it is difficult to reconcile this evidence with the evidence of P. W. No. 5 at page 41. Ahmad Husain, moreover, did not produce any *mukhtarnama* to show that he was formally authorised to collect. P. W. No. 6 is a tenant at Jamauli. He says "I paid Rs. 11 a year to Ghulam Murtaza for 25 or 30 years till one year before his death, and then paid the rent to his wife at his direction as he told me that he had given over the land to the Thakurain" and in cross-examination says "I paid rent to Muhammad Husain and sometimes to the Thakurain. *Ahmad Husain never made collections*." Now this Muhammad Husain was not appointed an agent till after Ghulam Murtaza's death (*mukhtarnama* printed as Ex. 7, page 95 of part II of the record). It is contended that he may have collected rents before formal appointment but there is no evidence of this. P. W. No. 5 says that he paid rents during the year in question either to the lady or to Muhammad Husain. P. W. No. 6, page 42

says that he paid rent to the lady; Turab Ali, P. W. No. 12, page 50, says that he paid rent to Ghulam Murtaza till a year before his death. Ghulam Murtaza told him to pay the rent to his wife as he said that he had transferred the property to her. Now P. W. Nos. 5, 6, and 12, are all tenants of Jamauli where Muhammad Husain himself owns land. P. W. No. 5 admits that he is a tentant of Muhammad Husain. This Muhammad Husain, according to P. W. No. 7, page 43 is a nephew of one Aulat Hussain, whose sister is married to Amjad Khan, the son of the plaintiff. His sympathies would, therefore, be with the plaintiff; and it is suggested that he got these witnesses.

On the other hand, the defendants have produced a very large number of tenants and co-shares who deposed that nothing was done to alter any arrangements until after the death of Ghulam Murtaza. They are D. W. Nos. 1, 2 and 7 from Jamauli, Nos. 8 and 20 from Bhatauli, No. 9 from Hajipur, No. 10 from Kachiya, No. 11 from Akhori, No 12 from Balpur, No. 12 a co sharer in Jamauli, No. 16 a *Zilladar* of a co-sharer in all the villages, No. 18 a co-sharer in four of the villages in suit, and Nos. 19 to 27 co-sharers in the villages in suit. They all say that Ghulam Murtaza made collections during his life and after his death Muhammad Husain made collections for the widow. The learned Subordinate Judge in his judgment under Issues No. 1, 2, and 3 (see page 107 of the first part of the printed record) holds that it is proved that Ghulam Murtaza remained in actual possession until his death, but he holds that the acknowledgment in the deed itself on the part of Ghulam Murtaza that he has ceased to be the owner of the gifted property, and had given over possession to the donee, would make the gift complete, in view of the fact that he was the husband of the donee, and that they were living together. He has cited Art. 393, page 302 of Tyabjee's Principles of Muhammadan Law, 1st Edition, which states that, where the subject of the gift consists of immoveable property which is occupied by tenants, if the donor requests them to attorn to the donee the possession of the property is thereby transferred to the donee. This article appears irrelevant in view of the fact that the Subordinate Judge had not believed the tenants who are produced to depose to the attornment. It must be held proved that Ghulam Murtaza, apart from the declaration in the deed, did nothing in the way of transferring possession to the widow, and we have now to consider whether the mere declaration in the deed, in view of the fact that the donee was the wife of the donor, was sufficient proof of delivery of possession. Certain rulings have been cited in which the evidence consisting of the declaration in the deed has been held sufficient to prove delivery of possession. Some of these rulings refer to cases where the donor died so soon after this gift that he had no time to do anything further. They will not be applicable to this case where a whole year intervened. In the Privy Council case, *Mohammad Mumtaz Ahmad* v. *Zubaida Jan* (3) their Lordships of the Privy Council found that mutation had taken place without objection, and that the donor had made an application to the Collector for expunction of her name. This case is, therefore, not on all fours with the present circumstances. In the case of *Mahamed Buksh Khan* v. *Hoseini Bibi* (4), it was held that the gift was a public one and authorised the donee to take possession which was in fact taken subsequently, and so it is not applicable. The case of *Shaikh Ibhram* v. *Shaik Suleman* (5) is to be distinguished on the ground that the donee was already in physical possession of the house in question. It appears that each case must be judged on its merits. In the present case there was no mutation. When Ghulam Murtaza died and the widow applied for mutation, although the defendant Ashraf Khan at first objected, he withdrew his objection upon the widow making a statement that she only held for life under the deed of gift. He now says in his evidence that his objection was based on the fact that the widow had not got possession during her husband's life time, a statement which the appellant's Counsel would use against him, on the ground that in this case his subsequent withdrawal of the objection amounted to an admission that the lady really did get possession. But, it being clear on the evidence that the lady, if she held possession, only held it vicariously through Ghulam Murtaza, the admission is no evidence that

(3) 16 I. A. 205; 11 A. 460; 5 Sar. P. C. J. 433; 6 Ind. Dec. (N. S.) 721 (P. C.).

(4) 15 I. A. 81; 15 C. 684; 12 Ind. Jur. 291; 5 Sar. P. C. J. 175; 7 Ind. Dec. (N. S.) 1040 (P. C.).

(5) 9 B. 146; 5 Ind. Dec. (N. S.) 98.

she actually got possession. The mutation proceedings are evidence neither one way nor the other. The state of the law appears to me to be that there must be evidence produced by the person claiming under a gift, as the plaintiff is, that the donor did all in his power to enable the donee to exercise her possession. In this case it is at least as likely as not that Ghulam Murtaza did not intend the deed of gift to operate until his death. The terms of the deed of gift along with the evidence as to the circumstances in which it was executed show that he only wanted to carry into effect the intention shown in the previous Will. When he made the Will it is shown by the deed of the so-called agreement executed on the same date that he did not want to give up possession until after his death. It is urged that he reconciled himself to her immediate possession in order to vaildate the gift, but if this were so, he might have allowed the lady to appoint an agent to make collections for herself, and indeed this (but falsely in my opinion) was alleged by the plaintiff. Again he might have seen that the money was entered in the *patwari's* payment register (*siaha*) as paid to the lady but no *siaha* has been produced. Lastly he might have made the lady apply for mutation in her name. I am unable to hold that the mere fact of his living in the same house with his wife would justify him in doing nothing at all beyond making the declaration of the transfer of possession in the deed of gift. It appears to me that to hold this would be inconsistent with the passages in the Hedaya enacting that in certain specific cases, such as that of minor wife (in some but not all circumstances) and that of a lunatic, the donor may retain possession on behalf of the donee. These specific cases, which do not include that of a wife who is not a minor, appear to me, on the principle of "what is not included is excluded" to have the effect of making it necessary for a gift by a husband to a wife to be completed by some act of delivery of possession other than the mere declaration in the deed. I am the less prepared on this point to condone any weakness in the plaintiff's case (the burden of proving delivery of possession was on the plaintiff) because he allowed 11 years to elapse since the death of *Musammat* Waziran before bringing this claim against the nephews.

For these reasons I am unable to hold that the deed of gift was perfected by delivery of possession.

Assuming that the gift was perfected by delivery of possession and was otherwise valid, the interest that passed to *Musammat* Waziran was clearly only a life interest in the whole, coupled with a right during her life to dispose of one-third. On her death the whole property retained by her at the time of her death would pass to the nephews. The Subordinate Judge's decision cannot, in my opinion, be sustained to the effect that these nephews should only get two-thirds. In view, however, of my findings that the deed of gift must be held to have given the widow an absolute estate, but that it was not perfected by delivery of possession, this question does not arise.

On these findings the position is as follows:—

The plaintiff's Appeal No. 44 is successful against the finding of the Subordinate Judge in favour of a family arrangement and in maintaining that the deed of gift should be construed as a gift of absolute title. The defendants' Appeal No. 51 succeeds as to the contention that there was not delivery of possession, and that the plaintiff-respondent is not entitled to succeed to even one-third of the property in suit. The result is that the plaintiff's claim fails except so far as it was allowed in respect of the area of 3 *bighas* 4 *biswas* mentioned in para. 3 of the plaint, and should stand dismissed with costs to the defendants in both Courts. The plaintiff asks for costs against the defendants according to the proportion that the value of the claim for the 3 *bighas* 4 *biswas* bears to his total claim but contest on this point was withdrawn by the defendants at so early a stage, and the costs are so relatively small, that I would not grant these costs. The decree of the lower Court should be amended according to this decision and also to supply the omission of the decree for the 3 *bighas* 4 *biswas* referred to in para. 3 of the plaint.

Wazir Hasan, A. J. C.—[*December 12, 1924.*]—These are cross-appeals from the decree of the Subordinate Judge of Barabanki, dated the 30th May 1923. Appeal No. 44 is of the plaintiff's, while the other Appeal No. 51 is of the defendants. The sole plaintiff in the suit out of which these appeals arise was one Salar Khan. He died

during the pendency of the appeals in this Court and in his place was substituted his son Amjad Khan, by an order dated the 11th April 1924. Amjad Khan is the sole appellant in Appeal No. 44. Amongst the defendants Ashraf Khan and Basharat Khan are the chief contesting parties. The other defendants from Nos. 3 to 18 are transferees of certain portions of the property in suit from the principal defendants. Amongst the defendants Gaya Prasad No. 7 died during the pendency of the appeals. His representatives are Harihar Bakhsh, already respondent No. 8 in his own right and one *Musammat* Munia. This statement completes the array of the parties.

Happily no facts except one are in controversy. The exception will be stated at its proper place in the course of this judgment. The property in suit consists of 3 *bighas* 4 *biswas* land situated in village Jamauli, Pargana Mawai stated at the foot of the plaint and 11 parcels of shares in different villages the specifications of which were given in the list attached to the plaint. The plaintiff's title to one class is different from his title to the other of these properties. The shares in the villages originally belonged to one Ghulam Murtaza Khan. *Musammat* Waziran was his wife. The plaintiff, Salar Khan, was the brother of *Musammat* Waziran. The 3 *bighas* odd land in village Jamauli was purchased by *Musammat* Waziran on the 30th July 1901. This last-mentioned property has been decreed by the Court below in favour of the plaintiff and is no longer in dispute in these appeals. The narrative of events which follows, therefore, relates to the shares in the villages alone.

On the 18th January 1894 Ghulam Murtaza Khan executed two documents one styled as a Will (Ex. A 13) and the other as an agreement (Ex. A14). The Will and the agreement both related to the property in suit. The main dispositions made by the Will may easily be described in the language of English Law as creating a life estate in favour of *Musammat* Waziran with an absolute remainder in favour of Ashraf Khan on the one hand and Asghar Khan, Wahid Khan, and Basharat Khan on the other in equal moieties. Asharf Khan is the son of Muhammad Ali, Basharat Khan, Wahid Khan and Asghar Khan are the sons of Masum Ali, both being the brothers of Ghulam Murtaza Khan. In the deed of agreement the dispositions made in the Will were recited and further Ghulam Murtaza Khan made a declaration that he shall remain in possession of all the properties so long as he lived but shall have no power of alienation.

On the 17th January 1905 Ghulam Murtaza Khan executed a document which is christened as a deed of gift (Ex. 5) and evidences a transfer *in presenti* of the property first to his wife, *Musammat* Waziran, and after her death to Ashraf Khan and Basharat Khan, his nephews. The deed was attested as witnesses by Ashraf Khan and Basharat Khan. The other two nephews of his, namely, Asghar Khan and Wahid Khan, had died before the execution of the deed of gift. The legal effect of this deed is a matter of serious controversy between the parties to this litigation.

Ghulam Murtaza Khan was a Hanafi Muhammadan. He died on the 6th February 1906. After his death proceedings for mutation of names in the revenue registers were taken by *Musammat* Waziran on the one hand and Ashraf Khan and Basharat Khan on the other. In the course of those proceedings *Musammat* Waziran's statement was recorded by the Court (Ex. A 12). In that she stated that her husband had died 15 days ago and that she had no issue. She was in possession of her husband's property under the gift. The gift gave her power of alienation in respect of one-third but not with respect to the remaining two-thirds. On these grounds she asked for mutation of names to be made in her favour. The proceedings came to a close by the order of the Court dated the 17th December 1906 (Ex. A 15), and mutation was granted in favour of *Musammat* Waziran in place of Ghulam Murtaza Khan. Curiously enough the entry in the *khewat* of the villages in pursuance of the order mentioned above was made in favour of *Musammat* Waziran in the right of inheritance and not as a donee under the gift (Exs. A 1 to A 10). The error is of no consequence, having regard to the circumstances in which the order for mutation in favour of *Musammat* Waziran was passed. We have also on this record an Ex. (No. 3), which is a copy of an extract from a register kept for the purpose of showing the destruction of mutation records after the expiry of 12 years. The nature of one of the records destroyed is described in column 3 of this extract

as "*Musammat Waziran* v. *Ghulan Murtaza* mutation of names by virtue of gift." It will be convenient to refer here to the evidence of Ashraf Khan, defendant in the present case, bearing on the matter now being narrated. He says: "After his (Ghulam Murtaza Khan's) death *Musammat* Waziran applied for mutation saying that she had been in possession under a gift. I filed objections to the mutation on the basis of the gift as she had not got possession during her husband's lifetime. *Musammat* Waziran was examined in the mutation case before the partition. After her statement I did not prosecute my objection." *Musammat* Waziran admittedly remained in possession and enjoyment of the property in suit till her death which occurred on the 18th November, 1909. The controversy between the parties relates to the period of the commencement of such possession. According to the plaintiff, *Musammat* Waziran's possession followed the gift. According to the defendants it commenced after the death of Ghulam Murtaza Khan. On this question of fact we are called upon to give our decision.

After the death of *Musammat* Waziran. Ashraf Khan and Basharat Khan entered into the possession of the entire property and mutation of names was made in their favour without any objection by any body. In the course of the proceedings relating to the mutation of names just now mentioned Ashraf Khan stated that the property left by *Musammat* Waziran was possessed by Basharat Khan and himself in equal shares. He further stated that that property was transferred by Ghulam Murtaza Khan first by Will and again by gift to *Musammat* Waziran and the deed of gift provided that after the death of Ghulam Murtaza Khan and of *Musammat* Waziran the deponent, that is Ashraf Khan, and Basharat Khan were entitled to it in equal shares (Ex. 4).

The present suit was commenced by Salar Khan, brother of *Musammat* Waziran, on the 4th November 1921. His case is that *Musammat* Waziran was the absolute owner of the properties in suit under the deed of gift of the 17th January 1905 that possession was delivered to the donee in pursuance thereof and that on her death he as her sole heir under the Hanafi Muhammadan Law was entitled to the recovery of possession of the said properties from the hands of the defendants whose possession was unlawful. The pleas taken in defence were—(1) that Ghulam Murtaza Khan belonged to the Shia sect and not to the Hanafi; (2) that the gift was invalid for want of delivery of possession; (3) that it did not confer a heritable estate on *Musammat* Waziran in any portion of the property in suit and that at best she acquired only a life interest thereunder; and (4) that the circumstances in which the gift was made and also those following the death of Ghulam Murtaza Khan constituted family settlements under each of which *Musammat* Waziran was to possess no more than a life interest in the property in suit and on her death it was to devolve on the legal heirs of Ghulam Murtaza Khan. On the question as to whether Ghulam Murtaza Khan was a Shia or a Sunni the learned Subordinate Judge found that he was a Sunni. This finding was accepted by both the parties to these appeals at the hearing before us. We must, therefore, hold that Ghulam Murtaza Khan was a Hanafi Musalman.

On the issue relating to the delivery of possession his finding is that there was such a delivery. On the plea of family settlement his finding is that the gift in question is the result of such a settlement and that a similar settlement giving effect to the provisions of the gift was reached during the mutation proceedings following the death of Ghulam Murtaza Khan. On these grounds he upheld the gift as it is. On the question of the construction of the deed of gift dated the 17th January 1905 the learned Subordinate Judge's opinion is that *Musammat* Waziran acquired absolute title descendible to her heir, the plaintiff, in respect of only one-third of the gifted property. He, therefore, gave a decree to the plaintiff for that share and dismissed the rest of the suit except as to the 3 *bighas* odd which were also decreed and which, as we have stated above, are now dropped out of the controversy.

At the hearing of these appeals two points were urged in support of Appeal No. 44 on behalf of the plaintiff:—1. That the finding of the learned Subordinate Judge that there was a family settlement is erroneous. 2. That according to the Hanafi Muhammadan Law the gift in question must be construed to have conferred an absolute estate upon *Musammat* Waziran in the whole of the gifted pro-

perty. In support of Appeal No. 51 the following points were urged on behalf of the defendants:—

(1) That there was no delivery of possession following the gift.

(2) That the finding of the learned Subordinate Judge that the gift in question conferred an absolute estate on *Musammat* Waziran in respect of one-third of the property was erroneous and that she acquired only a life estate in the entire property; and

(3) That the life estate so gifted was valid in law.

First of all, I propose to deal with point No. 2 in the plaintiff's appeal which of course involves a consideration of points Nos. 2 and 3 in the defendants' appeal as well. I have given my prolonged and anxious consideration to this part of the case and I confess that it is not easy to come to a decision on it with confidence.

In this direction the first step is to settle the construction of the deed of gift of the 17th January 1905. As a mere matter of construction, I am clearly of opinion that the contention of the defendants is sound. To construe this deed of gift, as indeed any deed, is to ascertain the intentions of the donor and this must be done primarily with the help of the language used by him. To this means it is permissible to such assistance as can be derived from the surrounding circumstances.

The translation of the deed of gift in question is printed at page 91, Part III, of the record. At the outset reference is made to the Will and the agreement of the 18th January 1894. The motive of the gift is stated to be "to avoid any difficulty to my wife in obtaining possession over the willed property after me." Then follows the operative part of the document—"I, therefore...have made a gift without consideration of my entire property detailed below...without the exception of any right or part to my wife *Musammat* Waziran...subject to the condition that out of the entire property mentioned in the deed of gift she shall remain in possession of shares worth Rs. 5,000 with power to make at her pleasure any sort of alienation like mortgage, sale or gift in respect thereof and that, as to the rest, worth Rs. 10,000, she shall not possess any power of alienation but she shall remain in possession thereof for lifetime. After the death of the donee the entire property gifted... shall revert to the donor's collaterals, *viz.*, Ashraf Khan, Basharat Khan and their heirs, in equal shares, and those heirs of mine shall become owners with full proprietary powers and the own heirs of the donee lady shall not inherit the same and the donee and my aforesaid heirs have accordingly agreed and consented to this. I have put the lady donee in possession of the property gifted to her, and, therefore, from to-day I have ceased to possess any right or claim in respect of the gifted property and my wife *Musammat* Waziran, from to-day became owner and possessor of the aforesaid property in accordance with the terms of this deed." The avowed object of the gift is to accelerate the operation of the Will and the agreement. The combined effect of both was to confer a life interest upon *Musammat* Waziran and the devolution of the reversion upon the testator's heir-at-law. By the gift, therefore, the donor Ghulam Murtaza Khan, makes in the first instance an immediate transfer of the property stated in the schedule attached to the deed in favour of his wife, *Musammat* Waziran, for her life. The life estate thus conferred is divided into two proportions, one-third and two-thirds. *Musammat* Waziran is given the power of alienation in respect of the one-third and that power is expressly withheld from her in respect of the remaining two-thirds. The next disposition is to come into effect after the death of *Musammat* Waziran and it relates to the whole property, that is, both the parts, one-third and two-thirds. The course of the devolution of the property after the death of *Musammat* Waziran may be construed as either one of inheritance to the donor or a further gift of an absolute estate in favour of Ashraf Khan and Basharat Khan. Having regard to the events which have actually happened it is not necessary to determine precisely which of the two courses mentioned above was intended by the donor to follow. Ashraf Khan and Basharat Khan both survived the lady, and they are the heirs-at-law of Ghulam Murtaza Khan. The power of alienation given in respect of the one-third and its explicit withdrawal in respect of the two-thirds creates no difficulty to my mind. Those provisions merely mean at the best that the reversion or the vested remainder shall be bound by any alienation which the lady may

choose to make in respect of the one-third or any fraction of it; but if such alienation is not made the entire property shall devolve upon Ashraf Khan and Basharat Khan and their heirs by virtue of reversion to the estate of Ghulam Murtaza Khan or by the force of a vested remainder under the gift. It is admitted that the lady did not exercise the power of alienation in respect of any portion of the property. Disregarding, therefore, in the circumstances of this case this power of alienation as of no consequence I am clearly of opinion that *Musammat* Waziran acquired merely a life interest in the property in suit.

The construction of the deed of gift adopted in the paragraph immediately preceding is not seriously disputed by the learned Counsel for the plaintiff. His contention, however, is that though the gift in favour of *Musammat* Waziran, both in letter and in spirit, is merely of a life interest this Court is compelled by the rules of the Muhammadan Law applicable to gifts without consideration to hold that an absolute estate passed to *Musammat* Waziran. The question thus raised is a difficult one. In giving my decision on that question, the first step which seems advisable to take is to consider the effect of the relevant pronouncements made from time to time by their Lordships of the Privy Council. Obviously, the best method of so doing is to refer to the judgments of the Privy Council in their chronological order. It need hardly be said that if these judgments singly or collectively are authority for the proposition contended for by the learned Counsel I must uphold the contention whatever may be my own views on the subject.

Nawab Umjad Ally Khan v. *Musammat Mohamdee Begam* (1). The case was one of Shias whose law on the subject under consideration is admittedly different from that of the Hanafis. The judgment of the Privy Council was, however, given with reference to the Hedaya, which is a book of law governing the Hanafi sect. In that case the donor made a gift *inter vivos* of certain Government promissory notes to his son with a stipulation that the interest accruing on the notes would be applied during the donor's lifetime to certain religious and charitable purposes. To appreciate the full effect of the decision I must quote here the portion of the judgment bearing on this question: "It remains to be considered whether a real transfer of property by the donor in his life-time under the Muhammdan Law, reserving not the dominion over the *corpus* of the property, nor any share of dominion over the *corpus*, but simply stipulating for and obtaining a right to the recurring produce during his life-time is an incomplete gift by the Muhammadan Law. The text of the Hedaya seems to include the very proposition, and to negative it. The thing to be returned is not identical but something different—see Hedaya, tit. 'Gifts,' Vol. III, Book XXX, page 294, where the objection being raised that a participation of property in the thing given invalidates a gift, the answer is: 'The donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use (of the whole indivisible article); for his gift related to the substance of the article, not to the use of it.' Again, if the agreement for the reservation of the interest to the father for his life be treated as a repugnant condition, repugnant to the whole enjoyment by the donee, here the Muhammadan Law defeats, not the grant, but the condition—Hedaya, tit. 'Gifts,' Vol. III, Book XXX, p. 307. But as this arrangement between the father and the son is founded on a valid consideration, the son's undertaking is valid, and could be enforced against him in the Courts of India as an agreement raising a trust, and constituting a valid obligation to make a return of the proceeds during the time stipulated."

It will be seen that the decision of their Lordships of the Privy Council is not based exclusively on the Muhammadan Law. The gift is also interpreted and upheld as an agreement for consideration resulting in a trust. In considering the rule of the Muhammadan Law as applied by their Lordships of the Privy Council stress must be laid on the observation that "the thing to be returned is not identical but something different." This judgment clearly recognises the juristic distinction between the *corpus* of and an interest in property.

Musammat Humeeda v. *Musammat Budlen* (6). The property in dispute in that case belonged to one Moulvi Mahomed Ali. On his death it devolved under the Hanafi Law of inheritance upon his son, Ali

(6) 17 W. R. 525 (P. C.).

Karim, and his widow *Musammat* Bibi Budlun, mother of Ali Karim. The property was confiscated in 1857 on account of the rebellious conduct of Ali Karim. The Government then sold it to several purchasers. *Musammat* Bibi Budlun instituted a suit against the purchasers and the Government for recovery of possession. Her case was that Ali Karim being unable to pay the dower debt due to her from her husband's estate relinquished his right as heir of his father to 14-annas share of the property in satisfaction of the dower debt. The question in the case was whether the arrangement by which the relinquishment was made by Ali Karim in favour of his mother amounted to an acquisition of a life estate or an absolute estate by the widow. The High Court held that she held only a life interest in the property in suit. Their Lordships of the Privy Council disagreed with the High Court and came to the conclusion that it was not proved that the widow had acquired anything less than an absolute estate. The decision turns entirely upon the construction of certain documentary evidence tendered in proof of the arrangement relied upon in that case. In construing that evidence their Lordships said:—

"The case made is that the son relinquished his share in his father's possession in satisfaction of the claim for dower. Such relinquishment would be *prima facie* absolute; and, if it were absolute, the widow could take the whole property, subject to the claims of other creditors. The subsequent acts of the parties are consistent with this state of things." In support of the construction which their Lordships placed on the arrangement in question the following observation was made:—

"Upon what grounds then ought it to be held that what the son gave up, he gave up for only the life of his mother, retaining the legal reversion in himself? The creation of such a life estate does not seem to be consistent with Muhammadan usage, and there ought to be very clear proof of so unusual a transaction." The result is that the opinion of their Lordships of the Privy Council that the mother of Ali Karim acquired an absolute and not a life estate was clearly founded upon the proof produced in that case. In my judgment, therefore, the decision in this case does not support the plaintiff's contention. On the other hand, it would seem to follow from the observations quoted above that if the intention to confer merely a life estate were established it would have been given effect to. At all events it may be safely said, as was said by Sir Lawrence Jenkins in the case of *Banoo Begum* v. *Mir Abed Ali* (7) "that their Lordships do not affirm the validity of such a transaction but they certainly do not discard it as impossible."

Mahomed Faiz Ahmad v. *Ghulam Ahmad Khan* (8). The transaction in dispute in that case was evidenced by two documents—one executed by Faiz Ahmad Khan, the appellant, and the other by *Musammat* Wali-un-nisa, the widow of his deceased brother. By the first instrument Faiz Ahmad Khan granted two villages to *Musammat* Wali-un-nisa. By the other the widow accepted the gift and relinquished her claim to any part of the estate of her husband. The suit was brought by the heirs of *Musammat* Wali-un-nisa against Faiz Ahmed Khan. The defence put forward on behalf of Faiz Ahmed Khan was that the villages had not been granted to the widow for any estate greater than for her life but had been granted by way of *ariat*. The Courts in India held on the construction of the two documents that the grant was not an *areeat* but that an absolute gift of the villages was made to the widow. In delivering the judgment of their Lordships of the Privy Council Sir Montague E. Smith laid stress on the use of the word "gift" in the document executed by Faiz Ahmed Khan and held that the word has a technical signification and could not be construed as conveying an interest by way of *areeat*, there being nothing in the documents to support the latter construction. The argument in the present case advanced on behalf of the defendants is not that the deed of gift of the 17th January 1903, evidenced a transaction of *areeat* in favour of *Musammat* Waziran. It is true, however, that some of the expressions used in the deed of gift under consideration for conveying an estate to *Musammat* Waziran are technical such as "I have made a gift.....of my entire property" and "*Musammat* Waziran from to-day became owner and possessor of the aforesaid property." The rule of interpretation applicable to such cases was stated by Lord Davey in the case of *Lalit Mohan Singh*

(7) 32 B. 172; 9 Bom. L. R. 1152.
(8) 8 I. A. 25; 3 A. 490; 4 Sar. P. C. J. 218; 2 Ind. Dec. (N. S.) 241 (P. C.).

Roy v. *Chukkun Lal Roy* (9) in the following words:—"There are two cardinal principles in the construction of Wills, deeds and other documents, which their Lordships think are applicable to the decision of this case. The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is, to use Lord Denman's language, that technical words or words of known legal import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense—*Doe d Gallini* v. *Gallini* (10)." It is hardly necessary to repeat that these technical expressions cannot be given the effect of conveying an absolute estate to *Musammat* Waziran in the present case. Those expressions are clearly controlled by unambiguous language manifesting an intention of conveying merely a life-interest.

Suleman Kadr v. *Dorab Ali Khan* (11). The portion of the judgment relevant to the present inquiry may only be quoted:—"Their Lordships are by no means satisfied that the gift to this lady of these Government promissory notes subject to a condition that she is to have the interest only for life, and that after her death there is to be a trust in perpetuity for all her heirs to all time, is not, according to Muhammdan Law, in its legal effect, a gift to her absolutely, the condition being void. However, without determining a point which is not necessary for the decision of the case....." The case was one of Shia Musalmans and it cannot be doubted that had their Lordships decided the point the decision would have been that the life estate was a valid estate. As it is, the decision is no authority one way or the other.

Abdul Wahid Khan v. *Nuran Bibi* (12). By a compromise in a litigation between one Gauhar Bibi, the widow, and Abdus Subhan Khan and Abdul Rahman Khan, who claimed as sons of one Muazzam Khan, it was agreed that the widow shall during her lifetime continue to hold possession and remain proprietor without power of alienation of the property in suit and that after her death Abdus Subhan Khan and Abdul Rahman Khan shall possess the property in equal moieties. Abdus Subhan Khan died in 1868, Abdul Rahman Khan in 1874 and Gauhar Bibi in 1875. While in possession Gauhar Bibi made a gift of the property in 1874 to Murad Bibi, daughter of Abdul Rahman Khan, Murad Bibi remained in possession till her death which occurred in 1881. Her husband, Abdul Wahid Khan, succeeded her and was the defendant in the case. The suit was brought by Nuran Bibi, sister of the two brothers. Her case was that the title which her brothers had acquired under the compromise devolved upon her by law of inheritance and that she had a right to the possession of the property on the termination of the life estate of Gauhar Bibi. The defence to this suit was that the compromise created only rights contingent upon the brothers surviving Gauhar Bibi and as they had both died before Gauhar Bibi no estate passed to the plaintiff. On those pleadings the issue which legitimately arose was "Was the interest of the two brothers vested or contingent?" In agreement with the Court of first instance their Lordships of the Privy Council held that it was not vested. Here again the question was one of construction and in deciding that question their Lordships referred to their previous decision in the case of *Musammat Humeeda* v. *Musammat Budlun* (6) already mentioned. In this case as in the previous case their Lordships expressed their opinion "that expressions from which it might be inferred that the plaintiff was to take only a life interest might be explained on the supposition that they may have been used to import that the property was to remain with the widow for the full term of her life, and that the son as her heir would succeed to it after her death." This cannot be predicated of the present deed of gift. Indeed the deed says that "the heirs of the donee lady shall not inherit the same" and the persons upon whom the remainder or the reversion was to devolve were the heirs of the donor and not of the donee. Before parting with the decision of their Lordships of the Privy

(9) 24 I. A. 76; 24 C. 834; 1 C. W. N. 387; 7 Sar. P. C. J. 155; 12 Ind. Dec. (N. S.) 1224 (P. C.).

(10) ( ) 5 B. & Ad. 621.

(11) 8 C. 1; 4 Sar. P. C. J. 267; 8 I. A. 117; 5 Ind. Jur. 499; Rafique & Jackson's P. C. No. 64; 4 Ind. Dec. (N. S.) 1 (P. C.).

(12) 12 I. A. 91; 11 C. 597; 7 Ind. Jur. 283; 4 Sar. P. C. J. 627; Rafique & Jackson's P. C. No. 89; 5 Ind. Dec. (N. S.) 1157 (P. C.).

Council I must quote the following observation also:—"Their Lordships think this is the reasonable construction of the compromise in this case, and that it would be opposed to Muhammdan Law to hold that it created a vested interest in Abdul Rahman and Abdus Subhan which passed to their heirs on their death in the lifetime of Gauhar Bibi." I have said more than once that the defendants' title to the property now in suit does not depend upon the validity of the remainderman's estate in the deed in question. In the first place, they are the heirs at law to the estate of Ghulam Murtaza Khan, and, in the second place, they are in possession of the property to which they may have no title; but the absence of title in the defendants will give no right to the plaintiff to succeed. I am, therefore, not called upon to decide whether the creation of a vested remainder is valid or invalid under the Muhammadan Law. Their Lordships did not decide, as it was not necessary to decide, that no title would have devolved upon the two brothers even if they had survived the widow. This decision also is, therefore, no authority in favour of the plaintiff's contention.

Umesh Chunder Sircar v. *Zahoor Fatima* (13). This is an important decision and was noticed at great length by Sir Lawrence Jenkins in the case of *Banoo Begum* v. *Mir Abed Ali* (7). The result at which the learned Chief Justice reached may be stated here in his own words: "This case then affirms the possibility of the creation by a Muhammadan of 'a definite interest like what we should call in English Law a vested remainder,' and that such a remainder though liable to be displaced was not a mere expectancy in succession by survivorship or other merely contingent or possible right or interest, but an interest that could be attached and sold." It is hardly necessary to point out that there can be no valid remainderman's estate without a valid preceding particular estate. The interpretation placed by Sir Lawrence Jenkins on the decision of their Lordships of the Privy Council is definitely opposed to the plaintiff's contention and equally definitely supports the defendants'. It may be noted that it was admitted at the Bar before us that the case was one of Sunnis and not of Shias.

Abdul Gafur v. *Nizamuddin* (14). The document relied upon in that case was styled as a *wakfnama*. The Courts in India held that it was invalid as such. The High Court further held that it was also inoperative as a settlement. Before their Lordships of the Privy Council endeavour was made to support the appeal on the ground that the deed ought to be treated as a Will. In respect of that ground their Lordships held that a Muhammadan cannot by means of a Will either curtail or defeat the legal interests of his heirs and that a Muhammadan Will is, therefore, inoperative with regard to two-thirds of the testator's succession, unless it is validated by the consent of the heirs having interest. Then their Lordships proceeded to observe: "Their Lordships do not think the appellants would take any benefit from the document of 1838 if it were construed as the Will of Karimuddin. It was plainly not his intention to create a series of life-rents, a kind of estate which does not appear to be known to Muhammadan Law—see *Masammat Humeeda* v. *Musammat Budlun* (6)—but to make the fee devolve from one generation of his descendants to another without its being alienable by them or liable to be taken in execution for their debts. Even if Tahirabibi had expressly consented to accept the Will, she would not have been the owner of a life-estate, but a full owner, with prohibition against alienation, which, being void in law, could not either affect herself or her creditors." It is clear to my mind that here again the question was decided on the construction of the document and it was held as a mere matter of construction that the intention was to make the fee devolve from one generation to another: in other words, the document was held to have created an estate of fee simple with a restraint on the power of alienation which of course was void in law. The decision, therefore, does not support the plaintiff.

Muhammad Abdul Ghani v. *Fakher Jehan Begam* (2). On the 7th March 1884 one Munni Bibi executed a document, the construction and legal effect of which was the matter in controversy. The plaintiff-appellant contended that the document was a

(13) 17 I. A. 201; 18 C. 164; 5 Sar. P. C. J. 507; 9 Ind. Dec. (N. S.) 110 (P. C.).

(14) 19 I. A. 170; 17 B. 1; 6 Sar. P. C. J. 238; 9 Ind. Dec. (N. S.) 1 (P. C.).

Will. The defendant, on the other hand, said that it was a deed of gift. In agreement with the opinion of this Court their Lordships of the Privy Council held that it was a deed of gift. By this deed Munni Bibi conveyed moveable and immoveable property to Muhammad Lutfullah Khan, nephew of her deceased husband. Amongst the immoveable property so conveyed there were three items—(1) *Mauza* Mundia Misir, *Patti* Gundhia (2), Gungipur, and (3) *sir* land at Jalalpur. In respect of these items the deed said :—"I shall keep the villages and *sir* lands which have been exempted hereunder, for my lifetime without the power of alienation by mortgage, sale and gift; and after me, the donee shall also be the owner of the said exempted property." As regards the validity of this gift two questions arose for decision : (1) The legal effect of the reservation of the three items of property by the donor for her own use during her lifetime and (2) the legal effect of the non-delivery of actual possession of the reserved property by the donor to the donee. At this stage I am not concerned with the second question. On the first question, their Lordships' decision was pronounced in the following words :—

"The reservation of the usufruct did not by itself make the gift of the property now in question void under Muhammadan Law. So far as that is concerned there is the authority of the Board in *Nawab Umjad Ally Khan* v. *Mohumdee Begam* (1) for that statement as to Muhammadan Law, although the parties in that case were Shias and not Sunnis." Now so far as the language of the document is concerned there can be no doubt that the technical expression 'I make a gift' was used with reference to the entire subject-matter of the gift including the three items and in describing the exception the donor used words indicating the *corpus* and not the usufruct of the excepted property: "with the exception of the villages and *sir* lands; I shall keep the villages and *sir* lands...for my life time." It must be taken, therefore, that in construing the deed of gift as a whole their Lordships reached to the conclusion that by the use of the expressions quoted above the intention of the donor was to reserve the usufruct for her own use during her lifetime. If such a reservation in favour of the donor is valid in law, as it must be held to be on the authority of the two decisions of their Lordships of the Privy Council, I see no reason for holding that a similar reservation of a creation of an interest having the same effect in favour of the donee is invalid.

These are all the decisions of their Lordships of the Privy Council bearing on the point under consideration that I am aware of or were cited at the Bar. From them I venture to deduce the following propositions relevant to the case before me :—

1. Proof of the intention to create a life estate is permissible.

2 Giving an interest in a certain property is different from and is not the same thing as the gift of the *corpus*.

3. Such an interest may be supported on the basis of a trust resulting from an agreement for valuable consideration.

4. Where the manifest intention of the donor is to give the *corpus* of and the absolute interest in the property gifted to one person and such gift is accompanied with a reservation of a limited estate in the same property in favour of another, both the gift and the reservation are valid.

5. No rule of the Muhammadan Law is propounded to the effect that where the donor in a transaction of a simple gift merely creates a life interest in the property gifted in the donee and reserves the reversion to his heirs-at-law the donee of the interest takes the absolute estate.

I now proceed to consider the application of the propositions stated above to the facts of the case before me.

Proposition No. 1.—There is no doubt as to the intention of the donor in so far as the gift to *Musammat* Waziran is concerned. His intention was to give her only a life and not an absolute interest in the property in suit. This has already been shown in that part of this judgment in which I have recorded my opinion on the question of the construction of the deed of gift of the 17th January 1905.

Proposition No. 2.—Having ascertained the intention to give only a life interest to *Musammat* Waziran and bearing in mind the provision relating to the reversion it follows that references in the deed of gift to "the property" must be construed to apply to the life interest in that property so far as the gift to *Musammat* Waziran is concerned.

Proposition No. 3.—The facts relevant to the applicability of the proposition now under consideration are these. The dispositions made by Ghulam Murtaza Khan in

favour of his wife, *Musammat* Waziran, and his heirs-at-law by his Will dated the 18th January 1894 were practically the same as those which were subsequently made by the deed of gift of the 17th January 1905. If this bequest had stood alone as the last act of Ghulam Murtaza Khan in respect of his property there could be no doubt in law that it would have failed in its entirety, being in favour of the heirs. The deed of gift clearly anticipates this eventuality and that indeed is the sole motive of making the gift. To avoid any possible difficulty in the matter of giving complete effect to his intentions Ghulam Murtaza Khan secures the consent of *Musammat* Waziran and his heirs Ashraf Khan and Basharat Khan to the terms of the gift. This consent is clearly stated in the deed itself, "and the donee and my aforesaid heirs have accordingly agreed and consented to this." The heirs Ashraf Khan and Basharat Khan also signed the deed of gift in token of their consent and when after the death of Ghulam Murtaza Khan, *Musammat* Waziran went to the Court of Revenue with a prayer for mutation of names in her favour she stood by the deed of gift and did not claim absolute interest in the property to herself. The result is that in consideration of the gift of life interest in the entire property in her favour *Musammat* Waziran agreed to respect the reversion in favour of the heirs of Ghulam Murtaza Khan. Therefore, even if she be held to have taken the property in its entirety as a legal owner she was merely a trustee for the beneficial interest of the reversioners.

Apart from trust, the transaction may be looked at from another point of view. It is not a simple gift but a contract for consideration which has moved from both sides as shown above. Besides under s. 25 (1) of the Indian Contract Act "natural love and affection" between the parties is enough to support it. It is admittedly not forbidden by the general law of the land and it is not forbidden by the Muhammadan Law of gift because it is not a gift. This view is covered by the principle of the decision of the Privy Council in *Solehman Qadir* v. *Salimullah Bahadur* (15).

It is said that the Privy Council judgment in *Sadik Husain Khan* v. *Hashim Ali Khan* (16) is opposed to this view. I do not think so. It was not a case of a contract for consideration as the present transaction may be construed to be but one of simple gift (which of course means gift without consideration) by means of an express trust. It was contended for the respondents that the gift being through the medium of a trust and in consideration of the release by the settlor's wife of her claim for dower no delivery of possession was necessary. Their Lordships rejected this contention and held that it was nothing but a transaction of gift pure and simple and failed for want of possession in the trustees.

Proposition No. 4.—In applying this proposition we have again to bear in mind the all-dominating intention of the donor to give no more than a life interest to *Musammat* Waziran and an absolute ownership either by way of gift or by way of maintaining the reversion at law to Ashraf Khan and Basharat Khan in the gifted property. This intention must be given effect to, so far as possible, and with a view to give effect to this the deed of gift may be construed as a reservation of the usufruct of the property in favour of *Musammat* Waziran. I do not for a moment think that the reason for the decision of their Lordships of the Privy Council in the first and the last of the cases mentioned above as to the validity of reservation of the usufruct rests on the fact that the reservation in both those cases was in favour of the donor himself. It would appear that in this aspect of the case the question reduces itself into one of mere form or words. If the deed of gift had assumed the form of a transfer of the absolute estate in the gifted property in favour of the heirs and that transfer had been subjected to a life interest in the same property in favour of *Musammat* Waziran the gift would have been entirely covered by the decision in the case of *Mohamad Abdul Ghani* v. *Fakhr Jahan Begam* (2) But though the form of the present deed of gift is different, the substance is manifestly the same.

Assuming that my application of pro-

(15) 69 Ind. Cas. 138; 49 I. A. 853; 49 C. 820; (1922) A. I. R. (P. C.) 107; 31 M. L. T. 79; 4 U. P. L. R. (P. C.) 70; 43 M. L. J. 385; 24 Bom. L. R. 1257; 27 C. W. N. 101; 21 A. L. J. 1; 37 C. L. J. 56 (P. C.).

(16) 36 Ind. Cas. 104; 43 I. A. 212; 31 M. L. J. 607; 14 A. L. J. 1248; 19 O. C. 192; 18 Bom. L. R. 1037; 21 C. W. N. 130; (1916) 2 M. W. N. 577; 21 M. L. T. 40; 38 A. 627; 1 P. L. W. 157; 4 O. L. J. 22; 25 C. L. J. 363; 6 L. W. 378; 10 Bur. L. T. 140 (P. C.).

position No. 4 to the present case is defective I have no hesitation in expressing my opinion that the view which I take of this case is merely a logical extension of the principle involved in that proposition. To give effect to the clear intention of the donor is certainly conducive to substantial justice, and to confer an absolute estate instead of a life interest, which the donor did not wish to do, is not. To negative the clear dictates of justice "and to find consolation in the fact that Lord Halsbury once said that law was not a logical science," —*per* Lord Dunedan in the case of *Rangasami Gounden* v. *Nachiappa Gounden* (17) is a course which I am not prepared to adopt unless compelled to do so by any express rule of law. Indeed law will cease to be a progressive science if logical deductions are absolutely barred. What difference can there be in principle between a case where a man gives, for instance, half of his property to another and reserves the other half for his heirs to inherit and the case like the present one. A life interest in a property is as much different from, and as much a particle of, the whole as any mathematical fraction.

Proposition No. 5.—This leaves me free to decide the point according to my own judgment. The question which I now propose to answer is—

Is there any substantive rule of the Muhammadan Law that when a donor intends to give no more than a limited interest to his donee in a certain property the donee in spite of the donor's intention takes an absolute estate in that property? Before entering into an examination of the texts of the Muhammadan Law I desire to make some preliminary observations.

In the first place, the contention that a life interest is unknown to Muhammadan Law is in my opinion not well-founded. That it is fully recognised by the Shia Muhammadan Law is admitted. In this connection the exhaustive judgment, if I may respectfully say so, of Sir Lawrence Jenkins in the case of *Banoo Begam* v. *Mir Abed Ali* (7) may be read with advantage. It is equally well recognised by the Shafei school—see Minha-Et-Talibin, by Nawawi, translated into English by E. G. Howard, page 234. In the Hanafi Muhammadan Law as well as in the laws of all other sects life interest is clearly permitted in cases of *waqfs*. The legal ownership in an endowed property vests in the Almighty and the beneficiaries either conjointly or successively are merely entitled to the use of that property for their lives, the ultimate beneficiaries being always the poor. Next we have the transaction of *areeat* common, as *waqf*, to all the schools of the Muhammadan Law. Under *areeat* distinction between the use of a thing and the actual thing itself is recognised and both are 'property'. "The use of a thing moreover is capable of being property in the same manner as the actual thing itself."—Hamilton's Hedaya, Vol. III, Book XXIX, heading 'Definition of *Areeat*'. The distinction should not be lost sight of when the rules relating to simple gifts are considered. At this place I need only say that those rules are limited to a gift of عين (*ain*), that is the *corpus* of it. But, as my careful study of them has convinced me they do not forbid or declare the invalidity of a gift of an interest in the *corpus*. To this matter I will revert later. No authority need be cited that an *areeat* or to use the technical expression "an investiture with the use of a thing without a return" may be made for a limited period and that period may be the lifetime of the *mustayir*, that is the donee of *areeat*. As stated in the Hedaya itself the word "*areeat*" is derived from *areea* which signifies a grant. It would seem to follow that where in a grant of property without consideration the grantee's interest is a limited one and in making the grant the grantor uses language which clearly excludes the intention of granting complete dominium the transaction is essentially one of *areeat*. Must we then wipe off the essense of the grant and substitute a new grant in its place of the full ownership simply because a grantor may use the word 'gift' instead of the word '*areeat*'. I am far from giving my answer to this question in the affirmative. Then we have the transactions of *widda* which may properly be described as cases of trust. Here again a limited interest in the subject-matter of the trust is well recognised. Lastly, the subject most akin to gifts is the case of a testamentary disposition by a Muhammadan. By such a disposition he

(17) 50 Ind. Cas. 498; 46 I. A. 72; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 477; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 1 U. P. L. R. (P. C.) 66 (P. C.).

can create a limited estate in the thing bequeathed and retain the dominium of the thing for his heirs. The matter is fully dealt with in Ch. V of Book III of Vol. IV of the Hedaya. Therein is also recognised the distinction between the bequest of a thing to one and the usufruct of it to another.

The second observation which I desire to make is that in the Chapters relating to gifts in the books of the Muhammadan Law, for instance I need only mention the Hedaya, the Fatwa-i-Alamgiri and the Durrul Mukhtar, any incorporeal hereditament or an 'interest' in a corporeal property finds no place whatsoever and the only conception of property in relation to the subject-matter of a gift is the physical entity. In the event of the complete absence of any such thing as we understand by the term *res incorporales* the whole law relating to gifts naturally deals with no other thing than the physical thing. But if the law of the Muhammadans or of any other class of people must keep pace with progress of society and the multifarious relations arising therefrom, interests in property apart from the property itself must be recognised. Are we compelled to hold that if a Musalman of to-day desires to carve by way of gift only a particular estate out of his property and retain the rest of it for himself or his heirs he cannot do so and if he does, the gift vests the entire estate into the donee in spite of the intentions of both to the contrary? I have come to the conclusion that the rules of the Muhammadan Law do not compel me to so hold. The question of the gift of a 'right in property' in relation to possession of the subject-matter of the gift has been considered in many cases by the High Courts in India. Reference may be made to the following two cases:—*Mullick Abdool Guffoor* v. *Muleka* (18), in which the judgment of the Court was delivered by Sir Charles Garth, C. J., and particularly to his remarks at page 1125* of the report, and *Anwari Begam* v. *Nizamuddin Shah* (19).

In the Hanafi Muhammadan Law of gift, the ultimate foundation of the entire law rests on the Prophet's saying تهادوا وتحابوا (Hedaya) which literally means 'presents for the increase of affection.'

(18) 10 C. 1112; 5 Ind. Dec. (N. S.) 743.
(19) 21 A. 165; A. W. N. (1899) 8; 9 Ind. Dec. (N. S.) 815

Page of 10 C.—[Ed.]*.*

Gift is defined in Fatawa-i-Alamgiri as follows:—

"Law defines *hiba* as the act of making owner of the substance عين without return." Baillie gives the translation of the definition in the following words: "Gift, as it is defined in law, is the conferring of a right of property in something specific, without an exchange." Durrul Mukhtar's definition is in the following words:—

تمليك العين مجانا اى بلاعوض

In these definitions the word عين (*ain*) is the important word. The Prophet's saying and the definition quoted above make it abundantly clear that the subject-matter of a gift as conceived by the Muhammadan Law is the corporeal thing alone. Once this fundamental notion is grasped every thing else in the Muhammadan Law of gifts is perfectly intelligible.

The reasoning of the Muhammadan lawyers is as follows:—As gift conveys the "specific thing" to the donee the condition that he shall be the owner of the thing gifted only during his life time is repugnant and must, therefore, fail. This is in consonance with every system of civilised jurisprudence. The second ground upon which in the books of the Muhammadan Law condition as to life interest is held to be of no effect is the interpretation which the Muhammadan lawyers place on the language used by the donor in making the gift. Naturally that interpretation falls to be founded on the essentials of the act of making a valid gift, one of such essentials being the subject-matter of the gift. It will be seen from what has just been said that the Muhammadan Law does not create a gift which the donor himself never intended to create. They always ascertain the true intention of the donor, of course, by the aid of the rules of interpretation applicable to the subject of the gift.

The highest, though in my opinion only apparent, support for the plaintiff's contention is to be found in the following passage of the Hedaya:—

"An *amree*, or life-grant, is lawful to the grantee during his life, and descends to his heirs, because of the tradition before quoted. Besides, the meaning of *amree* is a gift of a house (for example) during the life of the donee, on condition of its being returned upon his death. The

conveyance of the house, therefore, is valid without any return: and the condition annexed is null because the Prophet has sanctioned the gift, in this instance, and annulled the condition as before mentioned. An *amree* moreover, is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition, as has been already demonstrated." Another passage in the same book relevant to the discussion is as follows: "If a person make a gift of his female slave to another on condition that he restore her to him, or that he emancipate her, or create her an *amwalid*, or, if a person make a gift of a house to another, on condition that the donee give back a part of it, or, if a person make a gift of his house in charity to another, on condition that the receiver of the charity give him something in exchange for part of the house, *such gift or charity is valid but the condition annexed is invalid, because it is contrary to the spirit or intendment of the contract;* and neither gifts nor charities are affected by being accompanied with an invalid condition, because the Prophet approved of *amree* (gifts for life) but held the condition annexed to them by the grantor to be void."—Hamilton's Hedaya, Book XXXI, Vol. III. The text of the Hedaya for the underlined portion quoted above is as follows:—

فالهبة جائزة و الشرط باطل لأن هذه الشروط تخالف مقتضي العقد-

These quotations bring out in full relief the first line of reasoning adopted by the Muhammadan lawyers as given by me just now. In the second quotation emphasis must be laid on the works indicative of the reason by which the view is supported; "because it is contrary to the spirit or intendment of the contract." I conclude from these quotations that the argument that where the intention of the donor is to give merely an interest in and not the whole of his property the gift must be construed to convey the whole is erroneous. I have not the least doubt in my mind as to the true import of these quotations. They only deal with cases of transfer of ownership in the physical property and with conditions in derogation of that ownership. The real matter, therefore, which arises for consideration in each particular case is the determination, first, of the thing in which the ownership is transferred and, secondly, whether there is any condition derogatory to that ownership. If there is, it must be annulled. Now the thing transferred in the present case by Ghulam Murtaza Khan in favour of his wife, *Musammat* Waziran, is the ownership of the life estate in and not of the *corpus* of the property. There is no case before us of any condition being attached to that ownership. *Musammat* Waziran is dead and the ownership of her life estate which was gifted to her by her husband has come to an end.

I shall now quote that portion of Baillie's Translation of Fatawa-i-Alamgiri which is most relevant to the matter under consideration. This is to be found at page 517 of the book:—

"The words by which gift is effected are of three kinds; *first*, those which are fitted or appropriated to the purpose, as 'I have given this thing to thee,' 'I have made it to thee,' or 'This is to thee;' *second, those in which the meaning is veiled under an allusion, but are known to signify gift, as 'thy garment is this piece of cloth' or* (1) *'I have invested thee with this mansion for thy age,'* which would be a gift. So also if he had said (2) *'This mansion is to thee omree* (*for thy age*—omr) or hyatee (*for thy life*—hyat) *and when thou art 'dead it reverts to me,'* in which case the gift is lawful, and the condition void; *third*, words which bear equally the construction for gift and of *areeat* or commodate loan, as 'I have given thee this food for food,' an expression which, if he should say 'Take possession of it,' would be a gift, but without words might be either a gift or commodate loan. And if one should say, 'I have mounted thee on this beast,' it would be a loan, unless gift were intended. *The principle in cases of this kind is that when a word is employed which has reference to the body of the thing, it is a gift* and when a word is employed which has reference to the profits of the thing, it is a loan; and when the word may be understood in either sense; *the meaning is to be determined by intention.*" The italics are mine. I also quote here the Arabic text of the second part of the quotation:—

وأما الثاني فنقوله كسوتك هذا الثوب (١) اعمرتك هذه الدار فهو هبة كذا لو قال (٢) هذه الدار لك

rules.' Their Lordships concur in the conclusion arrived at below, that it would be inconsistent with that decision to apply a doctrine, which in its origin applied to very different subjects of property, to shares in companies and freehold property in a great commercial town. The argument of the appellant was not that the law of *mushaa* did in fact embrace (in the sense of having been applied to) such property, but that, if the same aspect of life and things were logically applied, it involved the invalidity of the gifts in dispute. But this is not the true criterion."

At the conclusion of this part of my judgment I must also mention the cases decided by the High Courts in India to which our attention was drawn by the learned Counsel for the plaintiff. They are few in number.

Nizamudin Gulam v. *Abdul Gafur* (24). This perhaps is the strongest case in favour of the plaintiff's contention. The decree of the High Court was confirmed by their Lordships of the Privy Council in *Abdul Gafur* v. *Nizamuddin* (14), to which reference has already been made. The grounds of the decision of their Lordships of the Privy Council are clearly not the same as of the learned Judges of the High Court. The deed in question in that case was a *wakfnama*.

The High Court and their Lordships of the Privy Council both decided that the settlement failed. But before the Privy Council it was also sought to be supported as a Will. The first question in that connection was one of construction and their Lordships of the Privy Council came to the conclusion, as already noticed, that there was no grant of a life estate but of the fee simple with restriction on the power of alienation which was void. The learned Judges of the High Court, however, had said:—"The creation of any life estate at all appears quite inconsistent with the Muhammadan Law," and "as a general rule, the donee in such a case would take an absolute estate." They quoted a passage from Baillie and another from the Hedaya. I am unable to regard this expression of opinion as a considered decision of the point which could only arise in the event of the construction of the deed of settlement being settled in favour of the propounders of it but it was not so settled as the decision of the Privy Council shows. As regards the quotations from Baillie and the Hedaya I have already considered them at some length.

Mumtaz-un-Nissa v. *Tufail Ahmed* (25). The transaction in that case was considered to be an *areeat* and not gift. There was no deed. In delivering their judgment the learned Judges said:—"No doubt, under the Muhammadan Law, the rule is that if it is clear that the intention of the donor was to give to the donee the entire subject-matter of the gift, any subsequent condition derogating from or limiting the extent of the right of the donee would be null and void." In the case before us I have held that the subject-matter of the gift was a limited interest only.

Mahomed Shah v. *Official Trustee of Bengal* (26). The head-note gives complete idea of the decision given by Mr. Justice Stephen on the Original Side of the Court and it is as follows:—"A deed creating a life interest with remainder over is void under the Muhammadan Law. Similarly a gift to unborn person is void." No such argument is raised before us by any party in respect of the deed of gift of the 17th January 1905.

These are the only cases in the authorized reports and I do not wish to detain myself any longer on this subject by referring to two or three cases more which have not appeared in any such report.

On the above grounds I hold that *Musammat* Waziran acquired merely a life interest in the property in dispute under the deed of the 17th January 1905. It follows that the plaintiff who claims the right of inheritance to the estate of *Musammat* Waziran has no title to this property.

Now I pass on to the only question of fact in dispute between the parties whether the gift of the 17th January 1905, in favour of *Musammat* Waziran was followed by delivery of possession or not. On this point of fact I am in agreement with the finding of the learned Subordinate Judge and hold that in the circumstances of this case the question must be decided in favour of the plaintiff. The decision of this matter should be approached in the light of the particular circumstances of the case. Such circumstances are as below:—

1. The object of the gift was to accelerate the operation of the previous Will,

(24) 13 B. 264; 13 Ind. Jur. 342; 7 Ind. Dec. (N. S.) 175.

(25) 28 A. 264; A. W. N. (1905) 269.

(26) 2 Ind. Cas. 292; 36 C. 431.

2. The donor stood in the relation of husband to the donee.

3. The donee was a *pardanshin* lady.

4. According to my finding the subject-matter of the gift in her favour was an interest in the property and not the *corpus* of it.

5. The husband and the wife lived amicably together so long as the former was alive.

6. In the deed of gift the donor made the following declaration: "I have put the lady donee in possession of the property gifted and my wife, *Musammat* Waziran, from to-day became owner and possessor of the aforesaid property in accordance with the terms of this deed."

If there were nothing else on this record there could be no two opinions on the materials stated above that the lady did acquire such possession as the nature of the property gifted to her was capable of. Against this conclusion, however, two points were urged on behalf of the defendants—

(1) That there was no mutation of names in the life time of the donor; and

(2) That the plaintiff produced oral evidence to show that she employed her own servants for the collection of rents, that Ghulam Murtaza Khan ceased to collect them and that that evidence is unreliable.

As to the first point, I attach no importance to it. The lady being a *pardanashin* woman could only look up to her husband for taking steps for the entries to be made in the Revenue Register and Ghulam Murtaza Khan might well have refrained from taking those steps for the reason that the gift in favour of *Musammat* Waziran was not in respect of the entire proprietary interest, and so far as the possession of the interest given was concerned he had already made a sufficient declaration in relation thereto in the deed of gift. Besides, Ghulam Murtaza Khan died almost a year after the gift and within that interval instalments of rents payable by tenants fell due hardly twice. Within less than a fortnight of the death of her husband *Musammat* Waziran applied for mutation of names in her favour on the basis of the deed of gift and said that she was in possession of the "assets of the deceased" under the gift (Ex. A-12). Ashraf Khan, the chief defendant in the case, acquiesced in the statement made by the lady and withdrew his opposition. Mutation was accordingly ordered to be made. After the death of *Musammat* Waziran, Ashraf Khan asked for the entry of his and Basharat Khan's name in place of *Musammat* Waziran's, and admitted that she had held the property under the gift (Ex. 4). In these circumstances it does not lie in the mouth of the defendants to say that there was no possession and no mutation on the basis of the gift. "Mutation of names in the Collector's office was not actually necessary to complete a transfer of possession under the deed of gift"—*Per* Sir Barnes Peacock in the case of *Muhammad Mumataz Ahmad* v. *Zubaida Jan* (3).

On the second point, the only result of producing unacceptable evidence can be this that the fact intended to be proved by the evidence remains unproved. The plaintiff cannot be put in a worse position than what he would have been in if he had produced no evidence at all. In the circumstances of the case the reasonable inference seems to be that Ghulam Murtaza Khan did collect rents so long as he lived. But after the execution of the deed of gift and the unequivocal declaration made in it and the position in which he stood to the donee his possession must be taken to have been that of an agent in the management of the property. That Ghulam Murtaza Khan had *bona fide* intention of divesting himself *in presenti* of the ownership of the subject-matter of the gift is not disputed, in other words it is not the case of either party that the transaction was a fictitious one. The reason of the rule of the change of possession will be fully satisfied where in the circumstances of a particular case such a change may only be constructive.

The subsequent management of the property by Ghulam Murtaza Khan must be presumed in this case to have been on behalf of his *pardanashin* wife—see the observations of their Lordships of the Privy Council in the case of *Ameeroonnissa Khatton* v. *Abdoonnissa Khattoon* (21) already referred to in another connection. In the case of *Muhammad Mumtaz Ahmad*

v. *Zubaida Jan* (3) also mentioned before, their Lordships of the Privy Council said:—"The lady (donor) had merely proprietary, not actual, possession of the greater portion of the property, that is to say, she was merely in receipt of the rents and profits. In the deed of gift she declared (an admission by which Usman as her heir and all persons claiming through him were bound) that she had made the donee possessor of all properties given by the deed; that she had abandoned all connection with them; and the donee was to have complete control of every kind in respect thereof. Ahmad Hussain, the daughter's husband, was the general manager of both mother and daughter, and would doubtless take care that the deed of gift should be carried into effect. Their Lordships have no doubt that sufficient possession was taken on behalf of the daughter to render the gift effectual." In the case of *Muhammad Baksh Khan* v. *Hussaini Bibi* (4) also already referred to, in delivering the judgment of their Lordships of the Privy Council, Lord Macnaghten said: "Gift was attended with utmost publicity, the *hibbanama* itself authorises the donee to take possession, and it appears that in fact they did take possession." The facts of the last mentioned case show that possession had been taken by the donees subsequently. The observations quoted above are *a fortiori* of the present case. On these grounds I uphold the finding of the learned Subordinate Judge on the question of possession.

The only matter which remains for me to decide is the question of the alleged family settlement. I am of opinion that the evidence relied upon in support of such a settlement falls far short of establishing it. There is no trace of a *bona fide* dispute at any stage. At the time of the making of the Will Ghulam Murtaza Khan was an absolute owner of this property.

His heirs had not a shadow of claim in respect of it nor the consent of the heir as regards his testmentary powers was of any avail to him, such consent being effective only when it is given after the death of the testator under the Hanafi Muhammadan Law. The situation was exactly the same at the time when Ghulam Murtaza Khan made the gift of the 17th January 1905. Apart from the agreement between him and his wife as regards the terms of the gift, his heir-at-law had no interest either in the subject-matter of the gift or in the making of it. Finally when we come to the event which occurred after the death of Ghulam Murtaza Khan they also furnish no basis for any inference in favour of the alleged family settlement. *Musammat* Waziran applied for mutation of names in her favour, so did the reversioners. When *Musammat* Waziran stated that she was in possession in virtue of the gift and asked for mutation in terms of it the reversioners withdrew their application. The unilateral act on the part of the reversioners proved no settlement. I, therefore, agree with the contention of the learned Counsel for the plaintiff that the alleged family settlement has no foundation whatsoever in fact.

The result of my finding on the first point is that the plaintiff's Appeal No. 44 of 1923, fails and that of defendants No. 51 of 1923 succeeds. I would, therefore, dismiss the former and allowing the latter dismiss the plaintiff's suit with costs throughout except so far as plots Nos. 397 and 618 situate in village Jamauli, Paragana Mawai, are concerned. The lower Court gave a decree in respect of these plots to the plaintiff and they are not the subject-matter of the appeal by the defendants. I would, therefore, direct that in the decree which shall now be prepared those plots shall be shown as having been decreed to the plaintiff but without costs.

By the Court.—For the reasons given in our separate judgments, we dismiss the plaintiff's Appeal No. 44 of 1923, and, allowing the defendants' Appeal No. 51 of 1923, dismiss the plaintiff's suit with costs throughout except in respect of plots Nos. 397 and 619 situate in village Jamauli, Pargana Mawai, which shall be shown as having been decreed to the plaintiff, but without costs, in the decree to be prepared in this Court.

Plaintiff's appeal dismissed;
and
Defendants' appeal accepted.

Z. K.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 12 OF 1922.

November 20, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

GOVINDAPRASAD LALITAPRASAD MISHAR—DEFENDANT—APPELLANT

versus

RINDABAI LALITAPRASAD—PLAINTIFF—RESPONDENT.

Hindu Law—Adoption—Brahmins—*Adoptive father and son belonging to different* gotras—Datta Homam, *performance of, whether necessary.*

Under the Hindu Law the ceremony of *datta homam* is essential to validate an adoption amongst *Brahmins* unless the adoptive father and son belong to the same *gotra*. [p. 473, col. 1.]

Case-law referred to.

First appeal from the decision of the First Class Subordinate Judge at Dharwar, in Suit No. 137 of 1919.

Mr. *A. G. Desai*, for the Appellant.

Mr. *H. C. Coyajee* (with him Mr. *R. A. Jahagirdar*), for the Respondent.

JUDGMENT.—The plaintiff sued to obtain a declaration that the first defendant was not the legally adopted son of the plaintiff's husband. The plaintiff disputed the *factum* of the adoption. That issue was found in the affirmative, but on the issue whether the adoption was valid, the Court held that the adoption was not valid, though in fact it had been made, because the adoptive father and the adopted son were of different *gotra*. Consequently the *datta homam* was essential to validate the adoption, and in this case it is not disputed that the *datta homam* had not been performed. If we were of opinion that the adoption was valid, it would have been necessary to consider the authorities at some length. But we agree with the judgment in the Court below that in this particular case the *datta homam* was necessary.

The authorities are considered in the latest Edition of Mayne on Hindu Law at pages 205-208, and at the bottom of page 207 the conclusion is as follows: "So far as it is possible to reconcile these conflicting decisions, they seem to point to the conclusion that, among the twice-born classes, the *datta homam* is necessary, unless the adopted boy is of the same *gotra* as his adopter, or unless a usage to the contrary can be established." In *Shoshinath Ghose* v. *Krishnasunderi Dasi* (1), their Lordships observed:—

"The mode of giving and taking a child in adoption continues to stand on Hindu Law and Hindu usage, and it is perfectly clear that amongst the twice-born classes there could be no such adoption by deed, because certain religious ceremonies, the *datta homam* in particular, are in their case requisite."

The question in issue in that appeal was whether there could be in the case of *sudras* such a giving and taking as was necessary to satisfy the law, by mere deed, without an actual delivery of the child by the father. Still this *dictum* of their Lordships may be taken as stating what their Lordships considered at that time was necessary to validate an adoption amongst the twice-born classes.

In this Presidency at any rate the only cases in which an adoption has been recognized as valid without the *datta homam* being performed have been those in which the adoptive father and the adopted son belonged to the same *gotra*. All the authorities on this subject are discussed in *Valubai* v. *Govind* (2) and in *Bal Gangadhar Tilak* v. *Shri Shriniwas Pandit* (3), their Lordships in considering the same question gave their approval to the judgment of Sir Lawrence Jenkins in that case. On a review of the arguments in that judgment it is obvious that the learned Chief Justice considered that it was only because there was identity of *gotra* that the *datta homam* could be dispensed with. It must be noted, however, that in referring to the decision of the Full Bench of the Madras High Court in *Govindayyar* v. *Dorasami* (4), their Lordships in *Bal Gangadhar Tilak* v. *Shri Shriniwas Pandit* (3) considered that decision as being of value as containing a careful study of the authorities and affirming that the ceremony of *datta homam* was not essential to a valid adoption amongst *Brahmins* in Southern India. With all due

(1) 7 I. A. 250 at p. 255; 6 C. 381; 7 C. L. R. 313; 3 Shome L. R. 231; 4 Sar. P. C. J. 191; 3 Suth. P. C. J 812; 4 Ind. Jur. 58; 3 Ind. Dec. (N. S.) 248 (P. C.).

(2) 24 B. 218; 1 Bom. L. R. 770; 12 Ind. Dec. (N. S.) 682.

(3) 39 Ind. Cas. 639; 42 I. A. 135; 17 Bom. L. R. 527; 39 B. 441; 13 A. L. J. 570; 19 C. W. N. 729; 22 C. L. J. 1; 29 M. L. J. 34; 18 M. L. T. 1; (1915) M. W. N. 484; 2 L. W. 611 (P. C.).

(4) 11 M. 5; 11 Ind. Jur. 409; 4 Ind. Dec. (N. S.) 4 (F. B.).

respect it would seem difficult to find from the judgment of the Full Bench that it was decided that the *datta homam* was not essential to any adoption amongst *Brahmins*. The head-note is as follows:—

"The ceremony of *datta homam* is not essential to a valid adoption among *Brahmins* in Southern India, when the adoptive father and son belong to the same *gotra*."

Their Lordships considered whether they should depart from the decision in *Singamma* v. *Vinjamuri Venkatacharlu* (5). They pointed out that some doubt had been thrown upon that case by the observation of the Judicial Committee in *Shoshinath Ghose* v. *Krishnasunderi Dasi* (1), that *datta homam* was requisite in the case of *Brahmins* and referred to the case of *Venkata* v. *Subhadra* (6) which was to the same effect. In *Singamma* v. *Vinjamuri Venkatacharlu* (5), the point was not argued on both sides and Jagannatha, who was cited in the case, was no authority in Southern India. Their Lordships concluded that the original texts conveyed the impression that *datta homam* might probably be an essential part of a valid adoption as a general rule and that in a proper case there was sufficient ground for directing an inquiry as to usage. Although the general rule might be as indicated above there was reason to think that there were exceptions to it. There was a text of Manu to the effect that if, among several brothers, one has a son, that son was the son of all. To this extent, that *datta homam* was not essential when the adoptive father and son were of the same *gotra*, they thought they might safely adhere to the decision in *Singamma* v. *Vinjamuri Venakatacharlu* (5).

The rule, therefore, may be stated in this form. The ceremony of *datta homam* is essential to validate an adoption amongst *Brahmins* unless the adoptive father and son belong to the same *gotra*. Apart from all the considerations there is this justification for it, that when it is sought to introduce a stranger into a family it is desirable that all the religious ceremonies should be performed so as to ensure the requisite publicity for the adoption. It may be said that there is a tendency in these days towards dispensing with religious ceremonies, but that is no reason why we should seek in this case to depart from what must be recognized as an established rule of Hindu Law. The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(5) 4 M. H. C. R. 165.

(6) 7 M. 548; 8 Ind. Jur. 557; 2 Ind. Dec. (N. S.) 964.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 154 OF 1922.

December 11, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

JAGMOHAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PRAYAG NARAYAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow, property acquired by, nature of—Stridhan—*Property given to widow as maintenance—Alienation—Alienee, rights of.*

Property acquired by a Hindu lady by adverse possession becomes her separate *stridhan* property. If, however, the property is acquired by a Hindu widow claiming as the widow of her deceased husband the property becomes an accretion to her late husband's estate and on her death passes not to her heirs but to the heirs of the deceased husband. [p. 474, col. 2.]

An alienation by a Hindu widow of property which is her *stridhan* is binding not only against the heirs of her deceased husband, who have no right to the property at all, but against the whole world. [p. 475, col. 1.[

Where, however, property is given to a Hindu widow for her lifetime by way of maintenance, the only interest which she has in the property and the only interest which she can alienate is her interest for life and the alienation would enure to the benefit of the alienee only during the lifetime of the widow. [*ibid.*]

Appeal against a decision of the District Judge, Gaya, dated the 9th November 1921, affirming that of the Munsif, Second Court, Gaya, dated the 3rd March 1921.

Mr. *Shiveshwar Dayal*, for the Appellants.

Messrs. *L N. Singh* and *Brij Kishore Prasad*, for the Respondents.

JUDGMENT.

Miller, C. J.—The suit out of which this appeal arises was instituted on the 11th March, 1920 by the plaintiffs who are the appellants in this appeal claiming certain lands in *Mouza* Indarpur Kochaisa against the defendant No. 1 who is the superior landlord of the interest in suit.

The land in suit originally belonged

to one Deochand Singh who died in or about the year 1882. Deochand Singh had two sons Prabhu and Bigan, the former being married to *Musammat* Deomurat Kuer and the latter to *Musammat* Marno Kuar. Both these sons, it is now found, predeceased their father and upon the death of Deochand in 1882 some question appears to have arisen as to the possession of this property. The two widows of Prabhu and Bigan, who had survived their husbands, were also alive at the death of Deochand. Upon that event the property would, in the ordinary course, go to Deochand's heirs and the widows would not be entitled to any interest therein because their husbands had predeceased Deochand. The only right which they would have in the property, if any, would be the ordinary Hindu widow's right to maintenance. One thing is quite clear in this case and that is that the widows were put in possession of the property and remained in possession for a number of years and one of the questions, which was in issue at the trial of this case, was whether the property which was acquired by the two widows in 1882 was acquired by them as their *stridhan* or, as the plaintiffs alleged, whether they were merely allowed to remain in possession of the property during their joint lives by way of maintenance. I may add that the property is a very small one being valued in the plaint at something under Rs. 1,000. The heirs of Deochand were somewhat distant collateral relations and presumably had other property of their own. They were no longer joint with him. There is, therefore, nothing surprising in the fact that these two ladies should have been allowed to remain in possession of the whole of the property left by their father-in-law by way of maintenance after his death. That was the case of the plaintiffs. If that case is made out then there can be no doubt that the plaintiffs ought to succeed in this suit. It is necessary to add what happened subsequently. *Musammat* Marno Kuar, the widow of Bigan predeceased her sister-in-law *Musammat* Deomurat Kuar. Deomurat Kuar sometime before the year 1907 after the death of Marno Kuar appears to have parted with her interest whatever it may have been in this property to the landlord the present defendant. Subsequently about the year 1907 there was some further question as between the heirs of Deochand and a sister-in-law of Deomurat on the one hand and the landlord, the present defendant on the other and an arrangement was entered into whereby the landlord was allowed to remain in possession. He appears to have acquired the property from Deomurat because she was not able to pay her rent. It does not appear that an actual suit was brought nor was any rent decree passed. However that may be he got possession of the property. Now the question which arises in this appeal depends upon the determination of the question whether Deomurat Kuar was in possession of the property merely by way of maintenance or whether she was in possession of the property by adverse possession as against the heirs of her father-in-law. If she acquired adverse possession after her father-in-law's death then no doubt the property would become her *stridhan*. The authority for that proposition is to be found in the decision of *Kashi Ram* v. *Amri* (1). The facts of that case were very similar to the present and it was held there relying upon a decision of their Lordships of the Privy Council in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (2) that property acquired by a Hindu lady by adverse possession becomes her separate *stridhan* property. As a general proposition that, however, required some limitation for if the property is acquired by a Hindu widow claiming as the widow of her deceased husband then, no doubt, according to the ruling of their Lordships in the case of *Lajwanti* v. *Safa Chand* (3), the property becomes an accretion to her late husband's estate and on her death would pass not to her heirs but to the heirs of her deceased husband. Although in the present case there was no specific finding that these two widows had come into the property in lieu of maintenance with the consent of the heirs of Deochand nevertheless that was the case put forward by the plaint-

(1) 5 Ind. Cas. 207; 32 A. 189; 7 A. L. J. 153.

(2) 5 I. A. 1; 1 C. L. R. 318; 3 Sar. P. C. J. 763; Bald. 148; 3 Suth. P. C. J. 474; Rafique and Jackson's P. C. No. 48 (P. C.).

(3) 80 Ind. Cas. 788; 6 P. L. T. 1; 22 A. L. J. 204; (1924) A. I. R. (P. C.) 121; 5 L. 192; (1924) M. W. N. 442; 20 L. W. 10; 2 Pat. L. R. 245; 28 C. W. N. 960; 26 Bom. L. R. 1117; 47 M. L. J. 935; 51 I A. 171; L. R. 5 A. (P. C.) 94 (P. C.).

iffs in their plaint. As against that the case put forward by the defendant was that this property had been acquired by them as *stridhan* and, of course, it would follow that if the property were in fact their *stridhan* any alienation of that property to the landlord would be binding not only against the heirs of Deochand who would have no right to it but against the whole world. On the other hand if the land in suit were merely the property of the widows given to them for their lifetime by way of maintenance then the only interest they had in it and certainly the only interest which they could alienate would be their interest for life. The result would, therefore, be in the event of this being their life-interest only that the alienation made to the landlord, the present defendant, would enure to his benefit only during the lifetime of the widows or the survivor of them.

Although as I have just stated there was no specific finding that the property was granted to the widows by way of maintenance still there was an issue raised whether the property was *stridhan* or not, and it was found by the Trial Court and the finding was upheld by the First Appellate Court that this property was not the *stridhan* of the widows. It seems to me, therefore, to follow upon that finding that the only interest which the widows could have was the interest asserted by the plaintiffs, namely, that of maintenance only. Although this interest was alienated still that alienation would not be binding upon the heirs of Deochand who would acquire a vested right in the property after the death of the widows and the question, therefore, which becomes important is whether the widows or the survivor of them died within 12 years of the present suit. If Deomurat who was the surviving widow died more than 12 years before the suit then there can be no doubt that the defendant would have acquired adverse possession against the plaintiffs. It is found as a fact, however, in the case that she died within 12 years of the suit and, therefore, in my opinion, the suit is not time-barred.

It is argued by the learned Government Pleader on behalf of the respondents that there was nothing really to show on the evidence in this case whether the widows had acquired this property by virtue of their right to maintenance or whether they had acquired it by adverse possession, that is to say, by some title asserted by them which had not been interfered with by the person entitled to inherit the property. But it is clear that if they were asserting an adverse title other than a title as widows of their deceased husbands they would be asserting a title which after 12 years would give them a right to hold property as part of their *stridhan*, but in the face of the finding of the lower Appellate Court that this was not their *stridhan*, it seems to me that we are bound to come to the conclusion that the only manner in which they would have acquired the property was as maintenance. In this state of affairs it seems to me that the appeal must succeed, the decree of the lower Appellate Court will be set side and a decree will be entered in favour of the appellants declaring their title to the property and their right to recover possession. The plaintiffs are entitled to their costs throughout.

Foster, J.—I agree.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 64 OF 1924.

November 24, 1924.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

KANAIYALAL NANALAL DESAI—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), ss. 42, 45—Suit to declare electoral rolls illegal and for injunction restraining election, nature of—Writ of mandamus*—District Judge, jurisdiction of.*

A District Judge has no jurisdiction to make any order which would be in the nature of a *mandamus* in a suit under s. 45 of the Specific Relief Act. That jurisdiction has been given only to the High Courts mentioned in the section and it can only be exercised within the local limits of their Ordinary Original Civil Jurisdiction. [p. 476, col. 2; p. 477, col. 1]

Plaintiff filed a suit against the Secretary of State for India in Council and the Collector of a District praying for a declaration that the preparation and

publication of the lists for voters for a certain District Board constituency was illegal, void and *ultra vires* and that no valid election to the District Board could be held under those lists; he also prayed for an injunction restraining the Collector himself or by his subordinates from holding any elections to the District Board under the alleged illegal lists:

Held, that the suit fell within the purview of s. 45 of the Specific Relief Act and that the District Judge had no jurisdiction to grant an *interim* injunction in the terms prayed for by the plaintiff. [p. 476, col. 2.]

Appeal from an order of the District Judge, Surat, in Suit. No. 57 of 1924.

Mr. *H. V. Divatia*, for the Appellant.

Mr. *Kanga*, (with him Mr. *S. S. Patkar*), for the Respondent.

JUDGMENT.—The plaintiff filed this suit against the Secretary of State for India in Council and the Collector of Surat asking for the following reliefs:—

(1) That it may be declared that the preparation and publication of the lists for voters for all general and Muhammadan constituencies of the District Local Board of Surat was illegal, void, *ultra vires*, and no valid election of the members of the District Local Board of Surat for the term commencing on and from the 1st day of January 1925 could take place under the said lists.

(2) For an injunction restraining the Collector of Surat from himself or by his subordinates holding elections of members of the District Local Board of Surat for the term commencing on and from the 1st January 1925 under the alleged illegal lists.

He then applied to the District Judge for an *interim* injunction.

After hearing arguments the Judge, while holding that he had no jurisdiction to grant the injunction, said:—

"Now the only effective relief which the plaintiff has prayed for is the injunction restraining the Collector from himself or through his subordinates holding elections of members of the District Local Board. What the plaintiff seeks is in substance a writ of *mandamus* or a writ in the nature of *quo warranto*. It is a high prerogative writ of a very extensive remedial nature. If this Court has power to grant the writ, then undoubtedly it would be proper to make this rule absolute by granting the plaintiff a temporary injunction in the terms prayed for. The writ such as is claimed by the plaintiff is principally used for public purposes and to compel the performance of public duties. This is not a suit under any specific provisions of any specific Act; nor is it a suit for the declaration of the plaintiff's right to vote and stand as a candidate for election which would be a suit of a civil nature [*Subhapat Singh* v. *Abdul Gaffur* (1)]; nor is it a suit to establish any legal character to which the plaintiff is entitled under the provisions of s. 42 of the Specific Relief Act. The present suit is, in my opinion, a suit of the nature contemplated by the provisions of s. 45 of the Specific Relief Act."

This is a perfectly correct exposition of the substance of the plaintiff's claim and the Judge was clearly right in holding the suit was of the nature contemplated by s. 45 of the Specific Relief Act. The plaintiff's Pleader, however, in arguing that that decision was wrong seeks to lead the Court away from the real issues in the case by asking us to consider not the relief claimed by the plaintiff but the statement in his plaint with regard to his own personal right to be put on the list of voters, although no relief is claimed in respect of such right. We are not concerned in this case with the question whether the plaintiff is entitled to vote, whether his name has been placed on the wrong list of voters, or whether his name has been omitted from the list in which he says his name ought to be. He sues as a member of the public for a declaration that the Collector in the performance of his duties with regard to the District Local Board elections has not performed his duties in the proper way, has done that which he ought not to have done, or has left undone that which he ought to have done, and that in consequence of such illegal action the defendant should be restrained from holding the elections. Section 42 of the Specific Relief Act, therefore, has no application whatever to this case. The only section which can possibly apply is s. 45. There can be no doubt that the District Judge has no jurisdiction to make any order which would be in the nature of *mandamus* in a suit under s. 45 of the Specific Relief Act. That jurisdiction has been given only to the High Courts mentioned in the section, and it can only be exercised within the local limits of their Ordinary

(1) 24 C. 107; 12 Ind. Dec. (N. S.) 736.

Original Civil Jurisdiction. The appeal, therefore, must be dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 449 OF 1923.

March 4, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

PARMANAND PANDIT AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MATA DIN RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 60, 63—Mortgage—Redemption—Covenant permitting mortgagee to continue in possession after redemption—Clog on equity of redemption—Grove, whether accession—Grove planted with consent of mortgagor—Mortgagor, whether bound to pay cost of planting grove.

Conditions which prevent or impede the right of the mortgagor to obtain possession of the mortgaged property even after redemption, if entered into at the time when the mortgage is made, must be taken to operate as a clog on the equity of redemption. On the other hand, a subsequent contract which modifies the right of redemption may not amount to such a clog. [p. 478, col. 1.]

A covenant contained in a mortgage-deed under which the mortgagee even after redemption is entitled to retain the property on payment of a fixed rent operates as a clog on the equity of redemption and is unenforceable in a Court of Equity. [*ibid.*]

A contract for the grant of a lease does not run with the land and cannot bind the representatives of the original parties thereto. [p. 478, col. 2.]

A grove as a grove is an accession to the mortgaged property within the meaning of s. 63 of the Transfer of Property Act and is incapable of separate possession and enjoyment. In order to be enjoyed as a grove a grove has to be maintained and the fruits and the produce of it are to be enjoyed. This cannot be done without detriment to the land on which the grove stands. Therefore, where a grove is planted by a mortgagee on mortgaged land with the consent of the mortgagor, the mortgagee is entitled to insist that at the time of redemption the mortgagor must take the land with the grove and pay to the mortgagee the cost of planting the grove. [*ibid.*]

Second appeal from a decree of the District Judge, Ghazipur, dated the 21st December 1922.

Dr. *M. L. Agarwala*, for the Appellants.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for redemption of a mortgage, dated the 18th of February 1878, executed by the predecessors-in-title of the plaintiffs in favour of the ancestors of the defendants. The mortgage was for a sum of Rs. 160 and was usufructuary. Among other conditions it provided that the mortgagees would be entitled to appropriate the profits in lieu of interest and that at the time of redemption there would be no accounting between the parties. There was a further provision that if in *Jeth* of any year the principal sum was paid then the property would be redeemed. There was a clause that even after redemption the mortgagees would not be ejected but they would hold on the land as lessees on payment of annas 8 per *bigha* annually. There was a further provision that the mortgagees would be entitled either to cultivate the land or to plant a grove on it. The mortgagees sometime after the mortgage, it is not quite clear when but at least more than 25 years before the suit, did plant a grove consisting of numerous fruit trees like mangoes, *jamun*, *mahua*, guava, etc., as well as a large number of *shisham* trees.

The plaintiffs claimed that they were entitled to actual possession on payment of the principal sum only. The defendants contested the claim and pleaded that even after redemption they were entitled to hold on payment of the fixed rent. They further claimed that if possession was to be given to the plaintiffs they must get full compensation for the grove which stands on the mortgaged land.

The Court of first instance was of opinion that in spite of the clause entitling the mortgagees to remain in possession as lessees, the plaintiffs were entitled to actual possession of the land but that they must pay compensation. It, however, assessed the compensation on the actual costs incurred which it fixed at Rs. 100. On appeal the learned District Judge agreed with the view of the First Court that the plaintiffs were entitled to actual possession of the land but thought that the compensation awarded was not fair. The value of the grove, in his opinion, ought to have been taken into account. He accordingly remanded the case and after the findings were returned he fixed the compensation at Rs. 1,800.

The plaintiffs have come up in appeal to this Court and the defendants have filed cross-objections. In fact both the parties had also filed an appeal and cross-objections in the lower Appellate Court.

On the appeal and the cross-objections two points arise for our determination. The first is whether the plaintiffs are entitled to actual possession of the leased land on redemption or whether the mortgagees should be allowed to retain possession as lessees even after the redemption. The second point is whether the plaintiffs are bound to pay any compensation and if so how much.

As to the first point it seems to me that the condition that even after redemption the mortgagees would hold on the land, was a clog on the equity of redemption. Conditions which prevent or impede the right of redemption even after redemption, if such conditions are entered into at the time when the mortgage is made, must be taken to be a clog on the equity of redemption. On the other hand a subsequent contract which modifies the right of redemption may not be such a clog. Although the principle underlying the rule of a clog on redemption is very old yet it still prevails and will not permit any device or contrivance, being part of the mortgage transaction or contemporaneous with it, to prevent or impede redemption. It follows that any covenant under which some right to retain possession is reserved to the mortgagee even after the property is redeemed is a clog on redemption as it both prevents and impedes redemption. That such a clause amounts to a clog on redemption is covered by authority. In the case of *Mahomed Muse* v. *Jijibhai Bhagvan* (1), which was followed by a learned Judge of this Court in the case of *Sheo Singh* v. *Birbahadur Singh* (2) and has been subsequently followed by the Madras High Court in the case of *Pamurlapati Ankivedu* v. *Samurlapati Subbiah* (3), a covenant under which the mortgagee even after redemption was entitled to retain the property on payment of a fixed rent was considered to be a clog on the equity of redemption and unenforceable in a Court of Equity. I am accordingly of opinion that the clause cannot bind the mortgagors' representatives and that, therefore, if they have paid the entire amount due, they are entitled to take possession of the land unencumbered of any contract for the grant of perpetual lease.

(1) 9 B. 524; 5 Ind. Dec. (N. S.) 349.
(2) 6 Ind. Cas. 707.
(3) 12 Ind. Cas. 382; 35 M. 744; 10 M. L. T. 256; (1911) 2 M. W. N. 231; 21 M. L. J. 1010.

There is another ground on which the clause allowing the mortgagees to remain in possession as lessees is not enforceable. There was no perpetual lease granted at the time when the mortgage was made and the clause can at best amount to a contract for the grant of a perpetual lease after redemption. It is apparent that if owing to failure of the mortgagors to redeem within 60 years there was no redemption, the perpetual lease would not come into existence. As a mere contract for the grant of a perpetual lease after an uncertain period of time, if any at all, the clause is no longer enforceable because the original parties to it are all dead and the present plaintiffs and defendants are their representatives. A contract for the grant of a lease does not run with the land and cannot, therefore, bind the representatives of the original parties thereto.

The next question involves a consideration in the first instance of the question as to whether the grove is an accession within the meaning of s. 63 of the Transfer of Property Act and whether, if an accession, it is or is not capable of separate possession or enjoyment. I am of opinion that the grove *as a grove* is both an accession and is incapable of separate possession and enjoyment. The grove in order to be enjoyed as a grove has to be maintained and the fruits and produce of it are to be enjoyed. This cannot be done without detriment to the land on which the grove stands. On the other hand if the grove were to be cut down the timber can be removed and is capable of separate enjoyment. The case, therefore, in my opinion is a case of an accession which has been acquired at the expense of the mortgagees, and if it is to be put to its full use, it is incapable of separate possession or enjoyment without detriment to the principal property. I have already referred to the clause in the mortgage-deed under which express power or consent was given to the mortgagees to plant a grove if they liked. In pursuance of that assent of the mortgagors the mortgagees have planted a grove which they were perfectly entitled to do. It is immaterial whether the assent was obtained previously or whether it was obtained just at the time when the grove was being planted. There was clearly an original assent given to the mortgagees within the meaning of s. 63. It follows,

therefore, that the grove as a grove has been acquired at the expense of the mortgagees, is not capable of separate enjoyment, and its accession has been made with the assent of the mortgagors. Under these circumstances the mortgagees are entitled to insist that the plaintiffs-mortgagors must take the land with the grove and pay to the mortgagees the costs thereof.

The learned Advocate for the appellants contends that the Full Bench case of *Raghunandan Rai* v. *Raghunandan Pande* (4) is an authority for the proposition that a grove is capable of separate enjoyment. It is urged that unless it be supposed that that was held by the Full Bench it is not easy to see how the decree in that case could have been passed under which the mortgagor did not get the grove or timber but the mortgagee was allowed to remove the timber and appropriate it. It is urged that if the Full Bench had thought that a grove is incapable of separate enjoyment, then in the event of there being no assent of the mortgagors, the accession ought to have gone to the mortgagors with the land under the first paragraph of s. 63. The learned Judges who formed the Full Bench, however, have nowhere said that a grove *as a grove* is capable of separate enjoyment. I am not, therefore, bound to assume that this must have been their view simply because a contrary result might appear to logically follow from a contrary hypothesis. That decision might have been based on the broad equitable ground that mortgagors are at best entitled to have the land restored in its previous condition and without the acquired accession which can be removed without detriment to the land. The Full Bench case is distinguishable from the present case because in that case the alleged contract that the mortgagee would be entitled to plant a grove, which had been pleaded in the written statement, was not proved to the satisfaction of the Court below nor pressed before the Full Bench. In my opinion the present case comes exactly within the second clause of s. 63 and the plaintiffs, therefore, are bound to take the land with the grove and pay for it.

As regards the amount of compensation the learned Judge has fixed Rs. 1,800 as a proper estimate. He has calculated the total amount that would have been spent for all these years in rearing up this grove and he has come to the conclusion, to use his own words, that "it is impossible to make a very accurate estimate of the expenditure which the defendants have incurred, but it seems to me that a sum of Rs. 1,800 would be a fair estimate. As I have already remarked the expenditure was incurred upon the faith of a promise made by the plaintiffs. If the present value of the grove is Rs. 2,300 it is a fair estimate to say that Rs. 1,800 was the capital spent upon it." It is clear, therefore, that his estimate of Rs. 1,800 is of the total amount spent on the grove and does not include the value of the timber or the interest on the amount spent. It may be that in calculating the amount the learned Judge has included some interest though not full interest because the profits made by the mortgagees had been practically very little. The learned Judge had in his mind the principles which ought to govern the calculation of the estimate and, in my opinion, his estimate must be accepted as a finding of fact.

I would, therefore, dismiss both the appeals and the cross-objections.

Mukerji, J.—I entirely agree with my learned brother that both the appeal and the cross-objection must be dismissed.

As pointed out by my learned brother there are two points in the case; (1) whether the agreement that the mortgagees were to continue in possession of the mortgaged land inspite of the receipt of the mortgage money was a clog on redemption and, therefore, must be disregarded; and (2) whether the mortgagors should get the trees without payment?

In pursuance of an agreement in the mortgage-deed the mortgagees planted the grove. The question is whether inspite of their planting the grove, the agreement that the mortgagees were to continue in possession must be treated as unenforceable in law. The principle on which the doctrine of clog on redemption is based has its origin in the Law of England, but it has been recongnized by British Indian Legislature and although the English Law as such is not applicable to this country, the law enacted in India is to be enforced. That law is to be found in s 60 of the Transfer of Property Act. It is significant that the usual words to be found in so many sections of the Transfer of Property

(4) 61 Ind. Cas. 812; 19 A. L. J. 573; 43 A. 636.

Act, namely, 'in the absence of a contract to the contrary' do not find any place in s. 60 of the Transfer of Property Act. The rule enacted thereby is this. Whenever the principal mortgage-money has fallen due the mortgagor on payment to the mortgagee may require the latter (*a*) to deliver the mortgage-deed, (*b*) to deliver possession, (*c*) to re-transfer the property. This s. 60 came in for interpretation by their Lordships of the Privy Council in the case of *Mohammad Sher Khan* v. *Swami Dayal* (5) and their Lordships remarked that the language of the section was unqualified. It seems to me to be clear both on the language of the law and on authority that any agreement contained in the mortgage-deed which prevents the mortgagor from acquiring possession of the property on payment of the mortgage-money is not enforceable, and must be disregarded. The mortgagor has an absolute right to get back the property on payment. Of course, where there is a subsequent transaction which extinguishes or modifies the right to redeem which the mortgagor possesses, the matter would be different. Such a case is provided for by the second paragraph of s. 60. The first question, therefore, must be answered in favour of the mortgagors.

The second question is whether the mortgagors ought to have the grove without payment. Section 63 is the law on the point. The grove is an accession and, therefore, under the general law as enacted in para. 1 of s. 63, it ought to go with the land to the mortgagors. There are, however, certain exceptions enacted. The first one is that where the mortgagee has spent money to acquire an accession and the accession is capable of separate enjoyment without detriment to the principal property, the mortgagor cannot have it without paying for the same. The question is whether a grove is a property which is capable of separate enjoyment. If it be capable of separate enjoyment without detriment to the principal property the mortgagor must pay for it if he wants to get it. There can be no doubt that there are two uses of the grove. A grove involves the right to maintain the trees on the spot. It also includes a right to remove the timber. Of the two rights that exist in the holder of the grove one is capable of separate enjoyment and the other is not. If the owner of the grove wants to enjoy it with the trees standing on the spot he cannot enjoy the trees as apart from the land. On the other hand, if he wants to cut down the trees he can separately enjoy the timber. That being the case, it must be taken that the question is not capable of an answer without losing sight of the fact that a grove can be put to two uses. It is no doubt open to the person occupying the grove to say that he would not enjoy it as a grove but he would enjoy the timber. In the latter case it would be open to the mortgagee to remove the timber if the mortgagor is not willing to pay for the same. This was held by me to be the law in *Ram Brichh Singh* v. *Chhakauri Singh* (6) decided on the 27th of November 1924. A similar view was taken in the Full Bench case of *Raghu Nandan* v. *Raghu Nandan* (4).

In this particular case, the mortgagees say that they are not disposed to cut and remove the timber and they want to enjoy the grove as a grove. Now the question is whether they can do so, if the mortgagors are unwilling to pay for it. I agree with my learned brother that the mortgagees cannot enjoy the grove apart from the land itself. That being the case the grove must go with the land. I have already stated that here the mortgagees are unwilling to cut and remove the timber.

The next question is whether we can compel the mortgagors to pay for the grove, that is to say the trees as they are standing on the spot. There are two cases in which the mortgagor can be compelled to pay for the accession, namely, (1) where the accession is necessary for the preservation of the property and (2) where the accession was acquired with the assent of the mortgagor. This is a case in which the accession was acquired with the assent of the mortgagors. The mortgagors not only said that the mortgagees might plant a grove but they promised that they would not take back the land at all. In the circumstances the mortgagors must pay compensation.

(5) 66 Ind. Cas. 853; 20 A. L. J. 476; 30 M. L. T. 220 9 O. L. J. 81; 42 M. L. J. 584; 25 O. C. 8; 35 C. L. J. 468; 24 Bom. L. R. 695; (1922) A. I. R. (P. C.) 17; 44 A. 185; (1922) M. W. N. 378; 4 U. P. L. R. (P. C.) 50; 28 C. W. N. 79; 49 I. A. 60 (P. C.).

(6) 86 Ind. Cas. 929.

By the Court.—The decree of the Court below is maintained and the appeal and the cross-objections are dismissed with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 37 OF 1924.

December 1, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

KOKAMAL MADHORAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

GULABSING GURUDATSING—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of pleadings—New cause of action, whether can be put forward.

The most important rule relating to the amendment of a plaint is that a plaintiff cannot by amendment be allowed to substitute one plaint for another. However leniently the rules regarding the amendment of pleadings in this country should be construed to prevent a failure of justice, it would impede the administration of justice if this particular rule were not strictly observed. [p. 483, col. 2.]

Plaintiff sued as a principal on a contract alleged to have been made with him by the defendants for the import of certain goods on *c. i. f.* terms. During the course of the trial the plaintiff wanted to sue as the defendants' agent who had on the receipt of the shipping documents cleared and delivered the goods to the defendants:

Held, that the claim which the defendants wanted subsequently to put forward was based on an entirely new cause of action and that the plaintiff could not be allowed to put forward that claim in the suit as originally brought and that consequently the suit must be dismissed. [*ibid.*]

Appeal from the decree of Mr. Justice Fawcett.

Mr. *Coyajee*, for the Appellant.

Mr. *Kemp*, for the Respondent.

JUDGMENT.—The plaintiff filed this suit in the Court of Small Causes, Bombay, alleging that the defendants requested him to order out aniline dyes on certain terms as to commission.

On the account which subsisted between the plaintiff and the defendants with regard to that transaction he claimed Rs. 1,061-2-6 with interest *Kartak Sudi* 1, 1977, to *Aso Vad* 30, 1978, amounting to Rs. 145-1-6.

The defendants applied to the High Court for a transfer on the strength of an affidavit in which they alleged—

(1) that the defendants did not request the plaintiff to order out goods to them;

(2) that defendants intended for goods from an Italian firm La Iridescente;

(3) that the said firm supplied the goods to the defendants through the plaintiff as agent of the firm;

(4) that plaintiff had no right to sue in his own name since he was the agent of a disclosed principal;

(5) that the defendants had a claim against the said firm for shortage and late delivery amounting to Rs. 4,000 against the balance of price of the goods supplied. To ascertain the amount an account would have to be taken of all the goods supplied from time to time;

(6) that the defendants counter-claimed against the plaintiff for such amount as would be found due on taking such account.

The plaint, though undated, must have been filed in 1922.

On June 19, 1923, an order was made for a transfer of the suit to the High Court on the defendants depositing the amount of the claim and Rs. 400 for costs in Court.

Affidavits of documents were filed by both parties and on August 13 the defendants took out a summons for an order that the preliminary issue "whether the suit as framed by the plaintiff was maintainable" should be determined immediately.

Lengthy affidavits were filed and on August 20 the Chamber Judge, after hearing Counsel, directed that the suit should be set down for trial on September 17. Why this suit should have been given preference over the numerous older suits then waiting for trial is not apparent? The case was eventually heard for eight days before Fawcett, J., from January 18-29, 1924.

The following issues were raised:—

1. Whether the defendants' contract for certain aniline dyes out of which the suit has arisen was with the plaintiff or the firm of La Iridescente?

2. Whether the plaintiff's suit is merely in respect of the amount of custom duty and expenses incurred on those goods or is in respect of the balance of the whole account of those goods from the beginning?

3. Whether in clearing those goods the plaintiff acted as agent of the defendants?

4. Whether in the event of its being held that the plaintiff was the agent of La Iridescente either in the transaction of

clearing the goods or of the sale thereof, the plaintiff can maintain the suit?

5. Was struck out?

6. In the event of its being held that the suit is maintainable whether it was a term of the contract that the goods should be immediately shipped and delivered to defendants before *Divali* 1976 (October 1920)?

7. Whether the defendants directly or indirectly agreed with the plaintiff that the latter should supply the dye known as Kongo Red 12-B to the defendants and if so, at the price charged by him?

8. Whether the plaintiff had been guilty of late delivery?

9. In the event of its being held that goods were delivered late, are the defendants liable for the higher customs duties that had to be paid on account of such late delivery?

10. Whether the defendants are entitled to damages and if so to how much, on account of the late delivery after the goods arrived in Bombay Harbour?

11. General issue.

The learned Judge in the early part of judgment pointed out the difficulties which had arisen, first owing to the erroneous statements in the plaint, and, secondly, to the fact that there was no formal written statement on the record and no counter-claim.

However he allowed the plaintiff to go on without amending his plaint, and allowed the defendants to pursue their counter-claim without its being specifically stated in the pleadings, and observed that some rule should be framed to secure improvement in such matters, when a suit was transferred from the Small Causes Court.

The difficulties which had arisen could have surmounted if the proper proceedings had been taken in Chambers. When the summons of August 13 was before the Judge the plaintiff could have applied for a proper written statement and counter-claim, while the defendants could have asked on the strength of the documents then before them for an amendment of the plaint.

The important documents were:—

(1) Letter dated August 10 from La Iridescente to the defendants offering certain goods.

(2) Letter dated August 15 from defendants to La Iridescente accepting certain goods out of those offered and asking for five Congo Red 12-B Lion cases to be included. The letter concludes: "As arranged between us you (La Iridescente) will arrange with Mr. Gulabsingh (plaintiff) to clear the goods on arrival and deliver the same to me against payment."

(3) Sale note by La Iridescente to the defendants of the goods accepted by the defendants with the following addition: "Congo Red 12-B Lion is on special contract with Mr. Gulabsigh, therefore. I have passed these orders to him and shall request him to execute same at equal price and terms as 111 B 405 quality (Rs. 4-10 per lb.)"

On a reference to the account annexed to the plaint it will be found that it contains no item relating to Congo Red 12-B. As a matter of fact plaintiff sent six cases of this number to the defendants at Agra.

It is difficult to find any justification for the inclusion of issue No. 7 in the suit. The plaintiff had actually brought a suit in the Small Causes Court against Khimchand, who was acting as defendants' agent when the sale note of August 18 was received for the balance of Rs. 83 due on this transaction. The defendants contended that the price was Rs. 4-10-0 per lb. and not Rs. 5-2-0, and claimed in this suit to set off Rs. 203 as shown in their account of August 30, 1920, referred to by the Judge at page 89, line 13, of the Printed Book, which, however, I cannot find in the index to Exhibits at the beginning of Part III.

It was sufficiently embarrasing to deal with a plaint which had to be abandoned, and with a counter-claim which was not made in proper form and without any particulars. To deal with an item which had nothing to do with the plaintiff's claim, and of which no mention was made in the pleadings could only tend to increase the embarrassment.

It must first be noted that the plaintiff's claim was for the balance due on an account for goods supplied to the defendants at their request.

That claim failed entirely. As the Judge finds and as Exs. B, C, and A clearly show the goods were supplied to the defendants by La Iridescente. The plaintiff, however, without any amendment was allowed to continue the suit on the footing of his being an agent of the defendants to clear the goods which they had ordered from La Iridescente. Defendants wanted to show that plaintiff was the agent of La

Iridescente and not of the defendants and with this object desired to cross-examine on this question. The cross examination was disallowed on the ground that the contention was absurd in view of the agreement evidenced by Ex. C, that with the consent of the defendants, the plaintiff should clear the goods on arrival and deliver them to the defendants on payment.

At first sight it would seem clear that La Iridescente were to arrange with plaintiff to clear the goods as they arrived and deliver them to the defendants on payment, in which case the plaintiff would be the agent of La Iridescente. Mr. Kemp has pointed out that the contract was on *c. i. f.* terms and, therefore, La Iridescente had only to hand over the documents to the defendants in exchange for the price. This may have been the intention, but Ex. C says that first the agent of La Iridescente was to arrange with plaintiff to clear the goods and to deliver them to the defendants on payment. Consequently defendants should have been allowed to cross-examine the plaintiff's witnesses to ascertain what actually happened.

But to my mind it was a fatal error on the part of the learned Judge to allow the plaintiff to continue the suit on the original plaint. The written statement of the defendants was a complete answer to it, but by a continuance of the proceedings defendants were eventually barred from pressing any claim they may have had against La Iridescente for damages under the contract incurred owing to late delivery. It may be said that they might have filed an action against La Iridenscente, but the plaintiff was suing on the contract himself and consequently as long as the plaint was on the file they were justified in claiming damages against him.

Now the learned Judge might have allowed the amendment, but instead of doing that he allowed issues to be raised as if the plaint had been amended; but we cannot re-construct from the issues, the pleadings as they should have been framed before issues were raised or evidence led. We must consider ourselves whether the plaint could have been amended according to the rules which are usually observed by the Court when an application for amendment is made. The most important rule is that a plaintiff cannot by amendment be allowed to substitute one plaint for another, and the plaintiff would have had to do this for an amendment to have been of any use to him. He sued as principal on a contract alleged to have been made with him by the defendants for the import of certain goods on *c. i. f.* terms. He would then have been entitled to recover the price of the goods in exchange for the documents. No question would arise with regard to the payment of custom dues or landing charges. He wants now to sue as the defendants' agent who has on receipt of the shipping documents cleared and delivered the goods to his principal. That is obviously a claim based on an entirely different cause of action, and the plaintiff should have been told to file a fresh suit, and the present suit should have been dismissed.

This is the order we must make now. We regret it, but the only other alternative would be to direct fresh pleadings to be drawn, and to send this case back for retrial, when the evidence which we think was wrongly excluded would have to be recorded. We do not think we are justified in imposing this burden on the defendants apart from the fact that we have no desire to depart from the rule referred to above. However leniently the rules regarding the amendment of pleadings in this country should be construed to prevent a failure of justice, it would certainly impede the administration of justice if this particular rule were not strictly observed.

The history of this case is a lamentable example of what can happen when it is disregarded altogether, and a plaintiff, even without an amendment, is allowed to go to trial on some cause of action which cannot be ascertained from any definite source. The defendants are not wholly free from blame. They claimed a set-off for the small sum of Rs. 203 on a contract which was entirely outside the suit. It could only have been dealt with as a counter-claim, but from the record a considerable amount of evidence was taken on it, and the Judge has devoted a considerable portion of the judgment to the discussion whether the plaintiff could charge the defendants Rs. 4-10-0 or Rs. 5-2-0 for the six cases of dyes which he sold them.

We think, therefore, that the plaintiff must pay to the defendants only half their costs in the Court below, and all their costs of the appeal.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 506 OF 1923.
February 26, 1925.
Present:—Mr. Justice Mukerji and
Mr. Justice Boys.
RAMZAN BAKSH AND OTHERS—DEFENDANTS—APPELLANTS
versus
MUHAMMAD ISHAQ—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 12—Appeal—Limitation—Time spent in obtaining copies of decree and judgment, deduction of—Copies, when to be applied for.

Having regard to the provisions of s. 12 of the Limitation Act an appellant would be within time, if his appeal is filed within the total amount of periods granted to him, *viz.*, the initial period granted by Sch. I to the Act, plus the time requisite for obtaining a copy of the decree, plus the time requisite for obtaining a copy of the judgment. If, however, any of the two periods requisite for obtaining copies overlap each other, one of the overlapping periods will have to be left out of account. [p. 484, col. 2.]

Under the provisions of s. 12 of the Limitation Act it is open to an appellant to make an application for obtaining a copy of the judgment within the period of limitation as extended by the time spent by him in obtaining a copy of the decree and *vice versa*, and in such a case he is entitled to deduct from the period of limitation prescribed for the appeal the time spent in obtaining a copy of the judgment as well as the time spent in obtaining a copy of the decree. [*ibid.*]

Din Dayal v. *Rameshar*, 28 Ind. Cas. 366; 18 O. C. 74; 2 O. L. J. 159, *Rajani Nath Kapali* v. *Kali Mohan Das Kapali*, 38 Ind. Cas. 66; 21 C. W. N. 217 and *Mool Raj* v. *Niadar Mal*, 55 Ind. Cas. 315; 42 A. 260; 18 A. L. J. 208; 2 U. P. L. R. (A.) 54, referred to.

Second appeal from a decree of the District Judge, Allahabad, dated the 16th December 1922.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *Zamirul Haq*, for the Respondent.

JUDGMENT.—The sole question for determination in this appeal is whether the appeal presented before the lower Appellate Court was within time. That Court dismissed the appeal on the ground that it was time-barred.

The facts briefly are these:—The decree sought to be appealed against was passed on the 22nd of September 1922. The appeal was filed on the 27th of November 1922. A copy of the judgment was applied for on the 23rd of September 1922 and a notice was given of the copy being ready on the 23rd of October of the same year. The decree was for partition and had to be engrossed on a stamped paper. The successful plaintiff did not provide the stamp paper till a very late date. On the 15th of November 1922 an application was made for a copy of the decree to be appealed against. As a matter of fact, the decree was not signed by the learned Subordinate Judge who passed it till 25th of November 1922. A copy was made of the decree on the same date and was handed over to the appellant. 26th of November was a Sunday. As we have already stated the appeal was filed on the 27th of November 1922.

The learned Judge, in dismissing the appeal as time-barred has, not given his reasons very clearly, as we take it, it appears that he was of opinion that an application for a copy of the decree ought to have been made while the period of limitation initially granted by the First Schedule of the Limitation Act was yet unexpired.

To find out whether the appeal before the lower Appellate Court was within time or not, we have to look for guidance to s. 12 of the Limitation Act. Under that Act we have got three periods for computation of limitation.

The first period is the initial period granted by the several Articles of Sch. I; the second period is granted by para. 2 of s. 12 which says that the time requisite for obtaining a copy of the decree will be excluded, then the third period is granted by para. 3 of the same section; the time requisite for obtaining a copy of the judgment on which the decree is founded shall also be excluded. Giving the language its general and ordinary meaning, it would appear that an appellant would be within time, if his appeal is filed within the total amount of periods granted to him, namely, the initial period granted by Sch. I plus the time requisite for obtaining a copy of the decree, plus the time requisite for obtaining a copy of the judgment. Of course, if any of the two periods requisite for obtaining copies overlap each other, one of the overlapping periods will have to be left out of account.

The authorities on the point do not seem to be quite agreed. In *Din Dayal* v. *Rameshar* (1), it was held by Mr. Kanhaiya Lal (as Mr. Justice Kanhaiya Lal then was) that it was open to an appellant to make his application for the second copy within the period of limitation as extended by his obtaining the first copy. The same view was taken in *Rajani Nath Kapali* v. *Kali Mohan Das Kapali* (2). Coming to our High

(1) 28 Ind. Cas. 366; 18 O. C. 74; 2 O. L. J. 159.
(2) 38 Ind. Cas. 66; 21 C. W. N. 217.

Court, in *Mool Raj* v. *Niadar Mal* (3), it was remarked that an appellant was bound to apply for a copy of the decree and a copy of the judgment at one and the same time at any rate, within the initial period of limitation. So far as we have been able to examine actual dates involved in the case, the appeal was entirely time-barred at the date it was presented. In these circumstances it was not necessary for their Lordships to say that it was incumbent on an appellant to apply for copies at one and the same time and within the period provided by the First Schedule. Indeed, there is no clear provision of law to that effect to be found in s. 12 of the Limitation Act. There can be no doubt that on the merits, the decision of this Court was perfectly right.

Coming back to the facts of the case before us the appellant had 30 days plus 31 days plus 11 days total 72 days from 22nd of September 1922 within which to appeal. The appeal, filed on the 27th of November 1922, was well within these 72 days. The appeal was, therefore, presented within the period of limitation.

We allow the appeal, set aside the decree of the Court below and remand the appeal to the lower Appellate Court for disposal according to law. The costs in this Court will be paid, at all events, by the respondents. The costs in the Court below will be within its discretion. The costs in this Court will include fees on the higher scale.

Z. K. *Appeal allowed.*

(3) 55 Ind. Cas. 315; 42 A. 260; 18 A. L. J. 208; 2 U. P. L. R. (A.) 54.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 91 OF 1924.

December 6, 1924.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

IBRAHIM FAZALBHOY JOOMABHOY & Co.—DEFENDANTS—APPELLANTS

versus

INTERNATIONAL BANKING CORPORATION—PLAINTIFFS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 33—Goods ordered by Company—Bill of Exchange drawn on Agent of Company—Acceptance "for and on behalf of the Company", effect of—Agent, personal liability of.

The alleged acceptance of a Bill of Exchange must, if possible, be construed *ut res magis valeat* and not *ut res magis pereat*. Where, however, the proper construction is clear on the face of the document, there is no room for the application of this principle. [p. 487, col. 1.]

Company management is different in India to what it is in England and in the great majority of Companies the entire management rests with the Secretaries and Agents according to the terms of their agreement with the Company subject to the supervision of the Directors. [p. 488, col. 1.]

A certain Company indented certain goods from a firm in England and it was arranged that the latter firm should draw Bills of Exchange on the Company in respect of the said goods. Some of the bills in respect of the goods so indented for by the Company were drawn on the defendants who were the Secretaries and Agents of the Company. The bills were sent by the plaintiff Bank to the Company for acceptance and were accepted by the defendants "for and on behalf of the Company." In a suit by the plaintiff Bank to recover the amount of the bills from the defendants:

Held, that the form of acceptance adopted by the defendants clearly excluded the personal liability of the defendants in respect of the bills and that the plaintiff was not entitled to a personal decree against the defendants on the bills. [p. 488, cols. 1 & 2.]

Appeal from the decree of Mr. Justice Kemp.

Mr. *B. J. Desai* (with him Mr. *Munshi*), for the Appellants.

Mr. *Coltman* (with him Mr. *M. C. Setalvad*), for the Respondents.

JUDGMENT.

Macleod, C. J.—The plaintiffs stated that they were the payees and holders in due course of seven Bills of Exchange drawn in London by Alfred Mumford and Co., Ltd., addressed to the defendant firm of Fazalbhoy Joomabhoy & Co., personally and without qualification as on various dates and amounts all payable sixty days after sight. The defendant firm of Fazalbhoy Joomabhoy & Co., accepted all the bills as payable at the plaintiff Bank and signed their acceptances "for or on behalf of the Eastern Commercial Corporation."

The plaintiffs claimed that such words did not affect the firm's personal liability. The bills were all dishonoured by non-payment on their due dates.

Fazalbhoy Joomabhoy, a partner in the defendant firm, died on July 15, 1922, and the plaint was amended by making defendants Nos. 1, 2 and 3, his heirs and legal representatives, together with defendants Nos. 4 and 5, the remaining partners, the defendants on the record. The plaintiffs prayed that the defendant firm (this was wrong, as the individual partners were sued after the amendment) should be ordered to pay the sum of Rs. 58,774-13-9, the total of the bills, with

interest at eight per cent. on the various amounts from the respective due dates and notarial charges. In the written statement it was pleaded that the plaintiffs were not the holders in due course of the seven Bills of Exchange and that defendants were not liable on those bills.

Defendants were Secretaries and Agents of the Eastern Commercial Corporation Limited a Joint Stock Company and as such had power to draw, accept, endorse, negotiate and sell Bills of Exchange and *hundies*.

The Corporation had indented from Messrs. Alfred Mumford & Co., for several lots of goods by several indents and it was arranged that the latter firm should draw Bills of Exchange on the Corporation in respect of the said goods.

Some of the bills in respect of goods so indented for by the Corporation were drawn on Fazalbhoy Joomabhoy & Co. After the bills were received in Bombay, they were sent by the plaintiff Bank to the Corporation for acceptance. The Corporation, on September 2, 1920, returned the seven bills in suit duly accepted by them along with other bills drawn on the Corporation. The defendants said the bills in suit were accepted on behalf of or on account of the Corporation and the terms of the acceptance excluded the personal liability of the defendants, and amounted to a distinct disclaimer by the defendants of any personal liability and gave the plaintiff Bank sufficient notice thereof. They relied on the law or the custom of merchants in Bombay for the contention that when a bill was drawn or accepted "for or on behalf of" a Joint Stock Company by its Secretaries and Agents, that expression was meant to signify that the bill was drawn or accepted on behalf of or on account of the Company, and excluded the personal liability of the Secretaries and Agents so signing on behalf of the Company. After the plaint was amended defendants Nos. 1, 2, 3 and 5 put in a written statement in identical terms.

At the trial the following issues were raised:—

(1) Whether plaintiff Bank were holders in due course for value?

This was admitted by defendants' Counsel.

(2) Whether acceptance of defendants was on account and on behalf of the Eastern Commercial Corporation, Ltd.?

The answer was, the defendants have accepted the bills and are liable as acceptors.

(3) Whether according to custom and usage in Bombay signature of one Agent for or on behalf of the Joint Stock Company does not signify the bill is due or accepted on behalf of the Company?

(4) Whether the said form of acceptance and signature on the bills in suit is not by law or usage a distinct disclaimer of defendants' personal liability?

The answer to these two issues was that evidence of the mercantile usage sought to be proved did not affect the case.

Accordingly the defendants were held liable for the amount remaining due on the bills.

No oral evidence was led and the only documents exhibited were the drafts, a statement of advances made against the drafts, and a statement of accounts.

The Judge says that it was admitted that the bills were drawn against certain yellow metal sheets consigned to the Corporation, and that there were prior consignments, the bills in respect of which were drawn on the Corporation. It is unfortunate that a specimen of one of these bills was not exhibited. But in the absence of any evidence we may assume that the bills in suit were drawn on the defendants by inadvertence, and that the defendants accepted them in the way they did under the belief that they were drawn as usual on the Corporation. They could not possibly have intended to accept the bills themselves.

Under s. 33 of the Negotiable Instruments Act no person except the drawer of a Bill of Exchange can bind himself by an acceptance.

On the face of the bill we may say at once that there was no acceptance by the defendants' firm on whom they were drawn; the acceptances were by the Corporation as strangers to the bills, and the plaintiff Bank should have at once noticed the defect and taken such steps as were possible to get it remedied.

The learned Judge remarked that the sole question was whether there was any acceptance by defendants, or did they intimate by the term of their signature that they were not accepting. An acceptance on the Company's name of a bill drawn on themselves would not be an acceptance at all.

We agree and we also admit the principle to be followed in such cases as this,

that we should construe the document if we possibly can *ut res magis valeat* and not *ut res magis pereat*. But if the proper construction is clear on the face of the document there is no room for applying the principle. Were these bills accepted in the Company's name? Counsel was asked in the course of the argument how a bill drawn on the Company would have been accepted, and he had to admit the bill would have been accepted in exactly the same way as the bills in suit. It is difficult to see, therefore, how there is any room for ambiguity. If the defendants, when accepting a bill drawn on the Company, accepted it in this form, that form must be taken as excluding their own personal liability, and yet when they accept a bill drawn on themselves in the same form it is argued that they have not excluded their personal liability. The same words cannot have a different meaning according as the bill is drawn on the Company or on the defendants. Counsel would be forced to admit that the defendants were liable personally on the other bills drawn on the Company and accepted by them.

The Judge mainly relied on the cases of *Mare* v. *Charles* (1) and *Herald* v. *Connah* (2). Neither of those cases by itself would support his conclusion, but he appears to have considered that their cumulative effect would be sufficient. In the first case a bill was drawn on one William Charles and accepted by him as follows: "Accepted for the Company. Payable at the Union Bank, William Charles Purser." Lord Campbell, C. J., pointed out that if the words of an instrument could reasonably bear an interpretation making it valid, they must construe them so as to make it valid, and William Charles must be taken to have intended to accept and not to refuse a bill drawn on himself. Unless he accepted the bill drawn on him personally in the sense that he rendered himself personally liable, he did not accept at all. On any other construction what he wrote on the bill must have amounted to a refusal to accept it. But it was clear he intended that the bill should not be dishonoured but accepted and they must construe what he had written *ut res magis valeat*. For, no person could, by accepting a bill drawn on another, alter the contract between the drawer and drawee. There must be a distinct disclaimer of personal liability, *e. g.*, where the defendant signed "per proc," and those words were by mercantile usage equivalent to a signature of the person for whom the "per procurator" signed.

In *Herald* v. *Connah* (2), a Bill of Exchange was drawn on Henry Connah, General Agent of L'Unione Compagna D'Assinagione and was accepted thus: "Accepted, payable at 8 York Street, Manchester, on behalf of the Company, H. Connah." The judgment of Bramwell B. is instructive as showing that owing to the special circumstances of the case, notably the fact that the Company was carrying on business abroad, the Court was determined if possible to make the defendant liable. He said:

"We must look to the instrument itself, and see what the parties intended, as that intention appears on the face of the document...I agree with the remark that has been made, that it may be there is no valid acceptance; but it is to be presumed in favour of a valid acceptance, unless the acceptor unmistakably notifies that he is not accepting in accordance with the effect of the draft...Now I hold that the right way for a person who is accepting for another, to notify that he is so accepting, is for him to use such words as 'accepted for' or 'per proc.'...The natural meaning of the words 'on behalf of' is that the defendant accepted as between himself and the Company for their account, but that he did accept it.'

The learned Baron would, I presume, have held that defendants in this case had excluded their personal liability. But whatever authority those cases may have had before 1882, the question with regard to the liability of a person signing a bill is set at rest in England by s. 26 of the Bills of Exchange Act:—

"(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an Agent, or as filling a representative character, does not exempt him from personal liability."

(1) (1856) 5 El. & Bl. 978; 25 L. J. Q. B. 119; 2 Jur. (N. S.) 234; 4 W. R. 257; 119 E. R. 745; 26 L. T. (o. s.) 238; 103 R. R. 831.
(2) (1876) 34 L. T. 885.

Section 28 of the Negotiable Instruments Act, 1881 is much to the same effect, only it enacts when an Agent is liable personally.

It is doubtful, however, whether these sections really apply when the question is whether the acceptance on the document is the acceptance of the drawee. Just as Bramwell, B. in *Herald* v. *Connah* (2) took into account that the bill was drawn on a foreign Company, so in this case we have to consider the circumstances in which these bills were accepted so as to ascertain whether the defendants must be taken to have intended to accept and not to refuse a bill drawn on them, or whether they have unmistakably notified that they were not accepting in accordance with the effect of the draft. It seems unfortunate that the Judge did not allow evidence with regard to the status of "Secretaries and Agents" to a Joint Stock Company in India. But it may be taken as common knowledge that Company management is different in India to what it is in England and that in the great majority of Companies the entire management rests with the Secretaries and Agents according to the terms of their agreements with the Company subject to the supervision of the Directors. When, therefore, the defendants used the form of signature which they used when acting as Secretaries and Agents for the Corporation, and especially when accepting the prior bills drawn on the Company, can it be a reasonable interpretation that they intended to make themselves personally liable for the bills, and is it not perfectly clear that they unmistakably notified that they were not accepting in accordance with the effect of the draft? I may put it in another way. If the plaintiffs had taken the bills to their Solicitor after acceptance and asked him whether the bills had been duly accepted, he must inevitably have advised them that the acceptances were not in order. Whether the signature is a repudiation of personal liability is one for the Court to decide. But the learned Judge concludes by saying that the defendants cannot avoid the conclusion to be drawn from the statement in their letter of September 2, 1920, which contains these words: "We are herewith sending you the above draft duly accepted by us," that the acceptance whether by the Company or by themselves is a good acceptance. The letter was annexed to the original written statement of the defendants but was not exhibited at the hearing nor was it relied on during the argument before us. Clearly it does not carry the case any further as the letter is signed in the same form as the acceptances. Fully recognizing that we should, if we possibly can, give effect to the principle of construing these acceptances *ut res magis valeat*, we are constrained to hold that there was no acceptance by the defendants of the bills in suit.

Appeal allowed and suit dismissed with costs in both Courts.

Crump, J.—I agree.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 19 OF 1922.

March 2, 1925.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

FIRM JHANDU LAL-MITTHU LAL —PLAINTIFF—APPELLANT

versus

Musammat WILAYATI BEGUM AND OTHERS—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 76 (b)—Bill of Exchange accepted by drawer—Presentment, whether necessary—Presentment before maturity, validity of—Endorser, whether can waive presentment—Promise to pay, effect of.

A Bill of Exchange comes to maturity on the expiry of the period of grace and no presentment of the bill is valid unless it is made after the bill has reached maturity. [p. 489, cols. 1 & 2.]

Where a person is himself the drawer and the acceptor of a Bill of Exchange it is open to a holder of the bill to treat it as a promissory note and the drawer would be liable on the bill whether there was presentment of the bill or not. [p. 489, col. 2.]

All the provisions relating to the presentment of a Bill of Exchange are made for the protection and benefit of the party who is liable on the bill and it is open to such a party to waive a presentment for payment. [*ibid.*]

Where a Bill of Exchange is presented to an endorser before it reaches maturity and he makes an oral promise to pay the bill after a certain period of time, the presentment itself is not valid but the promise by the endorser to pay the money can be treated as an undertaking to pay without any further presentment of the bill and presentment is consequently unnecessary in such a case. [p. 490, col. 1.]

First appeal from a decree of the Additional Subordinate Judge, Agra, dated the 17th September 1921.

Mr. *Iqbal Ahmad*, Dr. *K. N. Katju*, Messrs. *S. B. Johari* and *B. Dayal*, for the Appellant.

Messrs. *Muhammad Ulla* and *N. P. Asthana*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit which was brought on a *hundi*. The document in suit is printed at page 27 of our record and it appears that it was drawn on the 25th September 1918 by a person named Muniruddin. Muniruddin drew on himself and also accepted the *hundi* on the date just mentioned. He afterwards delivered it to a person named Muhammad Hussain who negotiated it with the plaintiff firm and obtained cash therefor. The amount of the *hundi* was Rs. 8,500.

The suit out of which this appeal has arisen was brought by the plaintiff firm against the legal representatives of Muhammad Hussain who is dead and against the drawer and acceptor, Muniruddin.

In the Court below the suit has been decreed against Muniruddin but it has been dismissed as against the representatives of Muhammad Hussain. The basis of the judgment is this, namely, that there was no proper presentment of the bill for payment so as to render Muhammad Hussain liable as an endorser.

The plaintiffs now appeal, and the argument is that the decision of the Court below is wrong.

We may mention here that an application has been made to this Court to admit additional evidence in the case in the shape of a letter. This application is made for the purpose of proving to the Court that the bill in suit was an accomodation bill; in other words, that Muniruddin drew and accepted the bill without valuable consideration. He did so merely for the purpose of enabling Muhammad Hussain to raise money on it.

It is stated that this evidence only became available after the suit had been decided in the Court below.

After hearing the arguments in the case, however, we are of opinion that there is no necessity to admit any additional evidence in the case. Whether the bill was an accomodation bill or not does not appear to us to make any difference to the legal situation of the parties.

We have now to consider what took place in the matter of presentment for payment. The *hundi* was declared to be payable 359 days after the 25th September 1918. It, therefore, came to maturity on the expiry of the period of grace, that is the third day after the 19th September 1919, that is to say, on the 22nd September 1919.

Now the only evidence regarding presentment is to be found in the statement of Chandan Lal who is a partner in the plaintiff firm, and according to Chandan Lal's story he presented the bill for payment to the drawer Muniruddin and also to the endorser Muhammad Hussain on the 19th September 1919.

We agree with the learned Judge of the Court below that this was not a good presentment in law for no presentment is valid unless it is made after the bill was reached maturity. The bill had not reached that stage on the 19th September 1919. There was, therefore, no valid presentment.

As against Muniruddin we think the Court below was right in granting a decree for, in any view, it appears to us that he was liable whether there was presentment or not. In the form in which the bill was drawn, Muniruddin himself being drawer and acceptor, it was open to the holder to treat the document as a promissory note, and we have the further fact that Muniruddin has not appealed against the decree of the Court below.

There remains the question of the liability of the endorser Muhammad Hussain.

Mr. Iqbal Ahmad who appears on behalf of the plaintiff-appellant relies upon the terms of s. 76 (*b*) of the Negotiable Instruments Act. This section and clause lay down that no presentment for payment is necessary, as against any party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment.

There can be no doubt that a party to a Bill of Exchange can waive a presentment for payment as all the provisions relating to presentment are made for the protection and benefit of the party liable.

In support of his argument, Mr. Iqbal Ahmad relies upon the statement of Chandan Lal, which is uncontradicted and which we have no reason to disbelieve. Chandan Lal's statement is that on the 19th of September he went first of all to the house of Muniruddin with the *hundi*. He showed the *hundi* to Muniruddin and asked for payment. Muniruddin told him to go to Muhammad Hussian saying that he did not think that Muhammad Hussain would be likely to pay as sales were slow and the money was locked up in business.

Chandan Lal says that he then went to

Muhammad Hussain with the *hundi* and said :—

"Please pay this mony, I have come here after seeing Muniruddin ; he (Muhammad Hussain) said, the money is not procurable at present, you may charge interest at the rate of 13 annas per cent. I shall pay the money in a year or six months when it is received."

Mr. Iqbal Ahmad contends that if this evidence is believed it is sufficient proof of a waiver of presentment for payment on the part of the endorser, Muhammad Hussain.

On the other hand, it is argued on behalf of the respondents that cl. (*b*) of s. 76 cannot be applied in the light of this evidence because it is not made to appear that Muhammad Hussain engaged to pay "notwithstanding non-presentment." The contention of the learned Advocate for the respondents is that unless the fact of the engagement is disclosed in the endorsement made in the present case the evidence before us could not be treated as evidence of an engagement to pay notwithstanding non-presentment.

It seems to us that this is putting too narrow a construction on cl. (*b*) of s. 76, and we think that if there is reliable evidence before us of a parol promise on the part of the endorser to pay the note that is sufficient. We think we may fairly say that when Muhammad Hussain informed the holder that he would pay the money in a year or six months when he had it available, that was an undertaking to pay without any further presentment of the bill.

We are of opinion that the plaintiff firm ought to succeed in this appeal and that a decree should have been passed also against the legal representatives of Muhammad Hussain. We, therefore, allow this appeal and substitute for the decree of the Court below a decree against all the defendants with costs including in this Court fees on the higher scale. It is, of course, to be understood that the decree, in so far as it concerns the legal representative of Muhammad Hussain, can be executed only against the assets of Muhammad Hussain in the hands of these persons.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.
FULL BENCH.

APPEAL FROM ORDER No. 7 OF 1923.

October 17, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, Mr. Justice Marten, Mr. Justice Fawcett, Mr. Justice Mulla and Mr. Justice Kincaid.

ATMARAM SAKHARAM KALKYE—PLAINTIFF—APPELLANT

versus

VAMAN JANARDAN KASHELIKAR—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 122, 123, 126—Deed of gift—Execution—Attestation—Acceptance—Revocation before registration, validity of—Registration, subsequent, effect of.

Per Full Bench (*Shah, A. C. J.* and *Mulla, J.*, dissenting).—Where a gift of immoveable property has been effected by means of an instrument signed by the donor and duly attested and accepted by the donee, it is not competent to the donor to revoke the gift before the instrument is registered. [p. 503, col. 2; p. 504, col. 2; p. 508, col. 1.]

Per *Shah, A. C. J.* and *Mulla, J.*—It is competent to a donor to revoke a gift of immoveable property before the instrument is in fact registered and the subsequent registration of the instrument against the wishes of the donor does not make the revocation ineffective. [p. 495, col. 2.]

Per *Shah, A. C. J.*—The essentials of a completed gift are that a transfer of the property should be made voluntarily and without consideration by an instrument which is signed by or on behalf of the donor and attested by at least two witnesses and which is registered, that is, registered in British India under the law for the time being in force regulating the registration of documents and that it should be accepted by the donee. Until all these conditions are fulfilled the gift is incomplete. So long as the transfer is incomplete it is open to the donor to resile from it and to cancel what he may have done. The gift is incomplete according to law so long as the document is not registered, and it is open to the donor to revoke it before it is completed. [p. 495, col. 2.]

Per *Mulla, J.*—The registration prescribed by s. 123 of the Transfer of Property Act is not mere evidence of the gift but is part of the gift itself. It is a necessary part of the proposition that a gift has been effected. It is not mere evidence to prove that there has been a gift, but it is a fact to be proved to constitute the proposition that there has been a gift. [p. 503, col. 2.]

Section 126 of the Transfer of Property Act applies only to a "gift", that is, a gift made in the manner prescribed by s. 123 of the Act. Where there is no such completed gift s. 126 has no application. [p. 507, col. 1.]

Appeal from an order of the First Class Subordinate Judge at Ratnagiri, in Appeal No. 224 of 1921, reversing that of the Subordinate Judge at Rajapur, in Civil Suit No. 226 of 1920.

ORDER OF REFERENCE TO A FULL BENCH.

Shah, Actg. C. J.—The facts which

have given rise to this appeal are these:—

Plaintiff No. 1, Sakharam Keshav Kalkye, executed a deed of gift in favour of defendant No. 1 on September 17, 1917, in respect of his several moveable and immoveable properties. At that time plaintiff No. 1 had no son. Soon after this deed of gift, defendant No. 1 attempted to go and live with plaintiff No. 1. There was a dispute between the parties and criminal proceedings were initiated on September 30, 1917, by plaintiff No. 1 against defendant No. 1 for criminal trespass. The deed was presented for registration by defendant No. 1 on September 26, 1917, but plaintiff No. 1 did not appear before the Sub-Registrar and the Sub-Registrar refused to register the deed, on October 3, 1917, treating the conduct of plaintiff No. 1 as being equivalent to a denial of the execution of the document. Defendant No. 1 appealed to the Registrar. During the course of the hearing before the Registrar plaintiff No. 1 appeared but resiled from his action and denied execution. The Registrar ordered it to be registered in November 1917 and accordingly it was registered on December 18, 1917. Subsequently plaintiff No. 1 adopted plaintiff No. 2 and both of them filed the present suit on August 7, 1920, to set aside the deed of gift and for possession of the property described in the plaint, alleging that the deed of gift was invalid and that it was fraudulently obtained from plaintiff No. 1 who was a weak-minded man. Defendant No. 1 pleaded that plaintiff No. 1 had executed the deed willingly and with full knowledge of the contents of the document and that it was not obtained by any undue influence or in a fraudulent manner and that as the deed was registered, the gift was valid. On these pleadings issues were framed, but after examining the parties, the Trial Court framed a preliminary issue in these terms: "Is the gift deed valid as its registration took place without the consent of the donor"? The learned Trial Judge found in the negative on this issue and also recorded findings on Issues Nos. 1, 3 and 5. Issues Nos. 1 and 3 related to the adoption of plaintiff No. 2 with which we are not concerned. But as a result of the finding on the preliminary issue the learned Judge held that the plaintiffs were entitled to cancel the deed of gift and accordingly passed a decree in favour of the plaintiffs.

Defendant No. 1 appealed. The First Class Subordinate Judge with appellate powers found that the deed of gift relied upon by the defendant was not invalid on the ground of the absence of consent of the donor to its registration. He accordingly reversed the decree of the Trial Court and remanded the suit for trial on the merits.

The plaintiffs have appealed to this Court from this order of remand. It is urged in support of the appeal that is not merely a question of want of consent to the registration on the part of plaintiff No. 1 and that in fact it is a case of revocation of the gift before the document was registered. In support of this his conduct immediately after the deed is relied upon as showing that it indicated revocation of the gift on his part. Further it is urged that it was competent to plaintiff No. 1 to revoke the gift before it was completed, and that the gift would not be complete until the document was in fact registered whether with or without the consent of the donor. In support of this contention reliance is placed upon the decision in *Subba Rama* v. *Venkatasubba* (1).

On behalf of the respondents it is urged that plaintiff No. 1 did not in fact revoke the gift, that it was not competent to him to revoke it, and the fact that the document was ultimately registered makes it effective as from the date of the document, that is, from September 17, 1917. Several decisions have been relied upon by Mr. Shingne in support of the contention that the consent of the donor to the registration is in no way essential and that the registration, when it is effected in accordance with the provisions of the Indian Registration Act, whether with or without the donor's consent, becomes effective against the donor. The decisions relied upon in support of this proposition are *Khushaba* v. *Chandrabhagabhai* (2), *Parbati* v. *Baijnath Pathak* (3) and *Venkati Rama Reddi* v. *Pillati Rama Reddi* (4). In addition to these cases I may also refer to the decision in *Bhabatoosh Banerjee* v. *Soleman* (5) and the differing judgments in *Parbati* v. *Baijnath Pathak* (3) which were considered in appeal

(1) 80 Ind. Cas. 477; 26 Bom. L. R. 427; 48 B. 435; (1924) A. I. R. (B.) 434

(2) 32 B. 441; 10 Bom. L. R. 536.

(3) 14 Ind. Cas. 61; 9 A. L. J. 300 on appeal 16 Ind. Cas. 406; 35 A. 3; 10 A. L. J. 300.

(4) 38 Ind. Cas. 707; 40 M. 204; 31 M. L. J. 690; 4 L. W. 465; 20 M. L. T. 450; (1917) M. W. N. 112.

(5) 33 C. 584; 10 C. W. N. 717; 4 C. L. J. 340.

in the case *Parbati* v. *Baijnath Pathak* (6). As regards the decision of this Court in *Subba Rama* v. *Venkatasubba* (1) it is contended by Mr. Shingne that it does not lay down the law correctly, and that the *ratio decidendi* of that case is not consistent with the reasoning underlying the other cases above referred to, and that the question as to whether it is competent to a donor to revoke the gift before the document is registered may be considered by a Full Bench.

As regards the first question as to whether in fact this is merely a case of not consenting to the registration or a case of real revocation of the gift before the document was in fact registered, we have come to the conclusion that it is a case of revocation before the document was in fact registered. This position was not seriously challenged by Mr. Shingne though not conceded. The criminal proceedings which were immediately initiated by plaintiff No. 1 and also his refusal to consent to registration clearly indicate that he wanted to revoke the gift and did in fact do so. I may mention that in the lower Courts this question has not been considered. The case has been considered on the basis whether the absence of the donor's consent to registration is sufficient to invalidate the gift. If it were merely a case of absence of such consent, I shoutd not feel any difficulty in following the current of decisions above referred to. But when the donor goes further than merely withholding his consent to registration so as to justify the inference of revocation before actual registration, a difficult question arises, *viz.*, whether the revocation is effective in law in view of the fact that the document has been subsequently registered.

"Gift" is defined by s. 122 of the Transfer of Property Act, and s. 123 provides that for the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. In the present case the instrument was executed on September 17, 1917, and the gift would be complete when the document is registered. If the gift is not complete until the document is registered, it is clear to my mind that it would be open to the donor to revoke it before registration. An incomplete gift can, of course, be revoked by the donor at any time: See *Standing* v. *Bowring* (7). In the words of Batty, J., in *Joitaram* v. *Ramkrishna* (8) "the essential to the validity of a gift seems to be...that the donor should have done all he could do to complete the gift." The gift would be incomplete so long as registration is not effected. It is quite true that the law of registration does not require that the executing party must be a consenting party at the time of registration. It may happen at the time of registration, according to that law, that either the donor's consent may be given on his behalf by some one else or registration may be ordered in spite of his not consenting to the registration. These positions are possible under the Indian Registration Act. All that the cases which I have referred to decide is that it is not essential to the validity of the gift of immoveable property that the registration of the deed by which such gift is effected should be either at the instance of or with the consent of the donor. That was the only point decided in *Parbati* v. *Baijnath Pathak* (3). In *Venkati Rama Reddi's case* (4) the question decided by the Full Bench was whether a deed of gift registered by the donee after the death of the donor without the consent of the legal representative of the donor was valid. That is practically the point decided in *Khushaba* v. *Chandrabhagabai* (2); and in effect nothing more is decided in *Bhabatoosh Banerjee* v. *Soleman* (5). I accept the conclusion reached in these cases that it is not essential to the validity of a gift of immoveable property, to which s. 123 of the Transfer of Property Act applies, that registration should be effected with the consent of the donor. But I do not think that the question whether the donor can revoke the gift before the document is in fact registered arose or was considered in any of these cases. The question was considered by this Court in *Subba Rama* v. *Venkatasubba* (1) and it was held that until the document was in fact registered the gift was inchoate and that it was open to the donor to revoke it before it was completed by registration. It is true that in that case the deed was not in fact registered before the dispute arose: and to that extent it can be differentiated

(6) 16 Ind. Cas. 406; 35 A. 3; 10 A. L. J. 300.

(7) (1886) 31 Ch. D. 282; 55 L. J. Ch. 218; 54 L. T. 191; 34 W. R 204.

(8) 27 B. 31 at p. 38; 4 Bom. L. R. 754.

from the present case. The question is whether the ordinary rule applicable to the law of gift that until the gift is completed, it is open to the donor to revoke it is in any way affected by the provisions of the Indian Registration Act under which it is possible that the document can be registered without the consent of the donor at the time of the registration. I do not think that it would be right to apply the provisions of the Indian Registration Act in that way to the rules relating to the law of gift. It is a Statute relating to the registration of documents generally, and has no direct connection with the law of gift. When the law provides that a gift of immoveable property can be effected only by a registered instrument, the stage of completion of the gift is marked by the actual registration. Up to that time it is open to the donor to revoke the gift. It does not matter to my mind whether registration in fact is ordered at the instance of the donor or against his wishes. It is open to the donor to revoke the gift before it is complete, and it is difficult to see how that rule can be affected by the mere fact that registration is possible according to the Indian Registration Act without the consent of the donor, and further that registration, when it is effected, makes the document effective as from the date of its execution. In such cases the question must be whether the donor has merely witheld his assent to the registration or has gone beyond that stage and revoked the gift. Where he has merely withheld his consent and has done nothing more to indicate that he revokes the gift, the cases which I have already referred to would apply. But where he goes beyound that stage and indicates a clear intention on his part to revoke the gift the revocation should be and would be effective despite the fact that registration is subsequently ordered according to the rules of the Indian Registration Act. It is quite true that in *Subba Rama* v. *Venkatasubba* (1) the act of revocation was absolutely unequivocal and beyond question. In the present case it is not so clear. The present suit was filed long after the registration was in fact effected. But the principle is the same as to whether it is open to a donor to revoke a gift before the document is in fact registered. If it is open to a donor to revoke the gift before registration, it must be determined on the circumstances of each case whether in fact he has revoked it before that stage is reached. In the present case the lower Courts have not appreciated this difference between revocation and mere absence of consent to registration. The difference would be real in many cases; and the question of law that arises for consideration in this appeal is of practical importance. I find it difficult to hold that the *ratio decidendi* in *Subba Rama* v. *Venkatasubba* (1) conflicts with the other cases I have referred to in this judgment. But there are observations in the various judgments indicating that the power to revoke before registration would be ineffective when the document is in fact registered and takes effect according to the provisions of the Indian Registration Act as from the date of its execution. This point was not considered and decided in *Subba Rama's case* (1) but the *ratio decidendi* of that case is in favour of the view that it is open to the donor to revoke the gift, and that the revocation cannot be affected by the subsequent registration of the donee contrary to the wishes of the donor. Under the circumstances I think that the following questions should be referred to a Full Bench for decision:—

(1) Was it competent to the donor to revoke the gift of immoveable property before the instrument was in fact registered?

(2) If so, whether, the subsequent registration of the document against the wish of the donor makes the revocation ineffective?

Fawcett, J.—In my opinion there is a conflict of view, which vitally affects the decision of this appeal. The first view is that, when an intending donor has executed a deed of gift, attested by at least two witnesses, he has (so far as he is concerned) done all that he need do towards completing the gift, inasmuch as the subsequent registration can be effected without his co-operation and even against his consent, therefore, the doctrine that a donor can revoke an incomplete gift has no application to such a case, and he has no *locus pœnitentiæ* between the time of execution of the document, and the time of its registration.

This view has, it seems to me, been clearly adopted by the High Courts of Madras and Allahabad in *Venkati Rama Reddi* v. *Pillati Rama* (4) and *Parbati* v. *Baijnath Pathak* (3). Both of these cases dissent from *Ramamirtha Ayyan* v. *Gopala*

Ayyan (9) where the exact point now before us arose, as stated in the passage from the lower Appellate Court's judgment which is cited at page 434, and both of these decisions hold that the law was not correctly laid down in that case. The Allahabad decision also expresses agreement with the judgment of Chamier, J., who expressly rejected this theory of the donor having a *locus pœnitentiœ* prior to registration of the instrument: See *Parbati* v. *Baijnath Pathak* (3).

Though the remarks on the point are perhaps *obiter dicta* yet the following passge from Batchelor, J.'s judgment in *Kushaba* v. *Chandrabhagabai* (2) distinctly favours the same view (page 444*) :—

"It must be remembered moreover that here the donor had done all that it was required of him to do in order to make the gift, and the subsequent registration could have been effected without any co-operation on his part. Further the deed of gift was registered afterwards, and on registration it operated as from the date of execution; and this, we think, is an answer to the technical objection that there was no acceptance of a registered instrument."

The second view is that adopted by this Court in *Subba Rama* v. *Venkatasubha* (1) and the Madras High Court in the overruled case of *Ramamirtha Ayyan* v *Gopala Ayyan* (9), *viz.*, that the gift is incomplete until the deed has been registered, and the donor can revoke the gift prior to registration.

There being thus two contrary views adopted by different Benches of this Court, and the point being of general importance. I think it should be referred to a Full Bench and concur in the Reference proposed by the learned Chief Justice.

I am inclined at present in favour of the first view. It seems to me that, when the donor has executed a deed, which will be effectual to vest the gift in the donee if it is registered and if the donee accepts the gift, then the stage of an inchoate or incomplete gift has been passed, registration being a subsequent operation independent of his consenting to it. It is an entirely different case to one of a gift *resting merely in promise or unfulfilled intention*, which under English Law can be revoked at any time: *Cf.* Halsbury's Laws of England, Vol. XV, Art. 852 at page 428. I also think that, if the Legislature had intended that a donor should have such a *locus pœnitentiœ* provision would have been made for it, before saying in s. 126 of the Transfer of Property Act, 1882, "save as aforesaid, a gift cannot be revoked." I do not think the argument used in *Subba Rama* v. *Venkatasubba* (1) that a donor can revoke a gift which is not accepted by the donee and is, therefore, an inchoate gift, is conclusive against the application of s. 126 to an incomplete gift in the sense of a gift by an instrument which has not been registered. English Law lends no support to the view that a donor can revoke a gift that is otherwise complete, before the donee knows of it: and accepts it: the case of *Standing* v. *Bowring* (6) in fact decides that he cannot. So far as I am aware, there is no authority to the contrary in India: and, therefore, the statement of Macleod, C. J. that "if the donee has not accepted the gift, clearly it is not complete, and the donor can revoke it" is open to serious criticism: *Cf.* Halsbury's Laws of England, Vol. XV, Art. 830 at page 418. But even supposing s. 126 refers only to complete gifts, in the sense of gifts fully effected in the manner stated in s. 123, my present opinion, for the reasons already given, is that there is no *locus pœnitentiœ* for the donor between execution and registration. I may add that under English Law a deed of gift, which has been formally sealed and delivered, cannot ordinarily be revoked, even though it still remains in the possession of the executing party (Halsbury's Law of England, Vol. XV, Art. 831 at page. 418). In the present case the donor went further and handed over the instrument to defendant No. 1, who presented it for registration. It is not, therefore, a case, where it can be said the donor omitted to do anything which was necessary to be done in order to transfer the property and render the gift binding upon him, to use the language of Turner, L. J , in *Milroy* v. *Lord* (10) cited in *Behari Lall Ghose* v. *Sindhubala Dassi* (11). It might have been different, if he had not parted with possession of the instrument, for in that case it could not have been presented for registration without his consent. The necessity of registration supplies a reason for saying that the English

(9) 19 M. 433; 6 M. L. J. 207; 6 Ind. Dec. (N. S.) 1007.

(10) (1862) 4 Deg. F. & J. 264; 31 L. J. Ch. 793; 8 Jur. (N. S.) 806; 7 L. T. 178; 45 E. R. 1185; 135 R. R. 135.

(11) 41 Ind. Cas. 878; 45 C. 434 at pp. 439, 440; 22 C. W. N. 210; 27 C. L. J. 497.

* Page of 32 B.—[*Ed.*].

rule mentioned at the beginning of this paragraph cannot properly be applied in India.

I agree with my learned brother that in the present case the evidence clearly shows that the donor revoked the gift before the document was registered, and as to the form of the two questions to be referred to the Full Bench for decision.

Mr. *A. G. Desai*, for the Appellants.

Mr. *P. B. Shingne*, for Respondent No. 1.

JUDGMENT OF THE FULL BENCH.

Shah, Actg. C. J.—The questions arising on this Reference have been fully and ably argued on both sides. I have already indicated in my referring judgment the view to which I was inclined then, and my reasons for that view. It is not necessary to repeat the facts. I have considered the arguments on both sides and after giving my best consideration to the arguments, my opinion is that question No. 1 should be answered in the affirmative, and question No. 2 should be answered in the negative.

I shall briefly state my reasons for this view in the light of the arguments which have been urged before us. Chapter VII of the Transfer of the Property Act deals with gifts, and s. 122 defines "gift" as "the transfer of certain existing moveable or immoveable property made voluntarily and without consideration by one person called the donor, to another, called the donee and accepted by or on behalf of the donee." It further provides that "such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void."

Section 123 provides that "for the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses." In the case of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

In the present case, we are concerned with a gift of immoveable property and it seems to me to be the clear effect of these two sections that until the document is registered the gift is incomplete in law even though the other two conditions as to the instrument being duly signed and attested and as to acceptance are satisfied. The essentials of a completed gift, according to these sections, appear to be that a transfer of the property is made voluntarily and without consideration by an instrument which is signed by or on behalf of the donor and attested by at least two witnesses, and which is registered, that is, registered in British India under the law for the time being in force regulating the registration of documents, and that it is accepted by the donee. Until all these conditions are fulfilled, according to my reading of the section the gift is incomplete.

To illustrate my meaning with reference to the essential nature of registration to complete a gift, I may put it in this way. If a document has been executed by the donor, and attested by two witnesses, and delivered to the donee, but neither party takes the trouble to get it registered according to the provisions of the Indian Registration Act, and the document remains unregistered, the gift, in my view, is incomplete, and does not take effect. The donor continues to be the owner and the donee would had no rights in the property even though the instrument is duly signed and attested and though the transfer is accepted by the donee.

The next step which I take is that so long as the transfer is incomplete, it is open to the donor to resile from it, and to cancel what he may have done. The gift, in my view, is incomplete according to law so long as the document is not registered, and it is open to the donor to revoke it before it is complete. It is a recognised rule of the law of gift that before the gift is complete the donor can revoke it. As to when the gift can be said to be complete must necessarily depend upon the law of the land. For instance, before the Transfer of Property Act, according to the view taken in this Court, the transfer of possession was considered essential to complete a gift by a Hindu, and where transfer of possession is essential, the gift would be revocable, in spite of the delivery of any written instrument to the donee before the transfer of possession is effected. Similarly, after the Transfer of Property Act, the necessity of transfer of possession to validate a gift is dispensed with, but the necessity for an instrument in writing signed by the donor and attested by two witnesses, and registered according to the provisions of the Act, is laid down. It may be mentioned that whatever be the necessity

for the transfer of possession in order to complete a gift by a Hindu before the Transfer of Property Act, the requirements of a valid gift after the Act came to be applied to this Presidency have to be determined with reference to the provisions of the Act. It is hardly necessary to refer to any authority on this point as the effect of the provisions of the Act is clear. I may mention that in *Bai Rambai* v. *Bai Mani* (12) this effect has been clearly pointed out.

In the present case, therefore, we are not concerned with the question as to whether possession of the property has been transferred or not. But we are concerned with the question as to whether there has been a transfer of property within the meaning of the Transfer of Property Act. In s. 5 "transfer of property" is defined. I may also refer to s. 9, upon which Mr. Shingne has relied, as indicating that a transfer of property may be made under the Act without writing in every case in which a writing is not expressly required by law. But in the case of a gift a writing is required by law as stated in s. 123, and it is also required to be registered.

I have already stated my reasons in the Referring Judgment for the proposition that an incomplete gift can be revoked by the donor at any time, before it is completed; or, if the use of the word 'revoke' appears inapt with reference to an incomplete gift, I would say that the donor can cancel the transaction before the transfer is effected to constitute a complete gift. The question is whether until the document is registered the gift can be said to be incomplete in the sense that it leaves the power of revocation in the donor unaffected. It is urged by Mr. Shingne for the respondents that the donor's power to revoke is at an end as soon as he has executed a document attested by two witnesses, and delivered it to the donee, and it is accepted by the donee, that the act of registration does not necessarily depend upon the volition of the executant according to the provisions of the Indian Registration Act, and that the donor having done all that he need do according to law his power of revocation is at an end. Though there has been a somewhat elaborate discussion of the provisions of the Indian Registration Act, in my view of the case, it is not necessary to deal with the provisions of the Act in detail. It is clear under the provisions, and I readily accept the proposition, that for the purposes of registration, under the Indian Registration Act, it is not essential that the document should be presented by the executant for registration, or that he should be a consenting party to the registration. The document could be presented by any person satisfying the requirement of s. 32 of the Indian Registration Act, that is, by a person executing it or by any person claiming under the document. It is also clear that registration may be effected even though the executant does not consent to registration.

The question to my mind is whether the provisions of the Indian Registration Act as regards registration can affect in any way the law which would govern transactions by way of gift, or they simply regulate the registration of the document when presented for registration. The provisions of the Transfer of Property Act as contained in the definition of the word "registered" in s. 3, and in s. 4 of the Transfer of Property Act, have no effect upon the power of the donor to revoke the gift up to a certain stage which exists independently of the provisions as to the necessity for registration of deeds of gift. I do not think that by making these provisions relating to documents requiring to be registered supplemental to the provisions of the Indian Registration Act, the Legislature could have meant to lay down anything more than this, that those documents were compulsorily registrable, though all of them may not require to be registered under the Indian Registration Act. The provisions of the Indian Registration Act, as I understand them, do not and cannot affect the question as to when the power of the donor to put an end to an incomplete gift ceases.

In determining the question under the Indian Law, it seems to me that all technical rules of English Law relating to deeds and delivery of deeds should be left out of consideration. At least they cannot help us in determining this question. In my opinion the question must be determined with reference to the Indian Law which is to be found for the purposes of this case in the Transfer of Property Act. The execution of the instrument and the delivery thereof without registration would not have

(12) 23 B. 234; 12 Ind. Dec. (N. S.) 155.

the effect of effecting the transfer or of completing the gift

I may refer to s. 126 of the Transfer of Property Act, upon which reliance has been placed on behalf of the respondents as indicating that a gift cannot be revoked except as provided in that section. That is perfectly true. But that applies to a case of a completed gift. It does not purport to lay down any rule as to the rights and powers of the donor before the stage of completion is reached.

Reference was made in the argument to the consideration that though in the case of sales and mortgages documents are required to be registered, it is not suggested that the executants would have power to revoke up to the time of actual registration. The argument based on the analogy does not, however, seem to me to be well-founded. It is perfectly true to say, with regard to those documents, as with regard to a deed of gift that the sale is not complete or that the mortgage is not complete until the document is registered, just as a gift would not be complete until the document is registered. But the vendor who has agreed to sell the property and has executed a conveyance not registered or a mortgagor who has executed as instrument duly attested as required by law but not registered cannot be said to have the power to revoke the contract. In the case of a gift, we are dealing with a transaction which is *ex hypothesi* without consideration, and the right to revoke an incomplete gift in the donor or to cancel his own act before the transfer is effected is an incident of this type of transaction.

As regards the decided cases. I do not consider it necessary to refer to them in detail now. I have considered all the cases; and my view is that, so far as they lay down that it is not essential for the purposes of valid registration that it should be with the consent of the donor, I am in complete agreement with them. But I am unable to agree, so far as the observations or the decisions go to show, that as it is not essential that the donor should be a consenting party to registration, the gift is complete so far as he is concerned as soon as he has executed a document and delivered it to the donee and it is accepted by the donee and it cannot be revoked even though registration is not effected That proposition is largely based upon the rule of English Law relating to deeds and delivery of deeds. I am very conscious that on this point the weight of judicial opinion is against the view which I take. In spite of my desire to accept that view if possible, I remain unconvinced and it becomes my duty to state the opinion which I have formed. As I consider it essential that in the case of a transaction without consideration like a gift, the points arising in this case should be determined with reference to the Indian Law, and as I do not feel any doubt in my mind that a gift is revocable on account of the very nature of the transaction, until it is completed according to law, I hold that the donor has the right to revoke the incomplete gift or to resile from his act before the document is registered. To deny that right to the donor is really to import into the provisions of the Transfer of Property Act a stage in the completion of the gift which is not contemplated or provided for by the Act itself. Shortly stated, I am still of opinion, if I may say so with respect, that the reasoning of the learned Chief Justice in *Subba Rama* v. *Venkatasubba* (1) is sound and correct.

As regards the second question, it must depend upon the view which one takes of the first question. It is clear that the document when registered would take effect from the date of its execution. But if it is open to the donor to cancel the transaction before the document is in fact registered, it follows that the fact of registration after revocation cannot affect the revocation.

Marten, J.—The questions referred to this Full Bench are in effect whether a donor of immoveable property can at any time before actual registration revoke a gift purporting to have been effected by a registered instrument signed by him and duly attested and accepted by the donee. It is common ground for the purposes of this reference that such an instrument in writing was in fact executed by the plaintiff and attested by two witnesses, and that it was handed to the defendant who accepted the same. It is also common ground that despite the plaintiff's protests the instrument was subsequently registered under the provisions of the Indian Registration Act, 1908.

It is, however, contended by the plaintiff in reliance on *Subba Rama* v. *Venkatasubba* (1) that he had power to revoke this gift at any time before actual registration

and that he did in fact so revoke it. On behalf of the defendant it is contended that this decision is opposed at any rate in principle to several decisions in other High Courts, and that it cannot be supported if the material sections of the Transfer of Property Act, 1882, and the Indian Registration Act be closely investigated.

Turning then first to the Transfer of Property Act, which was applied to this Presidency in 1893, it is material to observe that in s. 3 "registered" is defined to mean "registered in British India under the law for the time being in force regulating the registration of documents." Next, s. 4 provides that "s. 54, paras. 2, 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act.

Next, Ch. II deals with transfers of property by act of parties and it defines a "transfer of property" as meaning "an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons." Section 9 provides that "a transfer of property may be made without writing in every case in which a writing is not expressly required by law."

Then if one turns to ss. 54, 59 and 123 it will be found that in the case of certain sales or mortgages or gifts of immoveable property a registered instrument is required. Section 44 defines "sale" as "a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised." It then enacts that "such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of reversion or other intangible thing, can be made only by a registered instrument." It also provides that "a contract for the sale of immoveable property does not of itself create any interest in or charge on such property."

Turning next to mortgages, they are defined in s. 58. Then s. 59 enacts that "Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

Next we come to gifts. Section 122 defines a gift as :—

"The transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void."

Stopping there for a moment, as I have already pointed out, there was an acceptance here by the defendant donee, and moreover the document itself was handed to him. So s. 122 was complied with here.

Next we come to s. 123 which runs as follows:—

"For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered."

Section 126 provides for revocation of a gift in certain specified events which have not taken place here, and it ends as follows: "Save as aforesaid a gift cannot be revoked."

The use in s. 123 of the expression "registered instrument" has led to the argument that unless and until the instrument is registered, it is no more an instrument within the meaning of the Act than it would be if it had never been executed at all. But I think the proper way to construe this section is first of all to read the definition of "registered" into the section and then see how it stands. It would then run: "The transfer must be effected by an instrument signed by or on behalf of the donor, and attested by at least two witnesses and registered in British India under the law for the time being in force regulating the registration of documents." Moreover it is important to observe that ss. 54 and 59 use the same expression "registered instrument." I think, therefore, that that expression should be dealt with in the same way in all these three sections.

Now as regards transfers by sale or by mortgage under ss. 54 and 59, it is not contended that a vendor or a mortgagor could revoke a conveyance or a mortgage at any time before registration. And there is one very good reason for that, *viz.*, that the Indian Registration Act does not necessitate the consent of the transferor being obtained to the registration. Under

part 12 of the Indian Registration Act, the Registrar has power to register a document despite the refusal of the transferor, provided he is satisfied that it has been executed. [See s. 75 (1)]. It is only if he refuses to order registration that there is an appeal to the Civil Court under s. 77.

Consequently ss. 54 and 59 of the Transfer of Property Act are construed as necessitating two things, *viz.*, (*a*) a transfer executed by the transferor, and (*b*) registration which may be effected by either of the parties, but which does not depend on the consent of the transferor.

Why then should we adopt a different construction in s. 123? The Indian Registration Act does not require the consent of the donor to registration any more than it does that of a vendor or a mortgagor. In fact, the document in question in the present case has been registered under part 12 of the Indian Registration Act despite the donor's active opposition. It is, however, said that we ought to adopt a different construction because the transfers referred to in ss. 54 and 59 are for consideration, but s 123 refers to a transfer without consideration. I agree that in some cases this distinction may make a practical difference as to whether, quite apart from the validity of the transfer, you can obtain specific performance of any antecedent agreement for such transfer. But I entirely fail to see that it affects the validity of the transfer itself. The Act is here dealing with "transfers" and not with contracts. It indeed expressly excludes contracts of sale in s. 54 from creating any interest in or charge on land.

I wish then to emphasize this distinction between transfers or conveyances on the one hand and contracts on the other hand. They are dealt with in separate Acts, *viz.*, the Transfer of Property Act as to the one, and the Indian Contract Act as to the other; and disregard of the distinction between the two can only result in confusion. Further, since the arguments were concluded, my brothers Fawcett and Mulla have pointed out to me that in India under s. 25 (1) of the Indian Contract Act, a voluntary agreement in writing made on account of natural love and affection between parties standing in a near relation to each other is a binding contract if registered. Consequently one might have a voluntary registered contract to transfer under s. 25 (1), which would be as equally binding as a contract to sell or to mortgage. Whether the transfer to be effected in pursuance of that contract would be validly effected or not would depend on whether the provisions of the Transfer of Property Act were duly complied with. If they were, it would be a valid transfer. If they were not, there would in the eyes of the law be no transfer, and the parties would be relegated to their rights under the contract if any. In either event, the validity of the transfer would not depend on the contract nor on the Indian Contract Act. And even as regards contracts, one might get a binding voluntary contract under s. 25 (1) and on the other hand in most cases of mortgage transactions and in some cases of sales, there would be no binding contract at all prior to the document of transfer, though there would normally be some negotiations.

The question then of an antecedent contract or consideration would seem to form no adequate basis for construing the directions as to registration in the sale and mortgage sections in the Transfer of Property Act differently from the corresponding directions in the gift sections of the same Act. In the absence, however, of any argument on s. 25 (1) I give no opinion as to whether specific performance could be obtained of such a contract. So, too, as regards mortgages, there may be difficulties in the way of getting specific performance of an agreement to lend on mortgage: see *South African Territories Co.* v. *Wallington* (13) and *In re Smelting Corporation* (14).

Turning then to the gift sections once more, what are the requisites for a valid voluntary transfer? We have first to see whether we have an instrument duly signed by the donor and attested. Next, if we have, then is it registered? If it is not registered, then under s. 49 of the Indian Registration Act, the document will not affect any immoveable property comprised therein, nor can it be received as evidence of the transactions. But if it is registered, then under s. 47 it is to "operate from the time from which it would have commenced to operate, if no registration thereof had been required or made, (that is, the date of the document) and not from the time of its registration."

(13) (1898) A. C. 309; 67 L. J. Q. B. 470; 78 L. T. 426; 14 T. L. R. 298; 46 W. R. 545.

(14) (1915) 1 Ch. 472; 84 L. J. Ch. 571; 113 L. T 44; (1915) H. B. R. 126.

This, again is an important point. If the plaintiff is correct, registration is really analogous to execution or attestation; and until all the three requisites are satisfied there is no complete document. If that argument is sound, then the document ought to operate from the date of registration, and not from the date of its execution. In this respect the fact that s. 4 of the Transfer of Property Act directs s. 123 to be read as supplemental to the Indian Registration Act is material. It assists the view that while the ordinary law as to transfer is stated in Ch. II of the Transfer of Property Act, the provisions as to registration are to be effected in accordance with the provisions of the Indian Registration Act, which are the governing provisions and which in no way necessitate the continuing consent of the transferor.

I am accordingly unable to agree with the judgment of Sir Norman Macleod in *Subba Rama* v. *Venkatsubba* (1), where he says (page 430*):—"Therefore, a gift is a transfer, and the transfer of immoveable property gifted cannot be effected except by a registered instrument. It must follow that the gift is incomplete until the document is registered." The answer to this contention I have endeavoured to give above, but it is more pithily expressed by Sir Edward Chamier in *Parbati* v. *Baijnath Pathak* (3), where he says (page 305†):—"Registration is not the act of the donor but the act of an officer appointed by law to register documents." No doubt in one sense a gift is incomplete until registration, just as transfers on sale or mortgage may in a broad sense be said to be incomplete before registration. But they are not incomplete in the sense that the transferor can annul the transaction. It might equally be argued that an unstamped transfer is incomplete because until it is duly stamped it cannot be put in evidence having regard to s. 35 of the Indian Stamp Act. But it could not be contended that that would enable a vendor or a mortgagor to cancel the instrument before it was stamped, and I do not see why a donor should be in a different position. Stamping like registration does not depend on the donor's will and pleasure, but rests with the assignee and the officers appointed by law for those purposes.

The above decision of Sir Edward Chamier, who subsequently became the Chief Justice of Patna, was afterwards adopted on appeal in preference to the judgment of his dissenting colleague: See *Parbati* v. *Baijnath Pathak* (6). The Allahabad Appellate Court included the Chief Justice Sir Henry Richards, and in the course of their judgment it was stated as follows (page 4*):—

"The sole question to decide, therefore, is whether or not it is necessary in order that there should be a valid gift of immoveable property not only that the instrument should be duly executed and attested in the manner provided by s. 123 of the Transfer of Property Act, but also that the registration should be either at the instance of or at least with the consent of the donor. The section merely provides that the gift should be effected by an instrument executed by the donor, attested by two witnesses and registered. In our opinion a document registered in accordance with the provisions of the Registration Act is a registered instrument, and if the document is in fact duly registered in accordance with those provisions the gift is complete and valid. The law does not require that the registration should be at the instance of or with the consent of the donor".

Turning, again, to *Subba Rama* v. *Venkatasubba* (1) there is no reference in the judgments to the corresponding sections of the Transfer of Property Act dealing with sales and mortgages. We are consequently without the advantage of knowing the exact grounds on which the learned Chief Justice would distinguish the operation of ss. 54 and 59 from s. 123. But, speaking for myself, I entirely agree with and respectfully adopt the judgment of the present Chief Justice of Madras in *Venkati Rama Reddi* v. *Pillati Rama Reddi* (4) where, after setting out in detail the more material sections of the Transfer of Property Act and the Indian Registration Act, he proceeds as follows (page 208†):—

"It seems to me that the whole of this machinery for compulsory registration can only apply to cases where in substance the executant of the document or the representative of the executant does not wish to have the document registered. The enquiry will not serve any purpose except on the assumption that the executant desires to withdraw the document from re-

*Page of 26 Bom. L. R.—[*Ed.*]
†Page of 9 A. L. J.—[*Ed.*]

*Page of 35 A.—[*Ed.*]
†Page of 40 M.—[*Ed.*]

gistration. But if the argument to which effect is given in *Ramamirtha Ayyan* v. *Gopala Ayyan* (9) is right, in all such cases an enquiry would be wholly beside the point, because all that the donor or his representative has to say is that nothing is to be inquired into. 'I do not think the Registrar is to go at length into the question as to whether I did or did not execute this deed. It is sufficient for me to say that I decline to act upon it and I refuse to register it.' If that is right, of course, it involves this, that the whole of Part XII which is perfectly general in its terms must be confined to transactions other than transactions of gift. There is nothing to indicate any such intention on the part of the Legislature, and for my part, I see no reason at all for the distinction suggested between transfers by gift and transfers by sale. As it is pointed out in some of the text books, the effect of the decision in *Ramamirtha Ayyan* v. *Gopala Ayyan* (9) is to draw a distinction which is nowhere indicated in the Act between documents registered with the consent of the executant in the first instance and documents registered with the consent of the representatives...now that the matter has been raised directly before us, my own opinion emphatically is that it is contrary to principle and cannot be supported; and it would create hopeless difficulties and inconsistencies in the matter of registration."

The point was, however, referred to the Full Bench who agreed with the opinion expressed by Mr. Justice Coutts-Trotter, and in the course of their judgment it was said (page 211*):—

"The doctrine that a donor who has left his gift incomplete cannot be compelled to complete it, has no application to a case like this; for so far as he is concerned he has by executing the deed done all that he need do, for registration can be effected even without his co-operation."

Speaking for myself, I think that the policy of the Transfer of Property Act is to substitute written documents and registration for oral evidence as regards certain descriptions of transfers. But if a written document duly registered like the one in the present case is to be liable to be upset on some alleged revocation before registration, one main object of the Act is frustrated. The argument advanced by the plaintiffs does not confine the alleged right of revocation to revocation by a written and registered instrument. If then it may be oral, there is at once an opening for a false oral story which will be easy to concoct and difficult to check—an opening which I have no doubt would be seized on with avidity by many a litigant. And as to how many years must elapse before it would be safe to accept any title depending on a voluntary transfer, supposing the Transfer of Property Act be construed in that way, I would leave to those skilled in the Indian Limitation Act to consider.

It was argued by the learned Pleader for the plaintiff that the decisions of *Parbati* v. *Baijnath Pathak* (6) and *Venkati Rama Reddi* v. *Pillati Rama Reddi* (4) can be distinguished on the ground that in those cases there was merely an absence of consent by the donor to the registration whereas in the present case there was an act of positive withdrawal or revocation. But I am unable to see that in principle there is any essential difference in this particular class of case. The mere use of the word "revoke," as used in the formal questions submitted to us, implies that a gift has already been effected, and not that there is an absence of one of those continuing conditions of consent which are necessary for the efficacy of a transaction before it can be said to be completed. Consequently we are asked to treat the instrument much as if it contained an implied power of revocation in the donor prior to actual registration. If the donor wished to retain any such power, or for the matter of that a more extensive power of revocation, it could easily have been inserted in the instrument. But in fact the instrument contains nothing of the sort, nor in my opinion is there anything in the Act which on its fair construction reserves any such power of revocation in the donor, any more than it does in cases of sales or mortgages. On the contrary, s. 126, as I read it, would appear expressly to negative any such right on the part of the donor. It provides that "save as aforesaid a gift cannot be revoked."

Some reference was made to the fact that the parties are Hindus, and that under Hindu Law, as laid down in these Courts prior to the application of the Transfer of Property Act to this Presidency, possession would have been essential for a gift whe-

*Page of 40 M.—[*Ed.*]

ther or no a writing was required. But the learned Pleader for the plaintiff evidently found it difficult to contend that prior to the Transfer of Property Act, a Hindu donor could revoke his gift before registration, provided possession had been given. Consequently there seems all the less reason for contending that he should now be given such a power merely because an instrument in writing duly attested is substituted for the possession formerly required under the Bombay decisions for the validity of a gift, and that registration is also required just as it was before if the gift was in writing. I say the Bombay decisions because subsequent rulings of the Privy Council have thrown some doubt upon the point. But I need not pursue the matter further, nor consider the question of possession in the present case which I understand is a disputed point of fact, because as I read s. 129 of the Transfer of Property Act, the validity of a gift is now determined by the Transfer of Property Act under which possession is not essential for the validity of the gift in the present case.

Reference was also made during the course of the able arguments to the English Law of gifts. One of the clearest statements I know of on that subject is the well-known judgment of Sir George Jessel in *Richards* v. *Delbridge* (15). He there points out the difference between a valid gift and a declaration of trust, and states that an incomplete gift will not necessarily be treated as a valid declaration of trust. His exact words are (page 15):—

"The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person.....The true distinction appears to me to be plain, and beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise."

In India, as has been pointed out to me by my brother Fawcett after the conclusion of the arguments, s. 5 of the Indian Trusts Act, 1882, requires a trust of immoveable property to be in writing and registered. We have heard no argument on this section, and, therefore, I give no definite opinion on it. But to me it would seem difficult to argue that the declarant has a *locus pœnitentiæ* or an implied power of revocation at any time after execution and before actual registration. Here, again, registration could be effected even if he actively dissented.

Kekewich v. *Manning* (16) is another leading case on the subject of gifts or voluntary settlements. There Lord Justice Knight Bruce had to determine whether an alleged gift or settlement was complete or merely inchoate, and he stated the question in the following terms (page 187):—

"The present case has raised, necessarily or unnecessarily, a question which on several occasions, under different aspects, and in various circumstances, has been brought before this Court, especially since the time of Lord Hardwicke—the question, namely, whether an act or intended act of bounty,—whether a gift or a promised or intended gift, was in truth a perfect act, a completed gift, resting neither in promise merely, nor merely in unfulfilled intention; or was incomplete, was imperfect, and rested merely in promise or unfulfilled intention."

Milroy v. *Lord* (10), which is cited in the referring judgment of Mr. Justice Fawcett, is another leading case on the subject of English gifts.

It has been argued before us that on the principles laid down in those decisions the donor here has not done all that he could do to perfect the gift, because he himself might have got it registered. But I think that would be stretching the principles of the English Law of gift much too far. If sound, the same argument

(15) (1874) 18 Eq. 11; 43 L. J. Ch. 459; 22 W. R. 584.

(16) (1851) 1 De. G. M. & G. 176; 21 L. J. Ch. 577; 16 Jur. 625; 91 R. R. 53; 42 E. R. 519.

might also equally apply to a document which was not stamped by the vendor. The answer to it is that it is sufficient if the donor has done all that he need do to enable the donee to get the fruits of the intended gift. The cases of *In re Patrick* (17) and *In re King* (18) would tend to show that it will suffice for a valid gift if the settlor has done what is necessary on his part for a voluntary assignment, and has thus enabled his assignees to take any further steps that may be necessary to obtain the subject-matter of the gift. *Mallott* v. *Wilson* (19) decides that the mere disclaimer by a voluntary assignee, *e. g.*, the trustee will not render a voluntary settlement inoperative, nor give the settlor any power to revoke the gift unless an express power of revocation has been reserved in the iustrument.

Further, no case has been cited to us to the effect that under the English Law of gift a donor can withdraw a gift at any time before registration, supposing the land is in a county where registration is compulsory. So far as my own recollection goes, there is no such authority, nor have I any recollection of its being customary on sales to frame requisitions asking whether a donor had revoked his gift before registration, as might have been the case if the plaintiff's present contentions are sound in law. There are, however, material differences between the English and the Indian Laws of registration, as is pointed out by their Lordships of the Privy Council in *Tilakdhari Lal* v. *Khedan Lal* (20). That decision does not, however, refer to s. 20 of the English Land Transfer Act, 1897, which provides that on sales of land in compulsory districts a purchaser does not get the legal estate unless and until the document is registered under that Act. Registration under that Act is quite distinct from registration under the Middlesex or Yorkshire Registry Acts. But I have not thought it necessary to refresh my memory by making any extensive search of the English Authorities on the subject, as after all the case which we have to deal with is a case of Indian land and is governed by an Indian Statute. The real question we have to decide is what is the true effect of that Statute or rather of the two Statutes, the Transfer of Property Act and the Indian Registration Act.

Summarizing then the rival arguments, I find that the plaintiff has to concede that neither a vendor nor a mortgagor can revoke a transfer at any time before registration and that even voluntary transfers do not require the active consent of the donor to the registration. Further a voluntry transfer may in some cases be in pursuance of a binding contract under s. 25 (1) of the Indian Contract Act, just as a transfer on sale or mortgage may be in pursuance of an antecedent contract. But we are asked by the plaintiff to draw a distinction in the case of certain gifts between passive and active dissent to registration, and to say that while the former is immaterial, the latter invalidates the transaction. Speaking for myself I think that this distinction is nowhere to be found in the Acts, and should not be drawn; and that on the contrary the Acts were intended to shut out the very class of evidence on which this distinction if once allowed would normally be based—I mean oral evidence.

After giving then my best consideration to the several contentions put before us in the referring judgments and at the Bar, I have arrived at the conclusion that the decision of the Division Bench in *Subba Rama* v. *Venkatasubba* (1) cannot be supported; that the correct principles are those enunciated in *Venkati Rama Reddi* v. *Pillati Rama Reddi* (4) and *Parbati* v. *Baijnath Pathak* (6); and that accordingly the first question submitted to us should be answered in the negative. Consequently the second question does not arise.

Fawcett, J.—I retain my former opinion and agree with the judgment of my brother Marten.

I think there is a fallacy in the view that a gift not "completed" till the required instrument has been registered. Section 123 does not use the word "completed" but the word "effected." The distinction to my mind is that a gift may be "complete" so far as the donor is concerned, when he has executed and handed over to the

(17) (1891) 1 Ch. 82; 60 L. J. Ch. 111; 63 L. T. 752; 39 W. R 113.

(18) (1880) 14 Ch. D. 179; 49 L. J. Ch. 73; 28 W. R. 314.

(19) (1903) 2 Ch. 494; 72 L. J. Ch. 664; 89 L. T. 522.

(20) 57 Ind. Cas. 465; 22 Bom. L. R. 1319; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 47 I. A. 239; 32 C. L. J. 479; 13 L. W. 161; 2 P. L. T. 101; 48 C. 1 (P. C.).

donee, who accepts it, the requisite instrument; but the gift is not legally "effective" as a valid transfer for the immoveable property until the instrument had been registered.

As a similar case, I may refer to the law regarding a non-testamentary and voluntary settlement of immoveable property. Under s. 5 of the Indian Trusts Act, 1882, this can only be done by an "instrument in writing signed by the author of the trust or the trustee and registered." Section 78 provides that when the trusts of the settlement have been "declared by a non-testamentary instrument," they can only be revoked in exercise of a power of revocation expressly reserved to the author of the trust. If the author of the trust gave the instrument to the beneficiary and the latter got it registered, the language of s. 78 seems to me to be against the supposition that the author of the trust could revoke it before it is actually registered. If that had been intended, one would expect the word "registered" before "non-testamentary instrument": cl. (*b*) of s. 78.

I agree with my learned brother Marten that the fact of a gift being without consideration makes no difference. This point was discussed in *Behari Lal Ghose* v. *Sindhubala Dassi* (11) and the learned Judges say (page 439*):—"The substance of the matter is that although in contracts for sale, mortgage, lease or exchange, there is pecuniary consideration, and in a gift there is no such consideration, the right of rescission is circumscribed by the same set of circumstances."

It is to be noted that s. 59 of the Transfer of Property Act uses the same word "effected," as is used in s. 123 yet it is not contended that the mortgagor has a "*locus pœnitentiæ*" to resile from the transaction before the instrument of mortgage is registered. It is however, said that the case of a gift is different, because s. 25 of the Indian Contract Act allows the intending donor, in the case of an agreement to make a gift to withdraw it at his will unless the agreement has been registered, as stated in s. 25 of the Indian Contract Act. But this seems to me to beg the question at issue before us. Thus take illustruction (*b*) to s. 25, *viz*:—

"*A*, for natural love and affection, promises to give his son, *B*. Rs. 1,000. *A* puts his promise to *B* into writing and registers it. This is a contract." To my mind, the words of cl. (1) of s. 25 equally apply to a case like that before us, and the illustration might be altered by substituting for the words "and registers it" the words "and hands the document to *B*, who gets it registered under the provisions of the law in force for the registration of documents." It begs the whole question to assume that, unless *A* himself registers the document or assents to its registration, there is no valid contract.

The difference of opinion between the members of this Bench seems to turn ultimately on the question whether the requirement of registration is *per se* essential, irrespective of the consideration that the donor, by handing the document to the donee, has put it out of his power to prevent registration. I can see nothing in the rule as to *locus pœnitentiæ* laid down in *Maddison* v. *Alderson* (20) which extends the *locus* to such a case. On the contrary Lord Selborne's quotation from Bell's Principles at page 476, *viz*., "from an obligation to which writing is requisite and has not yet been admitted in an authentic shape," refers *prima facie* merely to the requirements of execution of a proper instrument and not to any subsequent production of the document or other act of that kind, independent of the will of the executant.

I would also draw attention to the fact that the rule of Hindu Law that a gift is not valid unless it is accompanied by delivery of possession of the subject of the gift from the donor to the donee was not construed to allow the donor a *locus pœnitentiæ* up to actual delivery, *provided the donor had done all that he could to complete the gift: Kalidas Mullick* v. *Kanhaya Lal Pundit* (22) and *Joitaram* v. *Ramkrishna* (8). This is, in my opinion, weighty authority in favour of applying the same principle to the requirement of registration, in any case where the donor has done all he need to complete the gift and by handing the instrument to the donee has put it out of his power to prevent its registration.

I would, therefore, answer the Reference as proposed by my brother Marten.

Mulla, J.—The facts which have given rise to the present Reference are shortly as follows:—

On September 17, 1917, plaintiff No. 1

* Page of 45 C.—[*Ed.*]

(21) (1883) 8 A. C. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.

(22) 11 C. 121: 11 I. A. 218; 8 Ind. Jur. 638; 4 Sar. P. C. J. 578; 5 Ind. Dec. (N. S.) 839 (P. C.).

executed an instrument of gift in favour of the defendant of certain moveable and immoveable properties belonging to him and handed it to the defendant. On September 26, 1917, the defendant presented it for registration Plaintiff No. 1 did not appear before the Sub-Registrar and the Sub-Registrar refused to register the deed. The defendant appealed to the Registrar. During the course of the proceedings before the Registrar the plaintiff appeared before the Registrar and declared his intention not to abide by the writing and denied execution. The Registrar ordered it to be registered and it was accordingly registered, on December 18, 1917. Subsequently plaintiff No. 1 adopted plaintiff No. 2 and they both filed the present suit on August 7, 1920, to set aside the alleged gift and for possession of the properties.

The questions referred to the Full Bench are :—

(1) Was it competent to the donor to revoke the gift of immoveable property before the instrument was in fact registered?

(2) If so, whether the subsequent registration of the document against the wishes of the donor makes the revocation ineffective?

The provisions of the Indian Law bearing on gifts are contained in Ch. VII of the Transfer of Property Act, IV of 1882. "Gift" is defined in s. 122 as a "transfer of...property made voluntarily and without consideration by one person called the donor, to another, called the donee"

Section 123 of the Act is as follows :— "For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses."

By s. 126 it is provided that "the donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked...A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. Save as aforesaid, a gift cannot be revoked."

"Transfer of property" is defined in s. 5 as meaning an act by which a living person conveys property to another living person. By s. 9 it is provided that "A transfer of property may be made without writing in every case in which a writing is not expressly required by law." The expression "registered" is defined in s. 3 as meaning "registered in British India under the law for the time being in force regulating the registration of documents." The law in force regulating registration at the date of the writing in this case was the Indian Registration Act XVI of 1908.

The point involved in the first of the two questions referred to the Full Bench is whether an intending donor who has executed an instrument of gift, attested as required by s. 123 of the Transfer of Property Act, and handed it to the intending donee, has a *locus pœnitentiæ* or implied power of revocation prior to registration of the instrument, or whether after he has executed and handed the instrument as aforesaid, the plea of *locus pœnitentio* is barred.

The limits of the rules as to *locus pœnitentiæ* were thus stated by Lord Selborne in *Maddison* v. *Alderson* (21) (pages 476*, 477*):—

"It is not in England only that such a doctrine prevails; a similar (perhaps even a larger) equity is also recognised in other countries, whose equitable jurisprudence is derived from the same original sources as our own. By the Law of Scotland, 'written contracts in strict technical language are those of which authentic written evidence is required, not merely in proof, but in solemnity; as obligations relative to land; or obligations agreed to be reduced to writing; *or those required by Statute to be in writing.*' To constitute any such contract there must be a 'final engagement'; and as a corollary to that rule a '*locus pœnitentiæ*' is given; *i.e.*, 'a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite and has not yet been adhibited in an authentic shape.' But to this '*rei interventus* raises a personal exception, which excludes the plea of *locus pœnitentiæ*. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocably referable to the contract and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable' Bell's Principles, ss. 18, 25, 26."

Portions of the passage cited above were cited with complete approval by their Lord-

*Pages of (1883) 8 A. C.—[*Ed.*].

ships of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (23) and also in *Lakshmi Venkayyamma* v. *Venkatanarasimha Appa Rao* (24). In the former case their Lordships observed that there was nothing in the Law of India inconsistent with the law as stated by Lord Selborne, but upon the contrary, that that law followed the same rule.

Reading ss. 122 and 123 together, a "gift" is a transfer which must be "effected" by registered instrument signed by the donor and attested by at least two witnesses. It follows from these two sections that a gift cannot be said to be "effected" unless the transfer which constitute the gift is itself "effected" in the manner prescribed by s. 123. "In the present case there is an instrument signed by the donor and attested by two witnesses; but before the instrument was registered, the donor declared his intention not to be bound by it, and he actually denied execution before the Registrar. The position then is this, that at the date on which the donor repudiated the transaction, there was no transfer "effected" in the manner prescribed by law and there was no valid and complete gift, in other words, there was no gift at all; see the observations of their Lordships of the Privy Council in *Sadik Husain Khan* v. *Hasihm Ali Khan* (25) where their Lordships said that "transfer" within the meaning of s. 122 meant *prima facie* a valid transfer. It is true that in the present case the donor did "all that he need do" towards completing the gift, namely, that he executed the writing and handed it to the donee, but it cannot be said, having regard to the language of s. 123, that because he did so, there was a transfer "effected" by way of gift, for a transfer by way of gift under that section can only be "effected" by a *registered instrument.* It is also true that having regard to the provisions of the Indian Registration Act, the registration could be effected without the co-operation of the donor and even against his consent and further, that on the instrument being registered, it operates from the date of its execution as distinguished from the date of registration, but it cannot be inferred from this that a transfer by way of gift had been "effected" in the manner prescribed by s. 123 before the date on which the donor drew back from the transaction. It is also true that when the donor executed and handed over the document to the donee, there was a clear intention expressed on his part to give and a clear intention on the part of the donee to take, but that does not conclude the case. The intention must be expressed in the manner prescribed by law, that is by a registered instrument signed by the donor and attested by at least two witnessess. Thus prior to the enactment of the Transfer of Property Act, delivery of possession was necessary in the case of Hindus, to complete a gift, where possession could be delivered. If a donor prior to that Act executed an instrument of gift attested by witnesses and even if he got it registered there was no gift if the transfer was not accompanied by delivery of possession, though the intention to give and to take was unequivocally expressed by the instrument the reason being that the condition prescribed by the law, namely, delivery of possession had remained unfulfilled. And the same was held of a Muhammadan gift in *Sadik Husain Khan's case* (25) referred to above. It seems to me that the registration prescribed by s. 123 is not mere evidence of the gift, but is part of the gift itself. It is, I think, a necessary part of the proposition that a gift has been "effected." It is not mere evidence to prove that there has been a gift, but it is a fact to be proved to constitute the proposition that there has been a gift. For the above reasons, I have come to the conclusion that at the date on which plaintiff No. 1 resiled from the transaction no transfer by way of gift had been "effected" as required by s. 123 of the Transfer of Property Act, in other words, there was no gift in law. Whether a transfer by way of gift is effected or not is a question to be determined exclusively with reference to the provisions of s. 123. You cannot split the requisites prescribed by the section into two parts, namely, (1) a writing signed and attested, and (2) registration, and say that because according to the English

(23) 28 Ind. Cas. 930; 42 I. A. 1; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; 42 C. 801; (1915) M. W. N. 621 (P. C.).

(24) 34 Ind. Cas. 921; 43 I. A. 138 at p. 148; 20 C. W. N. 1054; 14 A. L. J. 797; 31 M. L. J. 53; (1916) 2 M. W. N. 23; 20 M. L. T. 137; 4 L. W. 58; 18 Bom. L. R. 651; 39 M. 509; 24 C. L. J. 279 (P. C.).

(25) 36 Ind. Cas; 104; 43 I. A. 212 at pp. 222, 223; 31 M. L. J. 607; 14 A. L. J. 1248; 19 C. C. 192; 18 Bom. L. R. 1037; 21 C. W. N. 130; (1916) 2 M. W. N. 577; 21 M. L T. 40; 38 A. 627; 1 P. L. W. 57; 4 O. L. J. 22; 25 C. L. J. 363; 6 L. W. 378; 10 Bur. L. T. 140 (P. C.).

Law a gift is effected when the donor executes a deed of gift, there is a gift "effected" in the present case also, the donor having signed a document attested by two witnesses, and having handed it to the donee. According to the English Law, in the case of a voluntary deed, the donee is entitled to possession of the immoveable property immediately on the execution of the deed. It cannot be suggested that in cases governed by the Transfer of Property Act, a donee is entitled to possession immediately on execution of the instrument of gift and before it is registered. The present case seems to me to be pre-eminently a case in which the analogies of English Law ought not to be applied in construing an Indian enactment nor can you say that, in cases governed by the Transfer of Property Act, a transfer by way of gift may be deemed to be "effected" for the purpose of excluding the plea of *locus pœnitentiæ*, and not yet "effected" for the purpose of making it a valid gift. It seems to me that the distinction sought to be drawn in this case between a "complete" transfer and a "valid or effective" transfer is far-fetched, and it cannot be supported either in principle or on authority. I readily accept the proposition that a donee under an instrument of gift can have the document registered without the consent and even against the wishes of the donor, but that does not, in my view, justify the proposition that registration is not an essential part of a transfer by way of gift. The gift in the present case, when it was withdrawn, was inchoate and plaintiff No. 1 had, therefore, a *locus pœnitentiæ*. I do not think that the *locus pœnitentiæ* was barred by anything done by him subsequent to the execution of the writing. There is no such *rei interventus* in the present case as could raise a personal exception, which excludes the plea of *locus pœnitentiæ*.

Such being my view of the case, s. 126 does not apply. It applies only to a "gift," that is, a gift made in the manner prescribed by s. 123. In the present case there was no "gift" on the date on which plaintiff No. 1 resiled from the transaction.

It was contended on behalf of the defendant that s. 54 of the Transfer of Property Act which relates to sales and s. 59 of the same Act which relates to mortgages are in terms similar to s. 123 and that if a vendor or a mortgagor cannot after execution of the instrument of sale or mortgage resile from the transaction before the instrument of sale or mortgage is registered, a donor also cannot resile after execution of the instrument of gift and before registration thereof. I feel myself unable to accede to that contention. The reason why a conveyance or a mortgage cannot be revoked after execution and before registration is not because registration may be effected in spite of the donor's protest but because in the case of sales and mortgages once a *contract* of sale or mortgage is made, neither a vendor nor a mortgagor could rescind it at his pleasure, while in the case of an agreement to make a gift, the intending donor may withdraw it at his will except in the rare cases where an agreement to make a gift is made in favour of a near relation out of love or affection and it has been registered, as provided in s. 25 of the Indian Contract Act, 1872. Even in that case the agreement, according to the view I take of the law, may be terminated by the donor at his pleasure at any time before it is registered.

There are two other sections of the Transfer of Property Act to which I may here refer. One of them is s. 9 which provides that "A transfer of property may be made without writing in every case in which a writing is not expressly required by law." The other is s. 107 by which it is provided that all leases of immoveable property other than those mentioned in the first paragraph of the section may be made "either by registered instrument or by oral agreement accompanied by delivery of possession." It was argued on behalf of defendant that as no mention was made of registration in s. 9, registration did not form part of a "transfer," and the transfer in the present case was, therefore, "effected" when plaintiff No. 1 executed and handed the instrument of gift to the defendant. Now it is to be observed that just as there is no mention made of registration in s. 9 so there is no mention made of delivery of possession in that section. If the argument addressed by the Pleader for the defendant were sound, it would follow that a lease of the kind mentioned above could be made merely by an oral agreement, and delivery of possession should be treated, as registration is sought to be treated, as mere evidence of the lease as distinguished from part of the lease itself. Such a proposition is, on the face of it untenable. The fact of the matter is that s. 9 does not deal with the essentials of a trans-

fer. It indicates only two modes of transfer, namely, a transfer in writing and an oral transfer. Transfer *by delivery* which is one of the alternative modes of transfer in the case of gift of moveable property is not mentioned in the section, and yet transfer by delivery is undoubtedly one of the modes of transfer. Section 9 does not purport to deal with the various modes of transfer. The modes of transfer are prescribed in ss. 54, 59, 107 and 123. Section 9 says no more than this that where a writing is not expressly required by law, a transfer may be made without writing. It simply recognises oral transfers. The marginal note to the section, namely, "Oral transfer," indicates the scope and intent of the section. Upon long consideration, I have reached the conclusion that the first question must be answered in the affirmative and the second question in the negative. Before concluding this judgment I feel I ought to say that the case was argued with remarkable ability by the learned Pleaders on both sides. Indeed, it could not have been argued better.

Kincaid, J.—I agree with the judgment given by my learned brother Marten, and would answer the Reference in the manner indicated by him.

Shah, Actg. C. J.—In accordance with the opinion of the majority, the answer to the first question will be in the negative. There will be no answer to the second question as being unnecessary.

Z. K. *Answer accordingly.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 73 OF 1924.

February 24, 1925.

Present:—Mr. Justice Buckland.

MAURICE MAYAHAS—PLAINTIFF

versus

W. MORLEY AND ANOTHER—DEFENDANTS.

Limitation Act (IX of 1908), s. 20—Part payment—Payment by cheque—Date of payment, determination of—Partnership—Goods supplied on inspection—Dissolution of partnership—Return of goods rejected—Suit to recover price of goods retained—Liability of partners.

Where goods are sent to a partnership on inspection at a time when the partnership is subsisting, the fact of the subsequent dissolution of the partnership cannot have the effect of absolving the members of the firm at the time when the goods were sent, from liability in respect of the price of the goods, though the cause of action for a suit to recover such price may not have accrued until the return of the goods which were not required, which return takes place after the dissolution of the partnership [p. 509, col. 1.]

When a payment is made by cheque and the cheque is received as payment by the payee it operates as a payment from the date on which it is delivered to the payee though this is subject to a condition subsequent that if upon due presentation the cheque is not paid the original debt revives. [p. 510, col. 2.]

Where a payment by cheque is relied upon as an acknowledgment or part payment within the meaning of s. 20 of the Limitation Act, the date of the acknowledgment or part payment must be taken to be the date on which the cheque was delivered to the payee and not the date on which the cheque was cashed. [*ibid.*]

Mr. *A. N. Sen* (with him Mr. *Satish Chandra Bose*), for the Plaintiff.

Mr. *Sambhu Nath Banerjee*, for the Defendant.

JUDGMENT.—This is a suit to recover a sum aggregating Rs. 4,069 as the balance of the price of goods sold and delivered. The plaintiff sues two defendants, William Morley and Percy T. Andrews, who he says until January 1921 were carrying on business in partnership under the name and style of Morley and Andrews. While they were so carrying on business in partnership, he supplied at the end of October or beginning of November 1920, the goods specified in the first bill annexed to the plaint, and on the 17th November 1920 the goods specified in the second bill annexed to the plaint. Subsequently more goods were sent to the defendants on inspection. That was in the month of December. In the month of January 1921 the firm was dissolved and later some of the goods were returned. He accordingly made out against the defandants the third bill for the value of the goods retained.

The defence put forward by the defendant Morley, who is appearing in person, is a denial that he at any time had the goods or that he was ever in partnership with his co-defendant and he submits that the claims are barred by limitation.

The defendant Andrews has challenged one of the items appearing in the first bill and denies liability for the amount of the third bill, on the ground that the partnership, which he admits, was dissolved in the month of January 1921.

The points that arise for decision, therefore, fall under three different heads, first as to the orders and details of the bills, secondly, whether there was any partner-

ship so as to make the defendant Morley liable, and lastly the question of limitation.

With regard to the details of the bills, the vouchers have been proved and there is no doubt in my mind that the details given are correct and that the goods were ordered by Andrews and were supplied.

With regard to the items specified in the third bill, I find that the goods were sent on inspection during the time that the partnership, if there was a partnership, was subsisting. The fact of the subsequent dissolution of such alleged partnership cannot have the effect of absolving the members of the firm, at the time when the goods were sent, from liability, though the cause of action may not have accrued until the return of the goods which were not required. I, therefore, find as regards the third bill that the defendant Andrews is liable, and also Morley, assuming he was a member of the firm.

With regard to the question of partnership, I do not think there can be any question upon the evidence that Morley was a partner. His case is that he was engaged in business elsewhere, and the arrangement between him and Andrews was that he was to devote such time as he could spare from his other business for the purpose of doing work in this tailoring business, which was carried on under the name of Morley and Andrews, and for that purpose he was to attend in the morning and evening. He says he was to have a half-share in the net profits and denies that he was in any way liable for the losses. The plaintiff appears to have regarded him as a partner, though there is no substantive evidence to the effect that he was a partner given by the assistants who have given evidence. But there is the statement of the defendant Andrews, and it was admitted by Morley himself not only that the business was carried on in the name of Morley and Andrews but that there was a banking accounts in such name upon which he was entitled to draw cheques. He has also admitted that he signed a lease of the business premises, though he says that he did so as a surety. His explanation as to the use of his name is that without his name no tailoring business would have been done.

I find that at the time with which I am concerned the defendant Morley was in partnership with Andrews, and as such may be liable to the plaintiff.

I now come to the question of limitation. I will dismiss at once any question of there being a continuous account, such as was before the Court in *Kedar Nath Mitter* v. *Dinobandhu Shaha* (1). It is clear from the evidence given on behalf of the plaintiff that separate and distinct orders were given for the items comprised in the three bills. The bills were submitted separately and the plaintiff refers in the plaint to the causes of action which arose on the 2nd November 1920, the 17th November 1920 and the 14th May 1921, clearly treating the subject-matter of the three bills as giving rise to different causes of action.

The plaintiff alleges in his plaint that on the 6th January 1921 the defendants paid Rs. 1,000 by cheque. This is relied upon as an acknowledgment under s. 20 of the Limitation Act. In point of fact it now appears from the evidence given on behalf of the plaintiff by Balmukund Khettry and from the evidence of the defendant Andrews that the cheque was paid by the defendant Andrews to Balmukund Khettry on the afternoon of the 5th January 1921, and so far, therefore, as the cheque extends the period of limitation under s. 20, the fresh period of limitation must be computed from the 5th and not the 6th January 1921. The plaint was filed on Monday, the 7th January 1924, but if limitation should be computed from the 5th January 1921, then obviously it ought to have been filed on the 5th January 1924.

Before I deal with this, there is one small point, and that is that the first bill amounts to Rs. 1,200-11; the second bill amounts to Rs. 2,362-3. The payment was Rs. 1,000, which does not even cover the total amount of the first bill. In his plaint, the plaintiff says that the sum was a part payment of the two bills, and this appears from an entry in the plaintiff's cash book, where the payment is entered to these terms:—"Received from Messrs. Morley and Andrews in part payment of bills Nos. 1705-13 by cheque.....Rs. 1,000."

The defendant Andrews in the witness-box has stated that he gave a cheque in payment for the two pieces of serge which are to be found in the first bill and that the balance of the goods were to be returned. Nothing of the sort, suggesting ap-

(1) 31 Ind. Cas. 626; 42 C. 1043; 19 C. W. N. 724.

propriation by Andrews, was put in cross-examination to the plaintiff's witnesses. It seems to me rather strange that a sum not even sufficient to cover the first of the two bills should be appropriated to the two bills, in order, if necessary, to save limitation in respect of each; but nevertheless the plaintiff is in law entitled so to do unless an appropriation has been made by the person making the payment. In my opinion, there was no such appropriation by Andrews when the payment was made and the plaintiff was entitled to make the appropriation in that manner, and the entry in the cash book certainly supports him.

But the dates present a more serious difficulty in the way of the plaintiff. It has been contended that though the cheque bears the date the 5th January, and though it was paid to the manager of the plaintiff on that date nevertheless the actual payment from which the fresh period of limitation should be computed is the date of payment when the cheque was presented at the Bank. There is not before me any evidence as to the actual date when the cheque was presented and paid at the Bank, but inasmuch as it was handed over to the plaintiff's representative after-banking hours on the 5th January, I will assume that it was paid on the 6th January 1921, and this would suffice for the plaintiff's purpose, if his contention is otherwise correct. In support of this contention I have been referred to *Gorden* v. *Bruce* (2). That was a suit for money lent The plaintiff in lending the money handed the defendant a cheque for the amount. The defendant paid it into his Bank and received credit. The plaintiff's bankers paid the cheque some days later. The question there arose whether limitation ran from the date when the cheque was handed by the plaintiff to the defendant or from the date when it was met by the plaintiff's banker's and it was decided that the action being one to recover money lent limitation only ran from the date when payment was made by the plaintiff's bankers. A number of authorities were there cited in support of the proposition that a cheque, unless dishonoured, is payment, and the learned Chief Justice said in his judgment:—

"I quite agree with all the cases that have been cited, but in all of them the cheque has been treated as an acknowledgment of a pre-existing debt. Here the debt did not accrue till the payment of the cheque."

In those words lie the essential difference between that authority and the case which I have to decide. I have to consider the cheque which was paid on the 5th January from the point of view of an acknowledgment of the pre existing debt. But the matter, in my opinion, is covered by authority, by which I am bound, *viz.*, the case to which I have already referred.

There the learned Chief Justice said:—"It seems to me clear that if a cheque be delivered to a payee by way of payment and is received as such by him it operates as payment and is an extinguishment to that extent of the debt, though this is no doubt subject to a condition subsequent that if upon due presentation the cheque is not paid the original debt revives."

It is clear that the learned Chief Justice was treating the cheque as the payment, for later on he observes:—"If I am right in the view that the cheque actually was a payment the very payment was in the handwriting of the person making the same."

The plaintiff, it appears to me, is in this dilemma, if the payment is not the cheque itself, in which case there is no doubt that the fact of the payment appears in the handwriting of the person making it, then the payment is the payment by the Bank clerk across the counter on presentation of the cheque or as otherwise may occur, and in such case the fact of the payment does not appear in the handwriting of the person who makes it

I hold that there was no acknowledgment within s. 20 of the Limitation Act, and in consequence the claims based upon the first two bills are barred by limitation, but for the reasons which I have already given as to goods comprised in the third bill, I think the plaintiff is entitled to recover, and consequently there will be judgment against both the defendants for Rs. 1,501-8, with costs on scale No. 2, interest on judgment at 6 per cent.

Z. K. *Order accordingly.*

(2) (1868) 3 C. P. 300; 37 L. J. C. P. 112; 17 L. T. 544; 16 W. R. 366.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1440 OF 1921:
February 24, 1925,
Present:— Justice Sir Henry Scott-Smith, KT., and Mr. Justice Martineau.

NAWAB—DEFENDANT—APPELLANT
versus
HUKAM DIN—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), ss. 12, 20, 22—Agreement to sell immoveable property—Penalty for default—Specific performance, whether should be decreed.

A party to an agreement to sell immoveable property cannot be allowed to evade specific performance of the agreement merely because the agreement provides a penalty to be paid on default.

In a suit for specific performance of an agreement to sell immoveable property the onus is upon the defendant to show that the case is one in which the Court should not exercise its discretion and grant specific performance in favour of the plaintiff.

Hukam Chand v. *Nikka Singh*, 15 P. R. 1908; 97 P. L. R. 1908; 27 P. W. R. 1908, followed.

First appeal from a decree of the Senior Subordinate Judge, Sargodha, dated the 29th April 1921.

Mr. *Gullu Ram*, Lalas *Anant Ram Khosla* and *Tirath Ram*, for the Appellant.

Messrs. *Zafrulla Khan*, *M. A. K. Janjua* and Chaudhri *Shahab-ud-Din*, *K. B.*, for the Respondent.

JUDGMENT.—This is an appeal from the order of the Senior Subordinate Judge, Sargodha, granting the plaintiff a decree for specific performance of an agreement to sell about two squares of land executed by the defendant in his favour on the 8th September 1919. The price agreed upon was Rs. 14,000. Each of the parties executed an agreement which will be found printed at pages 4 and 5 of the paper book, and each of them agreed that if he made a breach of his agreement he would pay Rs. 1,000 as damages to the othe party. The lower Court saw no reason why the contract should not be specifically enforced and followed s. 20 of the Specific Relief Act. Counsel for the appellant admits now that his client did agree to sell the land to the plaintiff for Rs. 14,000. He also admits that the defendant committed a breach of the agreement and says that he is willing to pay Rs. 1,000 as damages for that breach according to the stipulation in the agreement. He urges that this is a case where specific performance should not be enforced. Now s. 20 of the Specific Relief Act is as follows:—

"A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same."

Now there is nothing in the contract itself which shows that Rs. 1,000 was to be considered as full compensation for any breach. The case reported as *Hukam Chand* v. *Nikka Singh* (1) is very similar to the present one and there it was held that a party should not be allowed to evade specific performance merely because the agreement provided a penalty to be paid on default. In this connection also the terms of s. 12 of the Specific Relief Act must be borne in mind. The explanation to this section is as follows:—

"Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money."

The onus, therefore, was upon the defendant to show that this was a case in which the Court should not exercise its discretion and grant specific performance in favour of the plaintiff. Counsel has referred to s. 22 of the Act in which it is alleged that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. In this case, however, there is *prima facie* no reason why specific performance should not be decreed. No fraud is alleged and it is not proved that the price agree upon was an inadequate one. On the contrary we have the evidence of Chaudhri Muhammad Ismail, Colony Assistant, printed at pages 24 and 25 of paper book 'A' who gave his opinion that the price of Rs. 14,000 fixed in the agreement was a reasonable one. No circumstances whatsoever have been shown to us by Counsel for the appellant which disentitle the respondent from getting the agreement in his fovour specifically enforced and we accordingly dismiss the appeal with costs.

Z. K.

Appeal dismissed.

(1) 15 P. R. 1908; 97 P. L. R. 1908; 27 P. W. R. 1908.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1873 OF 1922.

January 13, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Mukerji.

CHANDRA MOHAN TALUKDAR—PLAINTIFF—APPELLANT

versus

SHAIKH ELIM—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), ss. 11, 13, 21—Landlord and tenant—Suit for rent—Order for delivery of possession—Statement as to rent, admissibility of.

A statement contained in an order for delivery of possession as to the rent payable in respect of the land, is not admissible in evidence in a suit between the landlord and the tenant in which the rent payable is in dispute.

Pramatha Nath Choudhuri v. *Krishna Chandra Bhattacharjee*, 84 Ind. Cas. 420; 28 C. W. N. 1092; (1924) A. I. R. (C.) 1067, relied on.

Appeal against a decree of the Subordinate Judge, First Court, Maymensingh, dated the 24th of January 1922, affirming that of the Munsif, Third Court at Netrakona, dated the 19th of June 1917.

Babu *Kalikinkar Chakravarti*, for the Appellant.

Babu *Paresh Lal Shome* for Babu *Birendra Kumar De*, for the Respondent.

JUDGMENT.

Mukerji, J.—This appeal, which has been preferred by the plaintiff, arises out of a suit in which the plaintiff claimed paddy-rent from the defendant and the defendant contended that the rent that he had to pay was not paddy-rent but money-rent at Rs. 2. per year. The suit was decreed by the Court of first instance and that decree has been upheld by the lower Appellate Court.

Two points that have been urged on behalf of the appellant: *Firstly*, that the learned Subordinate Judge in arriving at his finding on the question as to whether the rent that was payable for the holding was paddy-rent or rent at Rs. 2 per year, as alleged on behalf of the parties, relied on a recital contained in a document Ex. 3 which is not admissible in evidence as against the present plaintiff; and *secondly*, that in arriving at the said finding the learned Judge has omitted to take into consideration the evidence that there is on the record relating to the payment of produce rent by the defendant to the plaintiff.

So far as the first point is concerned, the document, Ex. 3, is an order for delivery of possession. The statement to which an objection is taken appears in the schedule attached to that order in which after describing the *jama* it is stated that the rent for it is Rs. 2 per year. In support of this contention reliance has been placed upon the case of *Pramatha Nath Choudhuri* v. *Krishna Chandra Bhattacharjee* (1) The whole law on the subject has been fully discussed in that case and although the document the subject-matter of that decision is different from the one with regard to which an objection has been taken in the present case and in that respect that case is distinguishable from the present one, it cannot be said that the present document comes under the provisions of the Indian Evidence Act relating to the admissibility of documents. The circumstances under which the statement came to be made in that document do not appear and it is not possible to say either that the statement amounts to an admission or that it is such that it comes either under s. 11 or s. 13 of the Indian Evidence Act. In our opinion the statement is not admissible in evidence in the present case.

So far as the second ground urged on behalf of the appellant is concerned it appears that there is some evidence to the effect that the paddy-rent was paid by the defendant or his predecessor to the plaintiff. What the value of that evidence is it is not for us to assess; but the learned Subordinate Judge was certainly wrong in observing in his judgment, as he has observed, that there is no evidence to prove that Askar or after him the defendant delivered produce to the plaintiff. The judgment of the learned Sudordinate Judge must, therefore, be set aside and we accordingly do set it aside and send the case back to his Court in order that the document, Ex. 3, be excluded as being inadmissible and the appeal dealt with afresh after taking into consideration the evidence to which I have referred.

Costs will abide the result.

Greaves, J.—I agree.

Z. K. *Order set aside.*

(1) 84 Ind. Cas. 420; 28 C. W. N. 1092; (1924) A. I. R. (C.) 1067.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 769 OF 1924.

November 24, 1924.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Mukerji.

R. W. VALLIANT—PETITIONER

versus

MRS. N. ELEAZER—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 363—Kidnapping, what constitutes—Minor leaving guardian's protection—Intention—Offence.

In order to support a conviction for kidnapping from lawful guardianship the following are the points which require proof:—

(1) That the person kidnapped was then a minor under sixteen years of age, if a female.

(2) That such person was in the keeping of a lawful guardian.

(3) That the accused took or enticed such person out of such keeping.

(4) That he did so without the consent of the lawful guardian. [p. 513, col. 2.]

The mere fact that the minor leaves the protection of her guardian, does not put her out of the guardian's keeping, but if she abandons her guardian with no intention of returning, she cannot be held to continue in the guardian's keeping. The decision of the question in each case depends upon the facts of the case. [p. 513, col. 2; p. 514, col. 1.]

Criminal Revision against an order of the Third Presidency Magistrate, Calcutta.

Messrs. *Langford James, Camell* and Babu *Satindra Nath Mukherjee*, for the Petitioner.

Mr. *Khondkar*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The petitioner R. W. Valliant has been convicted by the Third Presidency Magistrate, Calcutta of an offence punishable under s. 363, Indian Penal Code, and sentenced to be detained till the rising of the Court and to pay a fine of Rs. 200 or undergo three months' rigorous imprisonment in default of payment. He has obtained a rule calling on the Chief Presidency Magistrate to show cause why the conviction and sentence passed on him should not be set aside on the two following grounds:—.

"For that upon the facts found and proved in the case, no offence under s. 363 has been made out against the accused and the learned Magistrate has erred in law in not holding so."

"For that the reasons given by the learned Magistrate for convicting the accused are unsound and illegal."

The petitioner has been convicted of having kidnapped Mildred Eleazar aged about 15 years and 5 months from the lawful guardianship of her mother. It appears that about two months before the date of occurrence, the 24th May last, the petitioner and the girl met and struck up a friendship. This friendship ripened into affection. The girl's mother and brother disapproved of this. There was an episode on the 20th May which led to the girl being chastised by her mother. On the afternoon of the 24th May there was a quarrel between the girl and her brother. They kicked each other and the girl left her home and went to the house of a friend Mrs. Victor. From there she wrote a letter to her mother in which she said she was not coming back. At Mrs. Victor's she was met by the petitioner and the two went to the house of Mrs. Christian a sister of Mrs. Victor. The girl wanted to stay the night there but Miss. Christian's brother did not consent to this. The petitioner who had left the girl in order to fulfil an engagement as a musician at the Saturday Club returned to the Victors at about 8 P. M. and took her to his mother's house in Kidderpore where she remained for four days. In the meantime the Police had been informed of the disappearance of the girl. The petitioner when questioned about the girl denied knowledge of her whereabouts but after he was arrested he wrote to his father and the girl was produced and made over to her mother.

In order to support a conviction for kidnapping from lawful guardianship the following are the points requiring proof:—

(1) That the person kidnapped was then a minor under 16 years of age if a female.

(2) That such person was in the keeping of a lawful guardian.

(3) That the accused took or enticed such person out of such keeping.

(4) That he did so without the consent of the lawful guardian. In the present case it has been established that the girl Mildred Eleazar was under 16 years of age and that she was in the keeping of her mother who was her lawful guardian prior to her leaving her home on the 24th May. The question we have to decide is whether it has been proved in this case that the petitioner took or enticed the girl out of the keeping of her mother. Several cases decided by English and Indian Courts were cited before us including those to which reference has been made in the judgment of the lower Court. In these cases the following important principles have been laid down: The mere fact that the minor leaves the

protection of her guardian does not put her out of the guardian's keeping. But if the minor abandons her guardian with no intention of returning she cannot be held to continue in the guardian's keeping. Which principle should be applied to a particular case depends on the facts of that case. We are in some difficulty in the present case as the learned Magistrate has not stated clearly the facts found by him on which he bases his conviction of the petitioner. The guilt or innocence of the petitioner depends on whether when the girl left her home she did so of her own accord and had definitely decided not to return or whether her conduct was mere petulant outburst in consequence of a quarrel with her brother. The girl's evidence gives us no assistance. She has told two totally different stories to the Police and to the Magistrate and her attempt to explain away her former statements is too absurd to need discussion. Her mother is not a witness on whom we can place implicit reliance. A most important piece of evidence on the question of the state of the girl's mind when she left home would be the contents of the letter which she wrote to her mother from Mrs. Victor's house. This letter has been withheld by the prosecution and all we know of its contents is that she wrote that she was not coming back. Further the Victors who could have given important evidence on this point have not been produced. The petitioner acted foolishly in denying knowledge of the girl's whereabouts when questioned by the Police. But the explanation he has given in his written statement that he thought she would be ill-treated if sent back to her mother does not appear to us unreasonable. On a full consideration of the oral and documentary evidence in the case we hold that the prosecution has failed to prove that the petitioner has committed an offence punishable under s. 363, Indian Penal Code.

We accordingly make this Rule absolute. We set aside the conviction and sentence of the petitioner and acquit him of the charge on which he was tried. The fine if paid will be refunded.

Z. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 76 OF 1925.

March 4, 1925.

Present:—Mr. Justice Stuart.

RAM GHULAM SINGH—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 186—Obstruction to public servant—Refusal to sit on panchayat *with certain members, whether offence.*

The accused when asked by the Sub-Divisional Officer to sit on a *panchayat* with a member of the depressed classes refused to do so and told the Sub-Divisional Officer that the *panchayat* would cease to exist and instigated his fellow *panches* and other persons not to sit with members of the depressed classes in the *panchayat*:

Held, that the accused was guilty of bad manners and was not a good citizen or a useful member of the community but that there was nothing in his conduct which would bring him within the purview of s. 186 of the Penal Code. [p. 516, col. 1.]

Criminal Reference made by the Additional Sessions Judge, Cawnpore at Banda, dated the 19th January 1925.

REFERRING ORDER.—This is an application for revision against the order of the District Magistrate, Hamirpur, dated the 10th November 1924 convicting the applicant under s. 186, Indian Penal Code and sentencing him to pay a fine of Rs. 50 in a summary trial.

The prosecution was started on the written complaint of B. Bhagwati Prasad Sinha, Sub-Divisional Officer who is said to have been obstructed by the applicant in his attempts to re-organise and re-constitute the Korara *panchayat* according to the orders of the District Magistrate.

The Sub-Divisional Officer in his complaint Ex. D says that he called the *panches* with their records at his camp in Damar and they came as instructed. He proposed to them the inclusion of a member of the depressed classes in the *panchayat* but this displeased Ram Ghulam applicant who is one of the *panches* and he eyed the other *panches* and declared that the *panchayat* would cease forthwith. He, the Sub-Divisional Officer, argued with him for a while but this only increased his defiance and the other *panches* remained sullen. Then Shiam Sunder, the brother of the *sarpanch*, who had brought the papers, was asked to keep the papers with him and he took them away but shortly after he returned and threw the *basta* containing the papers and went away and when he was sent for he came with Ram Ghulam appli-

cant and when asked to explain his conduct Ram Ghulam replied that the *panchayat* had ceased to work and Shiam Sunder repeated the same. Then next morning when he (the Sub-Divisional Officer) went to Korara to ascertain the local feelings about the present *panches* he discovered that Ram Ghulam had been instigating others not to work in the *panchayat* and as a result of it the *sarpanch* refused to work and the other *panches* gave only a half hearted consent.

Nothing more than what is stated in the complaint appears to have been stated by the Sub-Divisional Officer in his deposition before the District Magistrate because the District Magistrate in his judgment says: "Under the Government orders the Magistrate had to see if a member of the depressed classes could also be appointed to the new Korara *panchayat* Accused took offence at the order of sitting with a low caste man and declared that the *panchayat* would cease to function forthwith. He spoke for himself and for his brother *panches*. The Magistrate tried to expostulate but the accused evidently mistook it for weakness and showed more defiance. His fellow *panches* taking their cue from him sulked and sullenly stood by his side in his mischievous attempt at obstruction. The accused and Shiam Sunder brother of the *sarpanch* Gopi Nath went away after throwing the books and registers upon the Magistrate. They had to be sent for again and then they came and insulted the Magistrate. The following morning the Magistrate went to ascertain the local feeling but to his natural surprise he discovered that his apology notwithstanding the accused, had been instigating his people and arranging that no body should accept the membership of the new constituted *panchayat*.

The District Magistrate appears to be wrong in saying that the accused threw the *basta* on the Magistrate because the complainant says that Shiam Sunder threw the *basta* and went away and then returned with the applicant.

The Sub-Divisional Officer no doubt in his complaint says that he was thwarted, opposed and obstructed by the applicant in discharging his public duties and was insulted by him after he came with Shiam Sunder and the District Magistrate also finds that he was obstructed and insulted but what took place appears to be simply this that the accused when asked to sit with a member of the depressed classes refused to do so and told the Magistrate that the *panchayat* would cease to exist and instigated his fellow *panches* and other persons not to sit with the members of the depressed classes in the *panchayat*. He had not thrown the *basta* upon the Magistrate and his merely telling the Magistrate in reply to a question put to Shiam Sunder that the *panchayat* had ceased to exist, insulting though it was, would not make him criminally liable becouse mere abuses have been held not to constitute obstruction (Ratan Lal, 9th Edition, page 375). The Sub-Divisional Officer was, no doubt, hampered in the performance of his public duty by the refusal of the applicant and by his instigations but I do not think that the applicant's conduct amounted to voluntary obstruction within the meaning of s. 186, Indian Penal Code. In order to constitute voluntary obstruction within the meaning of s. 186, Indian Penal Code, there must be the commission of some positive overt act of obstruction and not merely a sort of passive resistance and refusal to carry out orders as would appear from *Queen-Empress* v. *Sommanna* (1).

There is no legal evidence to support the conclusion that the accused had been instigating others not to act in the *panchayat* after his apology of the first day because the Sub-Divisional Officer is the only witness examined in the case and he could not have seen or heard any body being instigated in his absence in Korara. He must have come to know of these instigations the next day from others who have not been examined as witnesses in the case. Persuations addressed to tenants in the absence of a Receiver not to pay rent to him were held not to constitute obstruction [*Ebrahim Sircar* v. *Emperor* (2) and *Matu Ram* v. *Emperor* (3)] although the accused had beaten the *lambardar* who was helping a *Naib Tahsildar* in performance of his duties and as the result of that beating the *lambardar* refused to help the *Naib Tahsildar*, the accused was held not to have committed any criminal offence. A person spreading false reports and thereby preventing persons from taking their children for vaccination was held not to have com-

(1) 15 M. 221; 2 M. L. J. 120; 1 Weir 133; 5 Ind. Dec. (N. S.) 505.

(2) 29 C. 236; 6 C. W. N. 141.

(3) 73 Ind. Cas. 338; 24 Cr. L. J. 591; (1924) A. I. R. (L.) 238.

mitted any offence under s. 186, Indian Penal Code. [*Queen-Empress* v. *Thimmachi* (4)].

Under the Village Panchayat Act the Collector or with his permission the Sub-Divisional Officer could have appointed any member of the depressed classes to be a *panch*. The applicant might have been left free to sit with him or not. He need not have been consulted or argued or expostulated with but if the Sub-Divisional Officer consulted him or wanted to bring him round to his own view the applicant could very well express his own opinion and I think he could induce his fellow *panches* also to hold the same opinion. To hold him criminally liable would be unduly widening the scope of s. 186, Indian Penal Code.

In my opinion the conduct and the acts of the applicant, however, blameworthy, do not fall within the meaning of s. 186 and he does not appear to me to have voluntarily obstructed the Sub-Divisional Officer within the meaning of that section. I would, therefore, submit the record to the Hon'ble High Court with a recommendation that the conviction and sentence of the applicant be set aside.

Mr. *U. S. Bajpai*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—I have read the order of the District Magistrate and his explanation. I am unable to support his order. I see his point of view. The applicant undoubtedly behaved very rudely. His manners were bad and he was clearly determined to be offensive but I cannot find that there is anything upon which a conviction can be based for an offence under s. 186. The applicant was at perfect liberty to resign from the *panchayat* and there is nothing in the law to prevent his advising whomever he may meet not to serve on the *panchayat*.

He no doubt is not a good citizen or a useful member of the community in so far as his actions in this matter are a guide but I cannot find anything which to my mind can support a conviction of voluntarily obstructing a public servant in the discharge of his public functions.

I accordingly accept this Reference set aside the conviction and sentence and direct that the fine if paid be refunded.

Z. K. *Conviction set aside.*

(4) 15 M. 93; 1 Weir 131; 5 Ind. Dec. (N. S.) 414.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 15 OF 1925.

January 28, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

CHIMANLAL PRANJIVANDAS —ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 294-A—Lottery—Publication of proposal to pay—Offence.

Petitioner issued a circular relating to a lottery in which he stated that the Sweep would close on a particular day and that the Draw would take place on a certain day under the supervision of the patrons stated in the tickets and that the prize winners would be notified of the result by telegram. Prizes of different values were mentioned in the circular and orders were solicited :

Held, that the accused was guilty of an offence under s. 294-A of the Penal Code.

Criminal application against conviction and sentence passed by the First Class Magistrate, Surat.

Mr. *A. G. Desai*, for the Applicant.

JUDGMENT.—The petitioner was charged under s. 294-A, Indian Penal Code, for publishing during the months of April and May last a circular of the so-called lottery of the Athlone Club Annual Sweep, popularly known as the Derby Sweep, to be drawn on June 4, 1924, for selling tickets thereof. The Magistrate convicted him and sentenced him to pay a fine of Rs. 25, in default to undergo simple imprisonment for eight days.

The petitioner applies to this Court in revision. The following are the terms of the circular issued by the petitioner:

"Annual Sweep on the Derby
in Aid of St. Peter's Building Fund
of the Athlone Club.
June 4th, 1924.
Prizes.

	Rs.
1st Horse £5,000	75,000.
2nd Horse £2,500	37,500.
3rd Horse £1,000	15,000.
Divided amongst Unplaced £. 1,000	15,000. Starters.
50 Special Prizes of £. 25	375 each.
160 Special Prizes of £. 10	150 each.

The Sweep will close on the 23rd May 1924, and the Draw under the supervision of the patrons stated in the tickets will take place on May 26, 1924. Prize winners will be notified by telegrams.

The above Sweep tickets can be obtained from the undersigned. Price of each ticke

Rs. 10 only. On a Draw a commission of 6¼ per cent. will be deducted from the prize amount. Money in advance.

A few tickets left. The favour of orders solicited."

Section 294-A runs as follows:—

"Whoever keeps any office or place for the purpose of drawing any lottery not authorized by Government shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, shall be punished with fine which may extend to one thousand rupees."

It is contended that the petitioner has not thereby published any proposal to pay any sum for the benefit of any person relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, that is to say, a lottery such as is referred to in the first paragraph of the section. The case appears to us to be sufficiently covered by the decision in *Queen-Empress* v. *Mancherji Kavasji Shapurji* (1). In that case the proprietor of a Bombay newspaper who published an advertisement in his paper relating to a Melbourne lottery was held to be punishable under s. 294-A, Indian Penal Code. The first question for the Court to decide was whether a foreign lottery was within s. 294-A. We have nothing to do with that question in this case. The second point was whether the publication of a proposal to pay any sum for the benefit of any person on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, was punishable. The Court said at page 100*:—

"To answer the second question we have to determine what is the meaning of the word 'published' in this section. We do not find any definition of the word in the Indian Penal Code, and we must, therefore, take that word in its ordinary sense. Thus taking it, it seems to us that if *A* sends an advertisement to *B*, the proprietor of a newspaper, for publication, *B* is punishable as well as *A* for such publication."

Now, clearly the circular which was published by the petitioner did contain a proposal to pay within the meaning of the second paragraph of s. 294-A, Indian Penal Code. It was not necessary that the payment proposed to be made should be made by the person advertising. That was decided by the case we have referred to. The circular states that "the Sweep will be closed on May 23, 1924, and the Draw under the supervision of the patrons stated in the tickets will take place on May 26, 1924. Prize winners will be notified by telegrams." It is clear, therefore, that the petitioner published a proposal to pay and the conviction was right. We reject the application.

Z. K. *Application rejected.*

(1) 10 B. 97; 5 Ind. Dec. (N. s.) 45).

*Page of 10 B.—[*Ed.*]

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 657 OF 1923.

February 1, 1925.

Present:—Mr. Justice Walsh.

DIN DAYAL—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 107—Security proceedings Assault case, evidence and judgment in, whether can be considered -Security, when can be demanded—Amount of security, how to be fixed.

Where a Magistrate is trying a security case and an assault case on the same day against the same persons, there is no harm if he uses his knowledge of the one to govern his judgment in the other, and makes such use appear in his judgment. The logical result, if the persons in both the cases are the same, ought to be that if the Magistrate convicts them in the assault case and thinks that they ought to be bound over he ought to bind them over as part of the decision of the assault case. The result of that would be that when the assault case is upset in appeal, the binding over would be upset too. [p. 518, col. 1.]

Where, however, the persons accused in the assault case are not identical with the persons against whom security proceedings are being taken, the proceedings and judgment in the assault case cannot be taken into consideration in arriving at a conclusion with regard to the security proceedings. [p. 518, col. 2.]

Where there are old standing feuds between two parties or two branches of a family which in the course of events have come to a head by a very serious and heavy litigation, it does not necessarily follow that a Magistrate ought to assume a possibility of a breach of the peace, and bind over one party or the other to keep the peace under s. 107 of the Cr. P. C. [p. 519, col. 1.]

Where orders under s. 107 of the Cr. P. C. are made against certain persons who have been acting

on behalf of their masters, the amount of security required should not be fixed in such a way as to leave the masters no alternative except on the one hand to lose their servants by refusing to become sureties for them so that the men would have to go to jail or, on the other, to be bound hand and foot by very onerous securities for the conduct of men who might leave their masters the next day and pursue at the instigation of the other side a consistent course of legalized blackmail upon their former masters. [p. 519, col. 2.]

Criminal revision from an order of the Sessions Judge, Cawnpore.

Dr. *Kailas Nath Katju*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—I am unable to find any justification for this order. It lays itself open to such serious criticisim that it is difficult to know where quite to begin. The order of the Deputy Magistrate, by which expression I mean the judgment, is mainly based upon a case which he had heard himself in which some of these persons were involved. I will deal with the question of the personnel in a moment. But it is quite plain that although he referred to other matters, he could not leave out of his mind the case of assault which he referred to, and which he had heard the same day. That case of assault in which he convicted has been upset, and, therefore, three-fourths of the judgment of the Deputy Magistrate disappears. I will refer to the judgment in which it was upset in one moment. There would have been no harm, and it would have been only natural for him, trying a security case and an assault case on the same day against the same persons, to use his knowledge of the one to govern his judgment in the other, and to make such use appear in his judgment. The logical result, if the persons were the same, ought to be that if he convicted in the case of assault and thought the persons ought to be bound over, he ought to bind them over as part of the decision in the assault case. Further, the logical result of that would be that when the assault case was upset in appeal, the binding over would be upset too. In the result we have a judgment in a security case based largely, if not entirely, upon an assault case, which no longer exists.

It may be said in answer to this criticism that the accused in the assault case and in the security case were not the same. But if that is a just criticism, then the judgment and the decision in the assault case had no bearing upon the security case and was irrelevant and ought not to have been referred to. In fact as regards four of the people who are before me, and who were before the Magistrates in the Courts below in this case, the proceedings and judgment in the assault case were wholly irrelevant, because they were no parties to the assault case, and, therefore, the judgment of the Deputy Magistrate is irregular in using knowledge of another case. Although he cannot forget it and returns to it from time to time in the course of his judgment, he appears to be conscious that it requires support from other directions. The support which it requires can only be described as faint-hearted. The Deputy Magistrate sets them out and says somewhat quaintly:—

"These events are not proved very strongly so as to make them an offence. They certainly give a fear in the mind of one about the safety of his life."

But if they are not proved sufficiently to make out an offence, they are not proved sufficiently to establish in a judicial mind the fact of reasonable apprehension. I am unable to understand the view of the District Magistrate about this acquittal in appeal. He says that the fact of the acquittal did not help the applicants before him. But the acquittal was subsequent to the order of the Deputy Magistrate, which was before him in revision, and if the subsequent acquittal did not help the case of the applicants, I cannot understand why the District Magistrate thought that their conviction helped the case against them, which was practically the main ground on which the Deputy Magistrate had proceeded. But, as a matter of fact, if the District Magistrate had taken the trouble to study the judgment of the Sessions Judge—I do not complain of his having failed to do so, because I think he ought to have quashed the order of the Deputy Magistrate at sight without further examination—he would have found that the Sessions Judge acquitted the accused in that case, and, therefore, two of the applicants in revision before the District Magistrate, upon the ground that it was not made out beyond reasonable doubt that they were present at the occurrence at all. He would also have discovered that his subordinate officer, the Deputy Magistrate, had used in the judg-

ment recording the conviction, an alleged statement as coming from the Civil Surgeon by way of expert medical evidence, which was not to be found. The Sessions Judge said that neither he, nor the prosecution, nor the defence, have been able to discover on the record any evidence justifying the finding with reference to the medical testimony arrived at by the Deputy Magistrate. This, of course, is a very serious matter, and having regard to the order of the Deputy Magistrate which I now propose to deal with, it ought to have opened the eyes of the District Magistrate to what was going on. The order which has been passed is, I hope, without precedent. I have asked in vain for the production of any precedent to justify it, and it appears to me to be outrageous on the face of it. Reduced to plain language, it looks very much as though the Deputy Magistrate thought that where there were old standing feuds between two parties or two branches of a family, which in the course of events had come to a head by a very serious and heavy litigation, one might always assume a possibility of breach of the peace, and bind over one party or the other to keep the peace under this section. If that theory became an established practice, a very large proportion of the litigant population of the United Provinces would inevitably have to be bound over, and the scarcity of sureties would become so great, that a considerable number of the litigants would find themselves in jail failing their ability to find anybody left to give security. But if, on the other hand, the Deputy Magistrate came to the conclusion that the servants of the three persons, who allege themselves to be the reversioners and who are the plaintiffs in the suit which has been filed, were really doing the wicked work of their masters, and were acting under their instigation and encouragement in either threatening or compassing the death of this expectant heir under the rule, and there was evidence upon which he could come to such a conclusion, then he ought to have found that fact against the masters and ordered them to give security. But he has discharged them, which makes his order inconsistent in terms with the main structure of his judgment. If, on the other hand, the masters have been rightly discharged and there is no evidence against them, then the case against the servants for having so conducted themselves as to create an apprehension of the breach of the peace on account of the litigation between their masters and the other branch of the family, entirely breaks down. Yet he has made them provide sureties, which, as regards them and the circumstances of their case, assuming that their masters are innocent, are not only excessive, but which the Deputy Magistrate knew was impossible, and which he intended to be a punishment for the masters whom he was discharging. The objections, legal and otherwise, to such an order are obvious. The Deputy Magistrate went as near as he could to compel the masters to give their surety. He says in his judgment:—"The amount seems to be appropiate to their masters standing surety for them." Of course he had no jurisdiction to make that order, but he made an order in such a form as to leave the masters no alternative except, on the one hand, to lose their servants by refusing to give sureties so that the men would have to go to jail, or being bound hand and foot by very onerous securities for the conduct of men who might leave their masters the next day and pursue at the instigation of the other side a consistent course of legalized blackmail upon their former masters. The order looks like a subtle attempt to procure by indirect means what the Magistrate professes by his former order to be unable to do by law, and I am surprised that the District Magistrate did not see through it. I am surprised also that he did not see through the palpable *mala fides* of this application. It followed immediately upon the masters and the servants, who are now before me, having applied in the Civil Court for the appointment of a Receiver, which resulted in these complainants being ordered to give security in the amount of Rs. 5,000. It was not founded upon any public report or complaint by the Police, but palpably on the allegation of a private individual, who was apparently smarting under a counter-move which had been taken by his opponent in the civil litigation. All this is so transparent, that the failure of the District Magistrate to see through it, can only be explained by his order in which he says that he is not going into the evidence. But it is a fact that the Deputy Magistrate who has made all these curious

orders, is the same Deputy Magistate who has made an order favourable to the same side in mutation proceedings on the revenue side, and although I have no jurisdiction over him or the District Magistrate except in criminal matters which are brought within the Code, I would suggest to the District Magistrate that, as a matter of administrative procedure, it would be well if the Deputy Magistrate were prohibited for all time from adjudicating upon any matter in which these persons are concerned. If I were his superior officer, there are certain matters upon this record which I should call upon him to explain. It is possible that somewhere or another in this case there lurks trustworthy evidence that somebody has done some act indicating that he is contemplating a breach of peace. There is no evidence before me of anything of the kind, and, therefore, I can only quash all the orders which have been made, and suggest to the District Magistrate that if he thinks that further proceedings of any kind are necessary, it should be directed against persons about whom there is some evidence.

Z. K. *Orders quashed.*

BOMBAY HIGH COURT.

CRIMINAL CONFIRMATION CASE No. 7 OF 1924.

May 14, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

MHABLI RAMA SAIL—ACCUSED —APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), ss. 25, 26, 167—Confession made to Police Officer in foreign territory, whether admissible—Conviction—Appeal—Conviction, whether can be upheld.

For the purpose of applying the provisions of s. 26 of the Evidence Act it is immaterial whether the accused was in Police custody in British territory or in foreign territory at the time when he made the confession which is sought to be put in evidence against him. [p. 522, col. 1.]

Where a confession has been improperly admitted in evidence it is permissible for an Appellate Court under s. 167 of the Evidence Act to uphold the conviction, if independently of the confession the Court is of opinion that there is sufficient evidence on the record to justify the conviction, but where the Court is unable to say how far the judgment of the Trial Court and the opinion of the Assessors was influenced by the improper admission of the confession and where it is probable that if the Assessors had not known of the confession at all they might have looked at the rest of the evidence in an entirely different light, the conviction cannot be upheld. [p. 522, col. 2.]

Per *Fawcett, J.*—There is no qualification of the expression "Police Officer" in s. 25 or s. 26 of the Evidence Act and a confession made to a Police Officer whoever that Police Officer may be, and whether he is a Police Officer in British territory or a Police Officer in foreign territory, is inadmissible. [p. 523, cols. 1 & 2.]

Criminal confirmation case against an order of the Sessions Judge, Karwar.

Mr. *Velinkar* (with him Mr. *G. P. Murdeshwar*), for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Macleod, C. J.—The accused by name Mhabli Rama Sail from Majali, a British village, on the boundary between British and Portuguese territory in the Kanara District was charged with having committed the murders of three persons on or about September 27, 1917, at Lolliem in Goa territory. The Portuguese Authorities commenced the preliminary investigation at once but it does not appear that any names were mentioned in connection with the crime. At any rate it was not suggested that the name of the accused was mentioned in any official record, or that any request was made to the British Authorities, as the accused belonged to a British village, to make a search for him. At the present Trial Ex. 13 said the news of the murder spread in a few days and it was rumoured that accused might have committed it. He was going from Majali side to Lolliem on the day of the murder when the witness met him about 11 A. M. and asked him where he (accused) was going. He said he was going to purchase cocoanuts. It is certainly very strange, if this witness had told the Investigating Officer that he had seen the accused on the day of the murder going towards Lolliem and that the accused actually told him that he was going to purchase cocoanuts, that suspicion did not arise against the accused, and that no attempt was made to discover whether he was present in his own village at Majali or any other place in British territory. If the evidence of Ex. 13 is now given for the first time it is of very little value. It appears that nothing further was done in the matter till 1922 when the accused was arrested by the Portuguese Authorities as

being connected with a murder that had been committed at a place called Thalna. He was brought before a Portuguese official called 'Administrator' whose duty it was to investigate cases although he was not empowered to try them. The Administrator in his evidence at the present trial said :—

"The accused was arrested in connection with a murder committed at Thalna. I was investigating that case as I am empowered to investigate into such offences. I did not do it as a Police Officer. I have nothing to do with the Police. They are not under me but under the commandant. The accused was brought into my office to be questioned in connection with the Thalna murder. When I was inquiring into the Thalna murder, as I knew of the temple murder of Shedi, I asked him about it on April 17 and on two successive days What he stated was taken down in writing?"

While the proceedings were pending the accused escaped from the Portuguese Authorities. He was arrested again in September 1922 in British territory, but the extradition proceedings fell through as the Portuguese Government did not produce evidence. However the Portuguese Government then approached the Bombay Government to sanction the prosecution of the accused in British territory, and sanction was given under the provisions of s. 188, Cr. P. C. The Kanara Police were not willing to proceed with the case without a guarantee from the Portuguese Government that the latter would produce the necessary witnesses who were not subject to the process of the British Courts, and this guarantee was not obtained till December 1923. It is certainly remarkable that although the Portuguese Government would not produce the necessary evidence to secure the extradition of the accused, they asked the British Authorities to sanction the prosecution of the accused in British t[illegible]ory, and laid the responsibility on [illegible] collect sufficient evidence to [illegible]mmitment order. The Sessions

[illegible]

[illegible]nce against accused consists [illegible](now retracted and retract-[illegible]ict Court of Quepem in [illegible]istrator of Kankon [illegible]tement of Rosa [illegible]king but not [illegible]e who states [illegible] to the house on the day in question to buy cocoanuts and remained there till witness left after finishing her work late in the evening, still shelling cocoanuts which they made a pretext for staying so late an hour. Evidence of the confession was given by the Administrator (Ex. 5) and his clerk (Ex. 8) who both refreshed their memories by referring to a copy of the document recorded at the time."

The first question to be answered is whether the evidence of the confession tendered by the prosecution was admissible under the Indian Evidence Act? There is a further difficulty in this case, because the proceedings taken by the Portuguese Authorities were not in any way in accordance with criminal procedure in British territory, where there is no office corresponding to the office of an Administrator. The Government Prosecutor at the Trial conceded that the Administrator was not a Magistrate and that his inquiry was an extra-judicial proceeding. The real question then was whether the confession was made while the accused was in Police custody. Because if he was in the custody of the Police and the Administrator was not a Magistrate, clearly the confession was not admissible in evidence under s. 26 of the Indian Evidence Act. There seems to have been an argument before the Sessions Judge whether the Administrator was a Police Officer and if he was, whether a statement made to him could be proved under s. 25. The learned Judge on this point remarks :—

"It appears that witness as Administrator is an officer with general executive duties; in criminal matters it is apparently left to his discretion what cases he should investigate; but he is not technically a Police Officer nor as a matter of substance does he appear to be so, any more than the District Judge who actually went to the spot in 1917 and conducted a far more active investigation."

So far I can agree.

Then the question was whether on the allegation of the accused that he was in Police custody the confession so made was a good one. The Judge says :—

"The accused was arrested on April 8, 1922; he remained in Police custody till May 15; he was examined by the Administrator on April 17 and following days. The Police brought accused to the Administrator's office on April 17

and took him away when his statement was taken; the Police stood in the verandah and did not come into the Administrator's office. This is the usual procedure in bringing an accused person to a Magistrate for confession; and it has been held that in such circumstances the accused is still in Police custody—*Queen-Empress* v. *Lakshmya* (1). It may be argued that s. 26 of the Evidence Act does not apply to Police Officers in foreign territory when such Police Officers are not in any way concerned with the investigation of the case; if they or their superiors have no interest in securing the conviction of the accused the reason for the provision in s. 26 disappears. In the present case the investigation appears to have been conducted by the Judicial and the Executive Authorities except for the minor part played by the Justice of the Peace who was also Police Patel."

This paragraph of the judgment is quite inconclusive. There is no decision of the Judge that the accused when he made the statement before the Administrator was or was not in Police custody. Clearly the accused was in Police custody, and it makes no difference for the purpose of applying the provisions of the Indian Evidence Act that he was in Police custody in foreign territory.

Then the Judge considered whether the confession was voluntarily made and came to the conclusion that there was no substantial ground for holding that the confession was not a voluntary confession. I can only conclude from that part of the judgment that the Sessions Judge had determined, although he did not say so directly, to admit the evidence. Otherwise there would be no necessity to consider whether this confession was voluntary or not. It was unfortunate in a case of this importance, when the whole case for the prosecution practically turned on the question whether the confession was admissible or not, that there should be no decision of the learned Judge on the point, beyond the fact that he allowed the evidence to be recorded. When he came to sum up the evidence he said:—

"In reviewing the evidence in the case I feel on firmer ground in discarding the confession of the accused on the ground that it was made in the presence of the Police and relying on the evidence of Rosa."

I can only assume that the Judge, when he said that the confession was made in the presence of the Police, meant that it was made when he was in Police custody, for the words 'in the presence of the Police' do not appear either in s. 25 or s. 26. Although the evidence was discarded, as a matter of law it ought never to have been admitted, and as it was admitted, it is impossible to say what influence it had on the Judge's appreciation of the remaining evidence in the case. We may take it that the Judge convicted the accused practically on the evidence of Rosa alone although in one or two particulars he considered it was corroborated by other evidence.

* * * * *

I do not dispute the fact that under s. 167 of the Indian Evidence Act it is permissible for us, in spite of the improper admission of the confession in evidence, to uphold the conviction if, independently of the evidence objected to, we thought there was sufficient evidence to justify the decision of the Sessions Judge, but I think that if the Judge and the Assessors had known nothing more beyond the fact that the accused had made a statement before the Administrator, they would have looked at the rest of the evidence in an entirely different light. On a consideration of the circumstances of the case, and the very meagre evidence after so many years with regard to the identity of the accused, it seems to me, following the usual rule with regard to the weighing of evidence in criminal cases, that there are no sufficient grounds for upholding the conviction. I, therefore, think that the appeal should be allowed and that the accused must be acquitted and discharged.

Fawcett, J.—I agree that, if the confession before the Administrator is excluded, there is no other evidence which is sufficient to justify the conviction of the accused. Having regard to the lapse of time since the alleged crime, I do not think the prosecution evidence relied on is sufficient or reliable enough to bring the charge of murder to the accused beyond reasonable doubt, although there is considerable suspicion.

As regards

(1) Rat. Un. Cr. C. 885; Cr. Rg. No. 22 of 1896.

might be admissible had the trial taken place in the Portuguese territory. But as the appellant has been tried in British India its admissibility must be judged by the rules contained in the Indian Evidence Act. The Administrator before whom it was made is no doubt not a Police Officer in the ordinary sense, and he appears to have a position somewhat analogous to that of a Committing Magistrate in the British India. He says that he can investigate any case within his jurisdiction and he sends the papers to the District Judge, who has authority to try the case. It is, however, only the District Judge who is empowered to sentence an accused, and the Administrator himself is not empowered to try the case. It is, I think, impossible, in view of the last named fact, to treat him as a Magistrate in the ordinary sense in which that word is used. It is also clear that the Public Prosecutor in the lower Court gave up the contention that he could be treated as a Magistrate. The accused undoubtedly was in Police custody when he made this confession, and the only argument which can possibly bring the case outside the terms of s. 26 of the Indian Evidence Act is the one referred to by the learned Sessions Judge, when he said:—

"It may be argued that s. 26 of the Evidence Act does not apply to Police Officers in foreign territory when such Police Officers are not in any way concerned with the investigation of the case; if they or their superiors have no interest in securing the conviction of the accused the reason for the provision in s. 26 disappears. In the present case the investigation appears to have been conducted by the Judicial and Executive Authorities except for the minor part played by the Justice of the Peace who was also Police Patel."

This contention, however, is directly opposed to the ruling of the Calcutta High Court in *In the matter of Hiran Miya* (2) where it is said that it is immaterial whether the Police Officer be the officer investigating the case, the fact that such person is a Police Officer invalidates the confession. There is no qualification of the expression "Police Officer" in s. 25 or s. 26, just as there is no qualification of the word "Magistrate" in s. 26 and on that account it was held in another case, *Faiz Ullah* v. *Emperor* (3), that the word "Magistrate" in s. 26 would cover a Magistrate, even though he were on leave and at the time not in the District in which he had been exercising jurisdiction. It seems to me impossible to say that s. 26 does not directly apply to this particular case and, therefore, the confession must be excluded as inadmissible. Accordingly I agree that the conviction should be reversed and the accused acquitted.

Z. K. *Conviction reversed.*

(2) 1 C. L. R. 21

(3) 22 Ind. Cas. 150; 3 Crim. L. Rev. 468; 8 P. W. R. 1914 Cr. 38 P. L. R, 1914; 16 Cr. L. J. 6.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 51 OF 1925.

March 16, 1925.

Present:—Mr. Justice Mukerji.

BABU RAM—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 307, 326, 336, 511—Arms Act (XI of 1878), ss. 14, 19 (f)—Firing gun in air—Rash and negligent act—Attempt to murder or cause grievous hurt—Gun fired by brother of license-holder—Illegal possession of arms.

Section 336 of the Penal Code contemplates a lawful act, but it punishes the same act which is otherwise lawful only if it is done in a rash or negligent manner. [p. 524, col. 2.]

A person who deliberately throws brickbats at passers-by and wants to shoot them and for that purpose aims a gun and fires shots, is guilty of an attempt at murder or of an attempt to cause grievous hurt with a dangerous weapon of shooting and not merely of an offence under s. 336 of the Penal Code. [*ibid.*]

When riots are taking place in different parts of a town a man possessing a gun may very well fire shots just to indicate to would-be mischief-makers that there are arms of defence in the house and that any body who might be mischievously inclined might take care of his safety. Such an act would not amount to an offence under s. 336 of the Penal Code. [p. 524, col. 2; p. 525, col. 1.]

Merely firing a shot is not punishable as an offence in itself. [p. 525, col. 2.]

The brother of a person who held a license for a gun took out the gun at a time when riots were taking place in different parts of the town and fired shots in the air so that people mischievously inclined might know that it was not safe for them to do any mischief to the people living in the house:

Held, that the possession of the gun by the person who fired it was on behalf of and with the express or implied permission of the license-holder and that, therefore, the person firing the gun was not guilty of an offence under s. 19 (*f*) of the Arms Act. [p. 526, col. 1.]

Criminal revision from an order of the Sessions Judge, Kumaun, dated the 13th February 1925.

Mr. *G. W. Dillon*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision against a conviction of the applicant under s. 336 of the Indian Penal Code and another conviction under s. 19 (*f*) of the Arms Act. The sentence was one of two months' rigorous imprisonment and Rs. 50 fine under the former conviction and one of two months' rigorous imprisonment under the latter, the sentences of imprisonment running concurrently.

The charge against the applicant under s. 336 of the Indian Penal Code, as it is to be found in the charge sheet, is as follows:—"You on or about the 10th day of *Mohurrum* this year at 4 P. M. or after threw bricks from your roof and fired gun from the same roof in such a rash manner that it endangered human lives of persons who were passing on the roads near about your *mohalla*."

The learned Magistrate who convicted the applicant in his judgment stated as follows:—"The evidence showed that there was a communal riot in the city of Pilibhit in different parts of it. The accused threw brickbats *at the Muhammadans* who were passing by the lane close to his house and not only this but he fired two shots *at them* from his house but fortunately no one was hit." At another place the learned Magistrate said 'I am inclined to think that it was for these reasons only that the shot *missed the aim* and nobody was hit or killed.'

The impression that I have gathered from reading the judgment of the learned Magistrate is that he found, on the evidence, that the appellant *deliberately* threw brickbats *at Muhammadan* passers-by and he *deliberately* aimed a gun and fired two shots at the said persons and that it was a matter of pure luck that nobody was injured. The learned Sessions Judge who heard the appeal does not clearly say what he found on examination of the evidence. He contented himself with the following remark:—

"I am of opinion that the evidence fully substantiates the case against the accused."

Now, if the case against the accused was what the learned Magistrate found to have been proved, the charge under s. 336 of the Indian Penal Code was an utterly insufficient and improper charge. Section 336 of the Indian Penal Code contemplates a lawful act. But it punishes the same act which is otherwise lawful only if it is exercised in a rash or negligent manner. If the finding be accepted that the applicant *deliberately* threw brickbats *at passers-by* and *wanted to shoot them* and for that purpose aimed a gun and fired shots, he was clearly guilty of an attempt at murder if not of an attempt to cause grievous hurt with a dangerous weapon of shooting.

It is for this reason that I have been utterly unable to understand the judgments of the Magistrate and the learned Sessions Judge.

To satisfy myself as to how the charge of such a light character, as a charge under s. 336 is, could be brought on the evidence accepted as true. I examined the statements of the witnesses, myself. My examination of the statements and the remarks of the learned Magistrate and the learned Sessions Judge that allowance had to be made for communal bias and exaggeration and want of observation, etc., satisfy me that the prosecution understood that nothing serious was really meant by whatever the applicant may have done and that all that was wanted to be punished was the firing of the gun at a time when possibly communal feeling was running high. If the evidence of some of the witnesses, *e.g.*, Kuttub-ud-din, Fazal Ahmad and Nur Ahmad is to be believed the applicant deliberately wanted to shoot Muhammadans passing by his house. On the other hand the evidence of the other witnesses would indicate that shots were fired in the air.

The position, therefore, is this. If the finding of the learned Magistrate is what he has mentioned in his judgment and if that finding has been upheld by the learned Sessions Judge, the trial must be quashed and the applicant should be ordered to be committed to the Court of Sessions so that he might undergo a trial by a Superior Court of Criminal Jurisdiction with an appeal (in a serious case like this) to this Court. On the other hand, if the charge was nothing but of firing gun during communal tension, it can hardly be said that any offence has been committed. When riots were taking place, as the learned Magistrate has stated in the judgment, in

different parts of the town, a man possessing a gun may very well fire shots just to indicate to the would-be mischief-makers that there were arms of defence in the house and anybody who might be mischievously inclined might take care of his safety.

The result, therefore, is that either the conviction should be set aside and a re-trial ordered or the conviction should be set aside *in toto*.

As I have said, I have examined the evidence and I am of opinion that the latter course is the only course which is open to me. The evidence will not sustain a charge of an attempt at murder or attempt at causing grievous hurt with a gun.

I accordingly set aside the conviction and sentence under s. 336 of the Indian Penal Code and order that the fine, if paid, be refunded.

Coming to the charge under s. 19 (*f*) of the Arms Act. The position seems to have been as follows. Communal riots were taking place in different quarters of the town. A brother of a license-holder took out the gun and fired shots in the air so that people mischievously inclined might know that it was not safe for them to do any mischief to the people living in the house. The question would then be whether a temporary possession like that would come under s. 19 (*f*) of the Arms Act.

Cases must be decided on their own particular circumstances and unless a decided case, lays down a general principle, it is no sure guide.

The charge against the applicant is that he was in possession of arms, in contravention of the provisions of s. 14 of the Arms Act. That rule of law lays down that it is unlawful to be in possession of any fire arms without a license. It is common ground that the brother of the applicant, living in the same house as the applicant held a license for the gun. Then the question arises, whether the gun, at the time the shots were fired, had ceased to be in the possession of the license-holder and had passed into the possession of the applicant?

The answer to the question must be based on some definite principle. The word possession is a well-known word in law, and a man may be in possession of a thing without being in physical touch with it. *A* locks up a vacant house. He will be deemed to be in possession of the same. A, a license-holder of a gun living at Allahabad and holding a license for that District may go to Calcutta leaving his gun at his house in charge of the servants or his wife. The possession of the wife and the servants would be the possession of the license-holder and it cannot be said that the wife and the servants are in possession of an unlicensed gun. Similarly, a servant cleaning a gun for his master or carrying it for him to the Police Office, for an inspection by an officer there, is not in possession of an unlicensed gun. But if the same servant takes out the gun without the permission of his master and commits an offence with it, or goes out for a mere show in a marriage procession, his (the servant's) possession would be unlawful. The reason is that the possession is not on behalf of the master but on behalf of the servant himself.

Again, it has to be remembered that the license for holding a fire-arm is a personal privilege, and the licensee is not entitled to use the gun as he may lawfully use any other article of his. The owner of a car may lend it to a friend, but he cannot lend his gun to him. In the former case the possession of the friend would be the possession of the owner, but the possession of the friend, in the case of the gun, may not necessarily be the possession of the license-holder. The reason is this. The law aims at the control of fire-arms in the country and the object of law would be defeated if the privilege granted to comparatively few people could be extended beyond its terms.

Bearing, then, the two somewhat antagonistic principles in mind, I have to see whether the possession of the applicant, at the time he fired the shots, was on behalf of his brother who held a license or whether it was on his own behalf? Further if it was on behalf of his brother, whether the applicant's possession was one which is not permitted by the principle underlying the Arms Act which I have to construe?

It is to be remembered that mere firing a shot is not punishable. If, therefore, the applicant was within the law, in holding the gun in his hand, at the time he fired the shots, he must be treated as innocent. The first of the two questions propounded above is one of fact. I have already stated the circumstances in which the shots were

fired. I have found that the firing of the shots had the object of scaring away the mischief-makers. The use and object were both lawful. In the circumstances, it must be taken that the possession of the gun by the applicant was on behalf of and with the express or implied permission of the brother, the license-holder. The next question is whether in the grant of the permission of the use of the gun given by the license-holder, he, in any way, contravened the principle of 'personal privilege'? I think he did not, I have already pointed out that the mere firing of a gun is not an offence. The personal privilege to possess a gun was not in any way abused by the license-holder's brother firing a few shots with it, for a lawful purpose and for the benefit of the license-holder or his family. If the license-holder can ask his brother to clean his gun, he may ask him to fire a few shots to scare away, say, the crows. If these two acts be not unlawful, the license-holder may lawfully ask his brother to scare away possible assailants by firing the gun.

I am, therefore, of opinion that no offence has been committed under the Arms Act s. 19 (*f*).

The case of *Muhammad Hasan* v. *Emperor* (1) is clearly distinguishable, on the facts. The son of the license-holder had taken the gun out of the house and was out for shooting. This was quite contrary to the spirit of the license, though the possession of the son was the possession of the father, in the wider sense of the term.

The result is that I set aside the conviction under the Arms Act as well.

The convictions and the sentences are set aside and the applicant, who was admitted to bail by the learned Judge of this Court who admitted the application, need not surrender. The fine, if paid, will be refunded.

Z. K. *Conviction set aside.*

(1) 85 Ind. Cas. 159; 22 A. L. J. 1095; L. R. 6 A. 23 Cr.; (1925) A. I. R. (A.) 175; 25 Cr. L. J. 479.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 773 OF 1924.

November 7, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Mukerji.

MAHABIR SINGH AND ANOTHER —PETITIONERS

versus

GIRIBALA DASSI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 192, 202, 203, 204—Cognizance taken by Magistrate—Order directing investigation—Transfer of case for consideration of report, validity of.

Sub-section (1) of s. 192 of the Cr. P. C. empowers a Magistrate to transfer a case for enquiry or trial, but it does not empower him to transfer a case simply for the purpose of considering the report of an investigation under s. 202 of the Cr. P. C., which he has himself ordered. [p. 527, col. 1.]

The provisions of s. 192 or of s. 202 of the Cr. P. C. do not entitle a Magistrate after he has proceeded under the latter section to make an order under the provisions of the former section transferring the case to another Magistrate for the purpose of being dealt with under s. 203 of the Code without a fresh investigation as contemplated by s. 202 of the Code. [*ibid.*]

Rule against an order of the District Magistrate, Howrah, affirming that of the Deputy Magistrate, Howrah, dated the 3rd August 1924.

Babu *Haradhan Chatterjee*, for the Petitioners.

Babu *Mritunjoy Chatterjee*, for the Opposite Party.

JUDGMENT.—The complaint in the present case was filed before Mr. D. Dutt, Deputy Magistrate of Howrah, on the 10th May 1924, and he on examining the complainant was of opinion that it was apparently a petty altercation and he made an order that Babu H. P. Roy Chaudhury, an Honorary Magistrate should enquire into it and submit a report. This order was evidently passed under the provisions of s. 202, Cr. P. C. In ordinary course on the report of Mr. H. P. Roy Chaudhury being submitted Mr. D. Dutt could have either dismissed the complaint or issued process. Matters, however, took quite a different turn. After several adjournments in consequence of the report not having arrived, Mr. D. Dutt on the 1st August 1924, passed an order which ran as follows :—" The cross-case has been disposed of by Mr. A. C. Bose. This case is, therefore, sent to him for disposal." It may be said that there was a cross-case which had in the meantime been disposed of by the Deputy Magistrate Mr. A. C. Bose. On

the 2nd August 1924, Mr. A. C. Bose looked into the report of Mr. H. P. Roy Chaudhury, Honorary Magistrate, which it is said had already been submitted before Mr. D. Dutt and which evidently had been sent along with the papers to Mr. A. C. Bose, and finding from the report that there was no case against the accused persons dismissed the complaint under s. 203, Cr. P. C. In doing so it may be stated Mr. A. C. Bose referred also to the fact that he had disposed of the cross-case. Thereafter the complainant filed a petition for revival, the proceedings in connection with which need not be referred to in detail, with the result that ultimately Mr. A. C. Bose issued summons against the petitioner.

The validity of the proceedings in connection with their transfer from the file of Mr. D. Dutt to that of Mr. A. C. Bose, is challenged on behalf of the petitioners and it is contended that Mr. A. C. Bose was not properly in seisin of the case and any order issuing process passed by him must accordingly be held to be an order passed without jurisdiction.

We have already stated that Mr. D. Dutt on receipt of the complaint had chosen to proceed under the provisions of s. 202, Cr. P. C. When he had done so evidently he thought of proceeding under s. 192 (1) Cr. P. C., as well. That sub-section empowers the Magistrate to transfer a case for enquiry or trial, but it does not empower him to transfer a case simply for the purpose of considering the report of an investigation under s. 202, Cr. P. C., which he has himself ordered. In the present case Mr. A. C. Bose did not proceed under s. 202, Cr. P. C., but all that he did was to act upon the report of the Honorary Magistrate which had been called for under the provisions of s. 202, Cr. P. C., by Mr. D. Dutt and without examining the complainant he dismissed the complaint under s. 203, Cr. P. C., as stated above.

We do not think that the provisions of s. 192 or of s. 202 entitle a Magistrate after he has proceeded under the latter section to make an order under the provisions of the former section transferring the case for the purpose of being dealt with under s. 203 or s. 204, without a fresh investigation as contemplated by s. 202, Cr. P. C. Mr. A. C. Bose was, in our opinion, not in proper seisin of the case as the transfer to him at that stage and in the circumstances stated above cannot be justified under any provision of the law. His subsequent order issuing process against the accused must accordingly be held to be without jurisdiction.

The Rule, therefore, is made absolute. The order issuing process is set aside, and it is directed that the complaint be put up before a Magistrate competent to deal with it, who on examining the complainant afresh will proceed to pass proper order in accordance with the provisions of the law.

Z. K. *Rule made absolute.*

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 72 OF 1924.

December 13, 1924.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Grump.

In re MAHADEV LAXMAN SATARDEKAR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 203—Discharge, whether bars second complaint—Procedure—Duty of complainant.

An order of discharge does not operate as an acquittal and leaves the matter at large for all purposes of judicial enquiry. There is jurisdiction still vested in all Magistrates including the one who made the previous enquiry, just as before, but all Magistrates, and especially the one who formerly discharged the accused, are bound to exercise due discretion to take that discharge into account in dealing with the case, and it is the duty of the complainant to inform the Magistrate before whom the case comes up on the second occasion that he had previously filed a similar complaint which has been dismissed, because when the Court to which the second complaint is made becomes aware that a similar complaint has already been dismissed it must exercise greater care in considering how to deal with the case. [p. 528, col. 2.]

Queen-Empress v. *Adam Khan*, 22 A. 106; A. W. N. (1899) 211; 9 Ind. Dec. (N. S.) 1100, dissented from.

Queen-Empress v. *Bapuda*, Rat. Unrep. Cr. C. 350; Cr. Rg. No. 40 of 1887, followed.

Criminal Reference made by the District Magistrate, Ratnagiri.

JUDGMENT.—This is a Reference by the District Magistrate of Ratnagiri. One Mahadeo Laxman filed a complaint on April 15, 1924, under ss. 448, 506 and 350, Indian Penal Code, in the Court of the First Class Magistrate at Malvan against

Sitaram Narayan Tavde, Havildar of the 11th Mahratta Light Infantry then stationed at Secunderabad, and three others. The complaint was that the accused entered the complainant's house on April 8, 1924, beat him and threatened to kill him. The First Class Magistrate verified the complaint and dismissed it under s. 203 of the Cr. P. C. on April 16, 1924.

The complainant then filed a fresh complaint on the same facts against the same accused in the Court of the Bench Magistrates of the Second Class at Malvan on April 25, 1924. The fact of his previous complaint having been dismissed by the First Class Magistrate was not mentioned by the complainant in his complaint to the Bench Magistrates. The Bench Magistrates entertained the complaint, recorded the complainant's verification statement, and ordered the issue of process under s. 448, Indian Penal Code. Accordingly, a bailable warrant was issued for the arrest of the accused Havildar, who brought to the notice of the District Magistrate the above facts in an application for transfer of the case.

On examining the papers the Magistrate was of opinion that the Bench Magistrates were wrong in taking up the complaint, which was already dismissed by the First Class Magistrate. Suce a complaint was held to be without jurisdiction and the proceedings were set aside by the High Court of Allahabad in *Queen-Empress* v. *Adam Khan* (1). The District Magistrate, therefore, requested the Registrar to kindly move the High Court to set aside the proceedings pending in the Court of the Bench Magistrates at Malvan.

In *Queen-Empress* v. *Adam Khan* (1), it was held that when a competent tribunal has dismissed a complaint another tribunal of exactly the same powers cannot re-open the same matter on a complaint made to it. The learned Judges said (page 108*):—

"We think it utterly contrary to sound principles that one Magistrate of co-ordinate jurisdiction should, in effect and substance deal with, as if it were an appeal or a matter for revision, a complaint which had already been dismissed by a competent tribunal of co-ordinate authority."

On the other hand in *Queen-Empress* v. *Bapuda* (2), it was held by this Court that there was nothing to prevent a Magistrate after he has once discharged an accused under s. 203 of the Cr. P. C. from enquiring again into the case against him. A discharge not operating as an acquittal leaves the matter at large for all purposes of judicial enquiry. There is jurisdiction still vested in all Magistrates including the one who made the previous enquiry, just as before. But all Magistrates and especially the one who formerly discharged the accused are bound to exercise due discretion to take that discharge into account, and to avoid any such oppressive proceedings as may either expose them to punishment under s. 219 or s. 220 of the Indian Penal Code or to civil action on the part of the accused.

We do not think, therefore, that the Bench Magistrates at Malvan had no jurisdiction to hear the complainant, and to inquire into the second complaint because a similar complaint had already been dismissed by the First Class Magistrate. But we do think that there was a compelling duty on the complainant to inform the Bench Magistrates that he had previously filed a a similar complaint which had been dismissed, because when the Court to which the second complaint is made becomes aware that a similar complaint has already been dismissed it must necessarily exercise greater care in considering how to deal with the case.

Therefore, we might send back the case to the Bench Magistrates to re-consider their order taking into consideration the fact that a previous complaint was dismissed; but considering the conduct of the complainant we see no reason why we should do so. Accordingly we set aside the order of the Bench Magistrates.

Z. K. *Order set aside.*

(1) 22 A. 106; A. W. N. (1899) 211; 9 Ind. Dec. (N. S.) 1100.

(2) Rat. Unrep. Cr. C. 350; Cr. Rg. No. 40 of 1887.

*Page of 22 A.—[*Ed.*].

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE
No. 178 OF 1921.
December 19, 1924.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice B. B. Ghose.

KANCHAN BARANI DEBI—
PLAINTIFF—APPELLANT
versus
UMESH CHANDRA ROY AND OTHERS
—DEFENDANTS—RESPONDENTS.

Bengal Patni Taluks Regulation (VIII of 1819), s. 11—Village Chaukidari Act (VI B. C. of 1870), s. 50—Putni taluq—Chaukidari chakran *lands, resumption of—Sale of* putni taluq *for arrears of rent—Purchaser of* taluq, *whether entitled to resumed* chaukidari chakran *lands.*

A *putni taluq* was created in favour of one *H* in 1820. The *chaukidari chakran* lands situated within the *putni taluq* were resumed under the Village Chaukidari Act and transferred to the *zemindar* under s. 50 of the Act subject to the payment of the amount of assessment made on those lands. Subsequently the *zemindar* settled those lands with one *S*, who had become the owner of the *putni taluq* by purchase in *putni* settlement. The *pattah* contained a clause that if, in future, any other person or persons besides the holder of the *putni taluq* should be proved to have *putni* interest in the *taluq*, he or they would acquire *putni* interest in the *chakran* lands also in the same manner and to the same extent as they may be found to have in the *taluq* and that if, in future, the *putni* interest in the *taluq* be transferred for arrears of rent or extinguished for any reason then the *putni* interest of the grantee in the *chakran* lands would also be transferred or extinguished along with the original *putni*. Later on *S* sold his *putni* interest in the resumed *chaukidari chakran* lands to the defendants. Thereafter the *putni* rent of the *taluq* fell into arrears and the *taluq* was sold under the Bengal Patni Taluks Regulation VIII of 1819 and was purchased by the plaintiff. The plaintiff then obtained possession of the *taluq* but not of the resumed *chakran* lands. She subsequently brought a suit for possession of those lands:

Held, (1) that the interest of the *zemindar* in the *chaukidari chakran* lands passed to the *putnidar* under the *putni* grant of 1820 and that the *putnidar* was entitled to possession of those lands on resumption under the Village Chaukidari Act by virtue of that grant; [p. 529, col. 2; p. 530, col. 1.]

(2) that far from separating the resumed *chaukidari* lands from the original *putni* the intention of the parties to the *pattah* granted to *S* was that the *chaukidari chakran* lands should be considered as part and parcel of the *putni*; [p. 530, col. 2.]

(3) that consequently the plaintiff was entitled to the *putni* as it was created in 1820 and was, therefore, entitled to possession of the *chaukidari chakran* lands as being part of the *putni*. [p. 531, cols. 1 & 2.]

Appeal against a decree of the Additional Subordinate Judge, Burdwan, dated the 28th June 1921.

Babus *Mahendra Nath Roy* and *Narendra Nath Chowdhury*, for the Appellant.

Babus *Ram Chandra Mazumdar* and *Gopendra Nath Das*, for the Respondents.

JUDGMENT.

Ghose, J.—The facts involved in this appeal are these: A *putni taluq* was created of six *mouzahs* of lot Kooly within the *zemindari* of the Maharaja of Burdwan by the *zemindar* in favour of one Joy Chandra Hazrah in September 1820. The rent was fixed at the rate of Rs. 2,654 per annum payable in certain instalments. The *chaukidari chakran* lands situated within the *putni taluq* were resumed under the Village Chowkidari Act VI (B. C.) of 1870 and transferred to the *zemindar* under s. 50 of the Act subject to the payment of the amount of assessment made on those lands. On the 12th May 1899, by a *pattah* executed on behalf of the Maharaja of Burdwan these lands comprising 133 *bighas* 6 *cottas*, were settled with one Syamlal Chatterjee in *putni* settlement. Syamlal was then the owner of the *putni taluq* lot Kooly by purchase. The settlement was made on receipt of a *selami* of Rs. 68 and at a rental of Rs. 135-4-2. Out of the amount fixed as rent, the grantee was to pay to the collecting *panchayat* Rs. 108-1-0 per year (the amount of assessment under the Act) and the balance of Rs 27-3-0 direct to the *zemindar*. On the 10th July 1906, Syamlal sold this *putni* interest in the resumed *chowkidari chakran* lands to the defendant No. 1 and the defendants are now in possession of those lands. Subsequently, the *putni* rent of lot Kooly, fell into arrears and, for the arrears due for the first six months of 1321 *B. S.*, the *putni taluq* was sold under Regulation VIII of 1819 and purchased by the plaintiff on the 17th November 1914. The plaintiff then obtained possession of the *putni taluq* but not of the resumed *chakran* lands. She now sues for possession of those lands on the ground that, by virtue of the purchase under Regulation VIII of 1819 and in accordance with the terms of the *putni pattah* and *kabuliyat* by which the lands were settled with Syamlal on the 12th May 1899, she is entitled to the lands in dispute. The defendants resisted her claim and the suit was dismissed by the Trial Court. The plaintiff appeals against that decree.

The only question for consideration is whether, as purchaser of the *putni taluq* lot Kooly at the Regulation sale, the plaintiff is entitled to possession of the lands in suit. It is common ground that the interest of the *zemindar* in the *chaukidari chakran* lands passed to the *putnidar* under the

putni grant of 1820 and that the *putnidar* was entitled to possession of those lands on resumption under the Chankidari Act by virtue of that grant. It was not possible to contend anything to the contrary after the decision of their Lordships of the Privy Council in the case of *Ranjit Singh* v. *Kali Dasi Debi* (1). That decision set at rest in 1917 all controversies as to the right of the *putnidar* to possession of *chaukidari chakran* lands after resumption under the Chaukidari Act. If there had been nothing else, the plaintiff would be entitled to the *chakran* lands, notwithstanding the sale of those lands by the defaulting *putnidar*. We have to see whether, by reason of the *pattah* dated the 12th May 1899, this position has been altered.

The contention of the defendants is that by reason of the *pattah* of 1899, it should be considered that the two parties concerned that is, the *zemindar* and the *putnidar* agreed that the *chaukidari chakran* lands should be separated from the old *putni* and formed into a new *putni*; or in other words, that these lands should not be considered as part and parcel of the *putni* of Joy Chandra Hazrah. It is certainly open to the only two parties concerned to alter the terms of the original *putni* if they chose to do so; and what we have to see is whether that was done. In order to do that, we have to examine the terms of the *pattah* by which the *chaukidari chakran* lands were granted to Syamlal Chatterjee. The appellant relies upon the fact that these *chaukidari chakran* lands were settled with Syamlal because he was the person in possession of lot Kooly in the *putni* interest. It is stated in the *pattah* (Ex. No. 1) that Syamlal Chatterjee had applied for obtaining those lands from the Maharaja on giving out that he was in possession of lot Kooly in *putni* interest. Further, there is this provision in the *pattah* "If, in future, it transpires that any other person or persons besides yourself has or have *putni* interests in the said lot Kooly, he or they will acquire *putni* interest in these *chakran* lands also in the same manner and to the same extent as they may be found to have in the said lot." Again, it is provided "If, in future, the *patni* interest in the said lot Kooly be transferred for arrears of rent or extinguished for any reason, then your *putni* interest in these *chakran* lands will be transferred or extinguished along with the original *putni*. Any objection to that will not be entertained." In these it is contended that, far from ting these lands from the original *pu* as the intention of the parties th *chaukidari chakran* lands should considered as part and parcel of the *putni* and it was intended to nullify any contention that this was a separate property because at that time it was considered doubtful whether the original *putni* of Joy Chunder Hazrah included the *chaukidari chakran* lands and whether the *putnidar*, as such, was entitled to those lands on the lands being transferred to the *zemindar* by the Collector under the Chaukidari Act. It seems to me that this contention of the appellant is sound. If it was intended that *chaukidari chakran* lands should be carved out of the original *putni* and a new title should be conferred on the *putnidar* with regard to those lands, one would not expect to find in the *pattah* with regard to the *chaukidari chakran* lands the provisions that I have mentioned before. It is, however, contended on behalf of the respondents that these provisions constitute a contract between the *zemindar* and the *putnidar* and cannot be enforced by a third person. It seems to me, however, that it is not a question of contract. The question is whether it was the intention of the parties to carve out of the original *putni* of Joy Chunder Hozrah the *chaukidari chakran* lands, and constitute a new *putni*. That intention, as I have said, cannot be gathered from those terms. If that is so, then we have to see whether the plaintiff as auction-purchaser under the Regulation sale would be entitled to those lands. Her right is derived under s. 11 of the Regulation. The second paragraph of the first clause of that section which is relevant to the question runs thus: "No transfer by sale, gift or otherwise, no mortgage or other limited assignment, shall be permitted to bar the indefeasible right of the *zemindar* to hold the tenure of his creation answerable, in the state in which he created it for the rent, which is in fact his reserved property in the tenure, except the transfer or assignment should have been made with a condition to that effect, under express authority obtained from such *zemindar*." The contention on behalf of the defendants respondents is that Syamlal Chatterjee had

(1) 40 Ind. Cas. 981; 44 I. A. 117; 44 C. 841; 25 C. L. J. 499; 21 C. W. N. 609; 32 M. L. J. 565; 15 A. L. J. 390 19 Bom. L. R. 862; (1917) M. W. N. 459 6. L. W. 101; 2 P. L. W, 1; 22 M. L. J, 489 (P. C.)

express authority to transfer these *chowkidari* lands under the terms of the *pattah* and reference is made to the terms by which it is provided what should happen if these lands are transferred by the grantee. The provision runs thus: "If the land be transferred by gift, sale or succession, the costs whatever may be incurred by the Raj estate for making an enquiry as to who is the person in possession for the time or whatever loss may be suffered by the Raj estate on account of the name of the present occupier not being registered shall be paid by the present occupier without objection." This, in my opinion, cannot be construed to be an express authority by the *zemindar* to transfer the *chowkidari* lands so as to disentitle him from selling these along with the *putni*. Under the law, a permanent tenure-holder, such as the *putnidar*, can alienate any portion of the *putni* or any land comprised within the *putni* and these provisions, which I have referred to, only refer to the circumstances which would happen if the *putnidar* makes such a transfer. These provisions cannot be construed as giving an express authority to make a transfer as contemplated by the provisions of the second paragraph of cl. (1) of s. 11 of Regulation VIII of 1819. If that is so, then the plaintiff would by virtue of her purchase be entitled to these *chaukidari chakran* lands as forming part of the original *putni* Joy Chunder Hazrah which was created in 1820. It was further contended on behalf of the respondents that in the sale proclamation these *chaukidari chakran* lands were not mentioned and the rent which was stated to be due on account of the *putni* was the amount payable under the original *putni* grant of 1820 converted into the current coin, that the extra amount of Rs. 27 odd which the *zemindar* was entitled to get under the terms of the *pattah* of 1893 was not mentioned and that, therefore, the *zemindar* did not intend to include into the sale *chaukidari chakran* lands. The position seems to me to be that the *zemindar* sold the *putni* of Joy Chunder Hazrah in the condition in which it was created in 1820. Whether by reason of his omission to mention the additional rent imposed on the *chaukidari chakran* lands he is disentitled from recovering that amount from the purchaser is a question which we need not consider. In my opinion, the purchaser is entitled to the *putni* as it was created in 1820; and so she is entitled to possession of the *chaukiduri chakran* lands as being part of the *putni*. The judgment and decree of the Subordinate Judge must, therefore, be set aside and the plaintiff's suit decreed with costs both in this Court as well as in the lower Court. The plaintiff, however, will not be entitled to eject the actual cultivators of the land as provided by the third clause of s. 11 of the Regulation. She will also be entitled to mesne profits from the defendants Nos. 1 to 3.

Walmsley, J.—I agree.

Appeal allowed; Suit decreed.

Z. K.

PATNA HIGH COURT.
FULL BENCH.

CIVIL MISCELLANEOUS APPEAL No. 139 OF 1924.

March 23, 1925.

Present:—Sir Dawson Miller, KT., Chief Justice, Justice Sir Jwala Prasad, KT., and Mr. Justice Das.

ADAYA PRASAD SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

RAM NARAYAN DAS AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 22—Limitation Act (IX of 1908), Sch. I, Art. 182 (6)—Execution of decree—Notice to judgment-debtor, when to be issued—Limitation, extension of.

In every case where an application for execution of a decree is made more than a year after the date of the decree or more than a year after the date of the last order made against the judgment-debtor in any previous execution, a fresh notice must be issued under O. XXI, r. 22 of the C. P. C. An order directing the issue of such a notice falls within the purview of cl. (6) of Art. 182 of Sch. I to the Limitation Act and operates to extend limitation for execution and the order is not bad merely on the ground that the application in respect of which it is issued was not made in accordance with law. [p. 533, cols. 1 & 2.]

Reference made by Mr. Justice Ross and Mr. Justice Kulwant Sahay dissenting from the view expressed in *Mahadeo Singh* v. *Dhobi Singh*, 74 Ind. Cas. 838, preferred against a decision of the Subordinate Judge, Monghyr, dated the 26th March 1924, rev[illegible] that of the Munsif Beguserai, d[illegible]h September 1923.

ORDER OF REFERENCE.—The quest[illegible]e present (the eighth) appl[illegible]on of a decree passed in[illegible]de on the 11th April [illegible]he Court of Appe[illegible] of the Muns[illegible]d. The ap[illegible]

tion depends upon whether limitation was saved by the issue of notice under O. XXI, r. 22 in the seventh application for execution on the 9th of November, 1922.

The learned Vakil for the appellant concedes that if this notice was required to be issued by the C. P. C. of 1908, then the case is governed by Art. 182, cl (6) of the Schedule to the Limitation Act; and the present application is within time. He contends, however, that inasmuch as on the fifth application for execution notice under O. XXI, r. 22 was issued, it was no longer necessary to issue any further notice under that rule and, consequently, the issue of notice under O. XXI, r. 22 on the 9th of November, 1922 was not required by the C. P. C., and Art. 182 cl. (6) has no application. He relies in support of this contention on a decision of a Division Bench of this Court in *Mahadeo Singh* v. *Dhobi Singh* (1). In our opinion O. XXI, r. 22 is general and requires notice to issue in any case where the application for execution is made more than one year after the date of the decree except as provided in the proviso. The proviso lays down that no such notice shall be necessary if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution. Now the seventh application for execution, in which the notice which is said to have been unnecessary was issued, was made on the 13th of May, 1922. The last order against the judgment-debtor made on a previous application for execution was passed on the 20th of February, 1920 when attachment and notice under O. XXI, r. 66 were issued; but, as that order was made more than one year before the seventh application for execution, it was, in our opinion, necessary that notice under O. XXI, r. 22 should have been given on the seventh application also. Consequently the issue of that notice was required by the C. P. C., and Art 182, cl. (6) applies and the appeal should be dismissed. In *Mahadeo Singh* v. *Dhobi Singh* [illegible] the execution was against the [illegible] representative of the judgment-[illegible] notice had, therefore, been iss[illegible] XXI, 22 (1) (*b*) and that [illegible] need be repeated; but [illegible] se ow that if our r[illegible]

(1) 74 Ind. Cas. 88[illegible] I. 916; (1924) A[illegible]

correct and the last clause ("if upon a previous application for execution against the same person the Court has ordered execution to issue against him") applies only to the clause immediately preceding *i. e.*, to the case contemplated in cl. (*b*) of the rule, then a fresh notice under cl. (*a*) was necessary. [illegible] therefore, differs from that [illegible] under the rules of the Co[illegible] [87 I. C. 1925] to be referred to a Full [illegible] decision of the question [illegible]d to execution, notice under O. XXI, r. 22 is contemplat[illegible] once been issued it is or is [illegible]time must be to issue a fresh notice if the [illegible]ation made for execution is made more tha[illegible] last order after the date of the last order a[illegible] party against whom execution is [illegible] Judges for, made on a previous applica[illegible] unable execution. [illegible]er in

Let the papers be placed before his [illegible]dship the Chief Justice.

Mr. *Siva Narain Bose*, for the Appellant.

Mr. *Satyendra Nath Banerjee*, for the Respondents.

JUDGMENT.

Miller, C. J.—This case has been referred to the Full Bench because the learned Judges before whom it came took a different view from that expressed in the earlier case of *Mahadeo Singh* v. *Dhobi Singh* (1).

The question for determination is whether a petition for execution filed on the 11th April, 1923 is time-barred or not. The facts which it is necessary to refer to in order to appreciate the question in dispute are shortly as follows:—

The decree, which is the subject of the present application for execution, was passed in favour of the respondents in the year 1913. After five applications for execution which left the decree unsatisfied, a sixth execution petition was filed on the 1st December, 1919. An order for attachment of some of the judgment debtor's property was made in those proceedings on the 26th February 1920 and in April the property was sold. The sale, however, was set aside on the 28th August following, and that execution case then came to an end. It should be noted that the last order passed against the judgment-debtor in that execution case was the order for attachment of the 25th February, 1920. That is the only date which is of any importance in that execution case in considering the present question. A seventh application

Where the character of the alleged signature of a testator is such that the Court is satisfied that the signature is not that of the alleged testator, the Court must act upon its conviction and pronounce against the document as a valid testamentary disposition. But in a case where the witnesses have positively affirmed that the testator did in fact execute the Will in their presence, the Court will be slow to hold the document to be a forgery unless evidence is to be found *aliunde* which tends to confirm the conclusion at which the Court has arrived independently and from a consideration of the nature of signature by which the testator is alleged to have executed the Will. [p. 536, col. 2.]

In order to constitute sound disposing mind a testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard, but he must also have the capacity to comprehend the extent of his property and the nature of the claims of the others whom by his Will he is excluding from all participation in that property, and the protection of the law is in no case more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one and more especially when that one object may be so forced upon the attention of the invalid as to shut out all others which may require consideration. [p. 538, col. 1.]

(Case-law referred to).

Messrs. *K. B. Dutt*, *B. L. Mitter* and *S. M. Bose*, for the Petitioner.

Messrs. *A. N. Chaudhury*, *Nishit Sen*, *B. Dass*, *B. C. Ghose* and *A. K. Ghose*, for the Opposite Party.

JUDGMENT.—This case is of great importance to those who are concerned in propounding the Will. It is also of interest to the medical community, because it illustrates the pitfalls which lie in the path of professional men who through carelessness or complaisance stray from the straight way marked out for their progress by the traditions of a great profession. The Will in suit is propounded by one Lila the sole executrix and the residuary legatee. The contesting caveator is the Ram Krishna Mission; the Kumar's daughter, Princess Lukshmi, claiming only that the Will be proved in solemn form. About 3 or 4 P. M. on the 21st November 1920 the testator, commonly known as the Raja of Khaira, is alleged to have made the Will, the validity of which is challenged in these proceedings. About 1 A. M. on the 22nd November 1920 Kumar Guru Prosad Sinha was seized with an attack of delirium tremens of so violent a nature that he threatened to kill Lila with whom he had been living, and to whom, a few hours before, he had left the bulk of his fortune under the terms of the alleged Will. From and after the early hours of the morning of the 22nd November until his death on the 28th November it was conceded by all parties that the Kumar was *incapax testimonii*.

Two issues fall for determination in these proceedings:—

(1). Did the Kumar execute the alleged Will?

(2) If he did so, was he at the time when he executed the Will, possessed of testamentary capacity. In respect of these issues, an argument ensued at the Bar as to where the onus of proof lay. Now, when a Will is propounded, there is no doubt that a burden lies upon the propounder of satisfying the conscience of the Court that the document in suit is in truth and in fact the last valid Will of a free and capable testator. "The onus is in general discharged by proof of capacity and the fact of execution from which knowledge of and assent to the contents of the instrument is assumed." [per Baron Parke in *Barry* v. *Butlin* (1)] but whenever circumstances exist which excite the suspicion of the Court, and "whatever their nature may be, it is for those who are propounding the Will, to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only when this is done that the onus is thrown upon those who are opposing the Will to prove fraud and undue influence or whatever else they rely on to displace the case made of proving the Will." Per Lindley, L. J., *Tyrrell* v. *Painton* (2). See also *In the goods of Gopessuar Dutt* (3). In this case, however, I am not concerned to consider or to decide upon whom the *onus probandi* lies. In *Basanta Kumar Roy* v. *Secretary of State for India* (4), Lord Sumner observed that "as their Lordships find the evidence sufficient to establish a clear conclusion of fact, it cannot matter now by which party it was given." In this case not only have the parties adduced before me a large body of evidence, but I have had the advantage of a skilful and analytical survey of the evidence by Counsel on both sides who have not spared themselves in the endeavour

(1) (1838) 2 Moo. P. C. 480 at p. 484; 12 E. R. 1089; 1 Curt. 614; 46 R. R. 123.

(2) (1894) P. 151; 6 R. 540; 70 L. T. 453; 42 W. R. 313.

(3) 13 Ind. Cas. 577; 16 C. W. N. 235 at p. 269; 39 C. 245.

(4) 40 Ind. Cas. 337; 44 I. A. 104 at p. 111; 44 C. 858; 25 C. L. J. 487; 1 P. L. W. 593; 32 M. L. J. 505; 21 C. W. N. 642; 15 A. L. J. 398; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 310 (P. C.).

to present their clients' cases in the most favourable and attractive form. The burden which they have taken upon their shoulders has considerably lightened the weight of my labours, and I have formed a clear and unhesitating opinion as to the judgment which I ought to give.

Now, in considering the evidence relative to the issues raised, the first matter which demands my attention is the Will itself. It is not a long Will, nor a Will of great intricacy, but it is couched in technical language; it excludes each and every one of the near relations of the Kumar from benefiting thereunder, and it provides specifically that the whole of his property shall be given to persons who are not of his kith and kin. According to the witnesses who gave evidence in support of its vaildity the draft of the Will was dictated by the Kumar without assistance, and without any previous discussion having taken place as to its terms, and the Will itself, after having been read out, was executed by the testator and by the attesting witnesses. Three witnesses affirmed that it was executed by the testator in their presence, and one of these witnesses Dr. Premnath went further, for he stated in writing on the document itself that at the time when the Will was executed, the Kumar was "in full possession of his senses." Now, a number of signatures admitted to be in the Kumar's handwriting were tendered in evidence, and I should be prepared to hold from a comparison of these signatures with the Kumar's alleged signature on the Will, that the Will, was not executed by the alleged testator. Not one of the letters in the signature on the Will resembles the same letters as used in the signatures admitted to be in the handwriting of the Kumar. Not only are the letters dissimilar, but the words which compose the signatures, instead of being somewhat shaky and irregular (as was the case with the normal signatures of the Kumar) in the words of one witness "are written in a firm hand, and in a copy-book style." But I need not labour this matter, because Counsel for the propounder in his final address, frankly admitted that the signature on the Will was not in the Kumar's normal handwriting. Indeed, he went further, and upon the dissimilarity in the handwriting founded an argument in favour of the genuineness of the signature on the Will, because, in his contention, it is unlikely that any one who was minded to forge the Kumar's signature, would have made so poor an attempt to reproduce his normal handwriting. As an argument *ad hoc* this contention is ingenious, but it is a double edged weapon, for the admitted abnormality of a signature is at least some evidence that it is not the hadwriting of the person who purports to have written it. I am not prepared to hold, in a case where the character of the signature is such that the Court is satisfied that the signature is not that of the alleged testator, that the Court ought not to act upon its conviction and pronounce against the document as a valid testamentary disposition, but in a case where witnesses have positively affirmed that the testator did in fact execute the Will in their presence, the Court will be slow to hold the document to be a forgery unless evidence is to be found *aliunde* which tends to confirm the conclusion at which the Court has arrived independently and from a consideration of the nature of the signature by which the testator is alleged to have executed the Will. Is any such corroborative evidence forthcoming in this case?. In the course of the hearing, and in the absence of the three Doctors whose evidence had been taken at various times on commission, I expressed the opinion that it would be desirable that some medical witnesses of distinction should be examined before me, and I have had the advantage of hearing Col Waters, Lt. Col. Connor and Lt. Col. Mosses in the witness-box. Now, it was admitted that the Kumar, who was 35 years of age, was a man who had led an irregular and dissolute life. He was usually drunk, in the day time as well at night. His manner was that of an extremely nervous and unstable man, and, according to Dr. Premnath "would give the impression that the Kumar Saheb was never in a fixed state of mind, but was in a kind of intoxication which I cannot explain by words: It was a peculiar way about him which is only known to those, who knew him." His hands at all time used to shake involuntarily, and when he was writing the hand which he used was seen to tremble. Admittedly, he was a man who had been endowed by nature with a full share of mental capacity, but, according to Dr. Kapur, who saw him about three hours before the time at which it is alleged that he executed the Will, "his nervous system was not that of a very intelligent man".

Expert medical witnesses have been examined with regard to the signatures on the Will. In answer to questions put to him, Col. Waters stated.

Q. In the case of chronic alcoholics they usually have trembling of hands?—Yes.

And those patients usually do not write in a firm hand?.

Probably not.

Would you look at the signature of Guru Prosad Sinha to the Will in suit? Yes.

That signature is a firm signature? I take it to be so.

What does it appear? It is a very fair signature.

That looks as if it was written very carefully? Yes.

It has the appearance of a carefully made signature; ordinarily an alcholic does not write in a very clear and firm hand like this? He does not

And later on, in his evidence—

Q. Assume that he had been suffering from that for some time, for six months or perhaps years with his hand trembling throughout, and about seven or eight hours after he has a violent attack of delirium tremens, would you suspect his hand not to be tremulous during that intervening period? The man has been a chronic alcholic. Drink has been stopped for four or five days. If he be proceeding towards recovery then naturally the trembling would tend to diminish.

Q. Supposing he was proceeding towards an acute attack then the tremour would probaly be there.

Colonel Connor was invited to look at the signature of the Will—

Q. Look at the signature; that is in a firm hand; is it impossible for a chronic alcoholic in the condition I have stated to write as firmly as you find the signature there.? Not impossible. I would not expect so firm a hand.

Then I turn to Col. Moses.

Q. Look at the signature—It is in evidence that he used to suffer from trembling of the hands and remembering that he was ill from the 17th to the 20th and 21st when his temperature was 103-104 deg, and that he had an acute attack of delirium tremens. After that, would you expect the handwriting to be what it looks like there? No; this is quite firm and still.

Again.

Q. About the signature; is it your evidence, that chronic alcoholics can never write in a firm hand?—They write in a very scrawly hand. There may be cases in which their hand is firm.

Q. From the description of Guru Prosad Sinha, is it your evidence that the man could never write in a firm hand? I would expect always a tremour in the writing.

Q. That is to say, shaky hands? Yes, he would write in a more scrawly hand.

Q. You would agree that some times alcoholics may write in a firm hand? Yes.

Q. Would it be possible for him to write like this?

Yes, possible.

Col. Davidson who attended the Kumar in his last illness was asked.

Q. Take it from me that the signature on the original Will is alleged to be the signature of Kumar Guru Prosad Sinha; kindly tell me if you expect a signature clear and firm like this from the Raja considering the condition that he was in on the 21st November mid-day coupled with the admitted fact that at mid-night he was suffering from an attack of delirium tremens? I should have thought that it was impossible. My opinion is that it is impossible.

But the matter does not rest there. Mr. A. K. Bose, a well-known and respected Solicitor of this Court who had been in constant communication with the Kumar in 1919 and for a certain period in 1920, unhesitatingly affirmed that the disputed signature on the Will, in his opinion, was not in the handwriting of the Kumar. Now, no expert evidence was, or, having regard to the above mentioned admission made by Counsel on behalf of the propounder—could have been adduced to rebut the evidence to which I have referred, or to counter the natural and reasonable inference to be drawn therefrom. In these circumstances without doubt or hesitation I find as a fact that the disputed signature on the alleged Will was not in the handwriting of the Kumar, and that the document was not executed by the alleged testator. It follows from this finding that in my opinion, the document in suit is not the Will of Kumar Guru Prosad Sinha.

I now consider the evidence adduced in respect of the second issue, namely:

whether at the time when the document was alleged to have been executed the Kumar was possessed of testamentary capacity. I take the test of testamentary capacity to be that which was laid down by the Judicial Committee of the Privy Council in *Horwood* v. *Baker* (5) in which Mr. Justice Erskine expressed the opinion of the Court to be that "in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property; and the protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration." Now, leaving out of consideration the matters which are in controversy and applying this test of testamentary capacity to the admitted facts relating to the physical condition of the Kumar, and to the circumstances prevailing at or about the time when the Will is alleged to have been executed, in my opinion, the right and reasonable inference to be drawn therefrom is that the Kumar was not possessed of testamentary capacity at the time when it is alleged that he executed the document in suit. The Kumar's illness commenced on the 17th November 1920, and terminated in his death on the 28th. Throughout the period of his illness he was lodging in the house of one of the attesting witnesses, Fakir Chand, Vakil of the Lahore High Court. On the 17th November Dr. Premnath, a young practitioner in medicine and dentistry in Lahore, saw him professionally. He was found to be suffering from fever, with a temperature of at least 102 or 103 deg. It appears that he complained also of pains in his joints. From the 17th November until the 22nd the Kumar was nursed by a woman called Lila, who for some time had been living with the Kumar. It was stated that she was not married to the Kumar, but whether that be so or not is a question which it is unnecessary for me to determine in these proceedings, and I refrain from doing so. Dr. Premnath prescribed medicine for fever, and at the same time ordered that alcohol should be stopped. Now, the effect of depriving a person suffering from chronic alcoholism, as the Kumar was, of the opportunity of obtaining alcohol not infrequently is that after a period of depression an acute attack of delirium tremens supervenes; and such an attack is the more likely to occur when the patient is suffering from fever, pneumonia or shock. On the 19th November Dr. Premnath was not satisfied with the condition of the patient, and called in consultation Dr. Kapur, a well-known physician in Lahore. Dr. Kapur took a serious view of the patient's state of health, and he diagnosed the disease to be sand-fly fever; it may be, owing to the combination of high fever and pains in the joints On the 21st November the condition of the patient had become worse. In addition to fever and pains in the joints the Kumar complained of irritation in the throat, pain in the back, and loss of appetite while his body was exuding a disagreeable odour. On that date Dr. Premnath saw the Kumar on four different occasions. In the early morning Dr. Kapur expressed the opinion that his lungs or one of them, at any rate—were affected, and he took a sample of urine for analysis. Dr. Premnath, disagreeing with the view expressed by Dr. Kapur as to the condition of the lungs, and apparently being anxious to have another opinion, called into consultation Col. Davidson, the Civil Surgeon, and Professor of Medicine and Jurisprudence at the King Edward Hospital, at Lahore. Col. Davdison prescribed a fever mixture and some medicine for a cough, and left after he had taken a sample of the Kumar's blood for analysis. A few minutes after Col. Davidson had gone away, Dr. Kapur returned, and stated that the analysis of the urine disclosed the presence of albumen. There can be no doubt after the disclosure of the result of the examination of the urine, that everyone concerned became seriously alarmed at the patient's condi-

5) (1840) 3 Moo. P. C. 282; 13 E. R. 117; 50 R. R. 37.

tion. About 9 P. M. Dr. Premnath gave the Kumar a sponge bath, and in the night about 1 A. M. a violent attack of delirium tremens broke out. It is conceded that after 1 A. M. on the 22nd November until his death the patient was incapable of making a Will. Now, the case for the propounder of the Will is that between 3 or 4 o'clock in the afternoon of the 21st November the Kumar who had not been told the result of the analysis of the urine, although it may be that he noticed signs of distress on the faces of those about him, suddenly expressed the desire to make a Will, and asked Fakir Chand to provide a scribe to write it out. Uttam Chand, a young Pleader in Fakir Chand's office, was sent for, and without making any remark to anybody the Kumar at once began dictating the Will to Uttam Chand who took it down in writing. During the dictation of the Will the Kumar, it is said, frequently suggested corrections and alterations therein. The draft was then taken away, copied out, and returned to the Kumar who read it through and extended it and afterwards the Will was read aloud, and signed by Fakir Chand, Uttam Chand and Dr. Premnath. The dictation of the draft occupied, it was stated, from half to three quarters of an hour. About half an hour after the Will is alleged to have been signed one Mehta Bahadur Chand appeared at the house, and he also signed the Will. It is to be observed that although the Will is couched in technical language, according to the witnesses who were called on behalf of the propounder, it was dictated without any assistance from anyone. The Kumar excluded from taking any benefit thereunder his wife, Bageswari, his daughter, Princess Lukshmi, and his brother Baijnath. After bequeathing a sum of money to two persons who were unrelated to him, the Kumar left a monthly allowance by way of maintenance to a woman, Susila by name, who it was stated had been living with the Kumar at the Grand Hotel Calcutta at the sametime that Lila was living with him there. The residue of his property he left to Lila. In the course of his evidence Col. Moses was asked—

Q. Would it be possible for him to concentrate his thoughts for a long time? No. He cannot sustain mental concentration for any length of time presuming that he is growing an attack of delirium tremens.

Q. In the morning, his condition is throughout loss of appetite, high fever, and he smells badly, in this condition, can he concentrate his mind and can he sustain his mental condition, for any length of time? He cannot keep up his concentration. He relapses and he cannot keep up his concentration.

Q. Could he dictate a deed like that? You cannot state positively about these things.

Q. What would be the length of time during which he can sustain his concentration? Suddenly you rouse him up, your sharp questions may bring about an answer; and if you stop, he relapses. It is difficult to say the actual length of time.

Q. The Court: Do you mean that he would respond to some outside agency at the time? Yes.

Q. But not have the power to concentrate? Yes.

Again.

Q. Would it make any difference if the same man contemplated making this provision for the first time, and if he had thought it out before and merely recited it? I do not think it makes any difference, whether it was the first idea or whether it was not. I do not think he would be able to sustain mental effort for a sufficiently long time to have this Will made, and to understand it.

Q. Is there any other reason? Except the chronic picture of a man who could not sustain any effort, on the verge of delirium tremens executing, reciting and dictating a Will like that.

Col. Waters:

Q. From what you said before, does it not appear that they try to regain their normal condition? Yes a man, a chronic alcoholic if roused, tries to pull himself together.

Q. In fact many alcoholics know that delirium tremens is coming on and for hours they struggle against it? I don't know.

Q. The coherence of thought does not last long? Probably not.

Q. If in a few hours he is going to be in a violent state of delirium tremens would you expect him to be able to calmly dictate that document without any assistance

with details of legacies, houses, etc.? Anything may be.

Q. Would you be surprised to hear that it was so? I should certainly expect it as surprising. Anything may happen.

Q. The Court. Doctors are always in this difficulty, as distinct from our profession, which relates to an exact science, from which we know some a little more and some less, a Doctor's profession which is connected with a progressive science, it is difficult to say what may or may not happen? It is difficult to say, it is impossible? It is so.

Q. You would be surprised? Yes.

Col, Connor.

Q. Take this case; a man like that who had these symptoms in the morning and then broke out into delirium tremens, actually violent delirium tremens, at 12 A. M., would he be capable of coherent and sustained effort for an hour or more? I say again that that depends more upon his state of chronic alcoholism. If he is a man who is usually drunk I should not expect it.

Q. A man who is usually drunk but whose liquor has been cut off and then these symptoms supervene, you would not expect him to be capable of sustained coherent effort for over an hour at one stretch? I would not expect it, but I may say in parenthesis it would not be impossible.

Q. You know the distinction between impossibility and improbability? You say it would be improbable, but not impossible. Yes.

Q. The Court: Taking your answers upto now and taking that document which requires concentration, for it is a coherent document dealing in a regular form with persons he is going to benefit and those he is going to disinherit, would you expect such a man as this to write and dictate such a document?. I would not expect a man such as has been painted to me to write such a document.

Dr. Kapur in his evidence on commission stated.

"I saw him last on the 21st November 1920 a little after 12 noon. The deceased was in his usual senses then. He was talking rationally. He was capable of understanding his affairs.

Cross-examination.

Was the deceased capable of making a Will between 3 and 4 P. M. on the 21st November 1920? I am not sure of it.

What do you mean by saying that the deceased was in his usual senses? Usually due to hard drinking he was at times under the influence of liquor and his nervous system was not that of a very intelligent man.

Having regard to the uncontroverted facts alone relating to the physical condition of the Kumar on the 21st November and the circumstances surrounding the alleged execution of the document in suit, I should be prepared to hold that between 3 and 4 P. M. on the afternoon of the 21st November 1920 the Kumar was incapable of making or executing the document in suit. But the evidence on this issue does not rest there. Both Col. Davidson and Dr. Premnath had given evidence on commission relating to this issue. Col. Davidson testified that about 12 noon on the 21st November he found the Kumar to "be suffering from great restlessness; I found it difficult to examine him properly owing to his restlessness and difficult to get him to concentrate his fixed attention upon any question." Knowing that delirium tremens is often the product of pneumonia in a drunkard (by product I mean sequela or complication) and also knowing that the disease may be precipitated by an attack of acute infection such as malaria, pneumonia, or sand-fly fever, I wished to see what the cause of the fever was, as in all cases of delirium tremens the temperature does not rise very high except in very bad cases, and I believe I took personally a blood smear for examination to see if malaria was present, I sent it for examination, but no malaria was found, and I could find no signs of pneumonia till the reply about the blood was received. I believe I continued the treatment of Dr. Premnath."

Q. You have told us that he was suffering from very great restlessness; do you remember if you noticed any particular action on his part to denote restlessness? What I found was that he was continually pulling off his bed clothes and from the diagnosis of the disease there must have been tremors in his hands before, because the disease is called delirium tremens because he suffers from hallucinations, and tremens because of trembling of hands

especially, and of the lips, mouth and tongue.

Q. What did you diagnose the disease to be? I diagnosed the disease to be delirium tremens.

Q. At the time when you examined him, had the disease attained an acute form or did you find premonitary signs of the disease? I found the disease present; hence it was not in a premonitory state.

And later on:

Q. Will you kindly read this Will and tell me if a person in the condition in which you found the Raja of Khaira, on the 21st about 12 noon or sometime after could dictate unaided a Will of this length and description between 3 and 4 P. M.? I say No. A persons suffering from delirium tremens is incompetent to make a Will by all authorities. He has not any civil or criminal responsibility. He suffers from want of combination and continuity of thought. Therefore, it is impossible for him to dictate a Will of this description.

Now if Col. Davidson's evidence is accepted, it is conceded that the Will cannot stand but it has been strenuously urged that no reliance ought to be placed on Col. Davidson's testimony, having regard to his conduct and the contradictory statements which he has made. Col. Davidson has not given evidence in this Court, and if it were not that I am satisfied that it is my duty to do so, indeed, it is not possible to arrive at a sound conclusion on the second issue without appraising the value of Col. Davidson's evidence, I should have been glad to refrain from any animadversion upon the conduct of a professional man. The course which Col. Davidson adopted was, indeed, a strange one. It appears that in January 1921 he was approached by one B. C. Chatterjee, who claimed to be an Advocate, and Chatterjee requested him to give him a certificate as to the soundness of the Kumar's mental faculties on the 21st November. That certificate he gave, he states, in the form of a written statement, but as this document was not forthcoming at the trial, I am unable to say what the terms of the certificate were. About the 8th August 1922, however, it appears that Chatterjee again approached Col. Davidson in company with one Nipendra Sircar, who is a beneficiary under the Will. Chatterjee, on this occasion, brought with him a set of interrogatories to be answered by Col. Davidson. The 6th interrogatory was as follows:—

Dr. Premnath has stated on oath that Raja Guru Prosad Sinha did execute the Will in his presence on the 21st November, 1920, between 3 and 4 P. M. and was in possession of his senses and was quite capable of making a Will at that time; are you in a position to differ from his statement regarding the mental capacity of the Raja at that time, that is between 3 and 4 P. M. If you do differ, please state your grounds.

Answer: I am not in a position to controvert the statement of Dr. Premnath.

It is, I think, an extremely unwary and undesirable thing that a Doctor should in any circumstances answer interrogatories of this description, and it is even more inadvisable for him to do so without previously having satisfied himself as to the identity and position of his interrogator. Col. Davidson, however, being under the impression that Chatterjee and Sircar were in some way or other connected with the case in the interest of the persons who were seeking to invalidate the Will, although he appears to have made no enquiries in the matter, answered the interrogatories then and there, and received Rs. 200 for so doing. About a week later Chatterjee once more approached Col. Davidson, on this occasion being accompanied by one P. N. Sinha. A further set of interrogatories were handed to Col. Davidson. These interrogatories in my opinion, were of a very improper nature. Interrogatories Nos. 12, 13, 14 and 15 were obviously in the nature of cross-examination of Col. Davidson on the answer which he had given to interrogatory No. 6, on the 8th August. They are as follows:—

No. 12. Do you think from your observation of the condition of the patient at 12 noon and from the further admitted fact that at 12 midnight the patient was suffering from an acute attack of delirium tremens, that it is likely that the patient dictated the Will between 3 and 4 P. M. without assistance from anybody?

Answer: I do not think it likely that he could have dictated a Will connectedly without marked assistance. In fact Taylor at page 896, 6th Edn. on Jurisprudence,

considers a person suffering from delirium tremens incompetent to make a Will unless his mind clears up before death, but as the Will is said to have been made on the 21st and his condition of delirium tremens was more marked on the 22nd, this exception does not hold good.

No. 13. What is your reason for stating that you would not controvert Dr. Premnath's statement that he actually dictated the Will between 3 and 4 P. M. ?

Answer : I think I would prefer to accept the opinion of Taylor. It depends upon what one means by dictation of a Will. In such dictation external help may have been largely exercised.

No. 14. Do you mean, not being present between 3 and 4 P. M. when the Will is supposed to have been dictated, you would not like to say anything against the statement on oath made by a Doctor known to you, on the strength of your opinion, although based upon scientific deductions ?

Anwer : See above.

No. 15. Do you believe that your opinion is supported by medical science ?

Answer : Yes, by the highest authority.

I find it difficult to understand how Col. Davidson could have thought it in consonance with his position as a professional man to answer such questions, and my perplexity is increased when I find that he has admitted that between the date when the questions were left with him, and the date when he answered them, some three days later, he received 3 pages of blue paper filled with medical authorities upon the subject, and in substance suggesting the form which his answers should take. But answer them he did, and he received a further fee of Rs. 200 for the answers which he gave on that occasion. Nay more, on the 30th August he produced in Court a further set of answers to the identical questions which had been put to him on the 8th August, and on that occasion his answer to question No. 6 was in direct contradiction of the answer which he had given to question No. 6 on the 8th August. His answer is as follows :—

A. Yes, after seeing the Will, and knowing the condition of the patient when I saw him; also from the fact that the patient suffering from delirium tremens is mentally unfit to make a Will.

On these facts I am invited to come to the conclusion that Col. Davidson is a man who is ready to give a medical opinion, true or untrue, if only he receives adequate remuneration for so doing. For the reasons which I am about to give, I refuse to accept as correct this grave imputation upon the character of a well-known professional man. Col. Davidson has endeavoured to explain his answer to interrogatory No. 6 on the 8th August in more ways than one. He stated that throughout he was under the impression that Chatterjee was submitting questions to him on behalf of those who were opposing the Will. But, in my view, this suggested explanation is no explanation at all. There appears to be no reason why a scientific witness should not be a witness of one or more or all of the parties to a legal proceeding. To a professional man, it matters not which party calls him as a witness. What is of concern to a medical witness is the accuracy of the scientific opinion which he expresses, not the party by which such evidence is tendered. Col. Davidson also sought to explain this answer by indicating that if he had seen the Will before he had replied to the interrogatory No. 6 on the 8th August, his answer would have been to the contrary effect. But if, as he asserted, the Kumar at 12 noon on the 21st November was suffering from delirium tremens, it is conceded that he was incapable of duly making not only the alleged Will, but a Will of any description whatever. Further, Col. Davidson attempted to excuse his answer to interrogatory No. 6 on the ground that, although he was satisfied on the 21st November that the Kumar was not possessed of testamentary capacity, Dr. Premnath might honestly have formed a different opinion, and that Dr. Premnath's view depended upon what Dr. Premnath "considered sufficient mental capacity to form a Will." But was that a reason which would justify Col. Davidson in refraining from stating an opinion which he had himself formed as to the Kumar's condition ? Surely not, for in such circumstances *suppressio veri* and *suggestio falsi* are one and the same thing. In my opinion, none of these suggested explanations have any substance in them. After mature consideration I am satisfied that the real reason which induced Col. Davidson to answer interrogatory No. 6 on the 8th August in the way he did, was that he knew that at that time there was no longer

any real opposition to the Will: that all the persons who were believed to have an interest in the Kumar's estate had settled their differences, and that all parties were at one in their desire to establish the soundness of the testator's mental capacity. It was, in my opinion, with that information before him that Col. Davidson was invited to answer the interrogatories which were put to him on the 8th August. Col. Davidson stated that Chatterjee or Sircar soothed his misgivings by suggesting that Col. Davidson "could not call Dr. Premnath a liar," and that he replied "his answer depends upon what he considers mental capacity, but a man suffering from delirium tremens could not make a Will." Having salved his conscience by this protestation Col. Davidson, in my opinion, allowed himself to be persuaded that he was justified in departing from what his professional instinct must have told him was the proper course for him to pursue. *Hincillee lacrimæ*; I regret to say that in these Courts instances not infrequently occur in which medical men, not of any standing or distinction, give medical certificates, for instance, for the purpose of obtaining the adjournment of a case, on grounds which after investigation turn out to be wholly insufficient to justify the exemption of a witness from attendance, thereby forsaking their position as men of science in order to oblige a patient. But complaisance and the pursuit of science go ill together, and if as a result of this case every member of the medical community in future determines to hold the traditions of his profession sacrosanct and inviolable, then, indeed, the enquiry will not have been undertaken in vain. It was, however, contended by Counsel on behalf of the propounder that it is inconceivable, if Col. Davidson had found that the Kumar on the morning of the 21st November was suffering from delirium tremens, that he should not have prescribed specific drugs for that disease. I am not impresssd with this contention. The medical evidence adduced was to the effect that the mode of treatment to be followed in the case of delirium tremens depended upon the urgency of the situation: that in case of delirium tremens the main endeavour of the physician should be to induce rest, and that the desired result would be obtained at least as efficaciously by good nursing as by the use of drugs. Neither Col. Waters, nor Col. Moses were prepared to say in the circumstances of this case that the course pursued by Col. Davidson on the 21st November was wrong. From these reasons I accept the evidence of Col. Davidson that at 12 noon on the 21st November the Kumar was suffering from delirium tremens, and was not of sound disposing capacity. Having regard to the view which I entertain in respect of the evidence to which I have referred I find myself unable to place any reliance upon the evidence of Dr. Premnath. It is fair to this witness to state that he has consistently affirmed that at the time when the Kumar executed the Will in suit he was in full possession of his senses, but, in my opinion, both Dr. Premnath and Fakir Chand have also consistently minimised the gravity of the Kumar's illness. In his statement on the 26th March 1921 no mention whatever is made by Dr. Premnath that at any time during his illness the Kumar was suffering from delirium tremens, or indeed from delirium at all. His description of the violent attack of delirium tremens from which admittedly the Kumar was suffering at 1 A. M. on the 22nd was as follows:

"I was with him at 1 A. M. and gave a prescription. The Rani Saheb got medicine from a chemist's shop herself leaving me in charge of the patient. The medicine had the desired effect and the Kumar slept the rest of the night."

On the 31st October 1921 in his evidence on commission, Dr. Premnath went somewhat further, for he stated "After the same midnight I was sent for again and I went and found him excited." Until he gave evidence in July 1922, Dr. Premnath however never thought it necessary or proper that he should mention that the Kumar was suffering from delirium tremens." On the 25th July 1922 Dr Premnath in his evidence on commission stated that he had fever, and "otherwise he was all right." It is strange, indeed, if that were so, that it should have been necessary on that day for Dr. Premnath to visit the Kumar on four occasions, Dr. Kapur twice, and Col. Davidson once. From the time that he wrote his certificate of mental capacity on the Will, until his cross-examination on the 25th July 1922, Dr. Premnath, in my opinion, deliberately refrained from mentioning that the Kumar suffered from delirium tremens, because he was determined to support the hypothesis that the Will in suit was that of a free and capable testator. It is, to my mind clear

that in this matter Dr. Premnath throughout assumed the part of a partisan, and not that of a scientific expert, and I am unable to place reliance upon his testimony. Upon the evidence I find that Fakir Chand and Uttam Chand were minded to pursue a similar course to that adopted by Dr. Premnath, and, in my opinion, having regard to the facts elicited at this enquiry, I find myself unable to accept the story told by these witnesses as to the circumstances under which the Kumar dictated and executed the document in question. It is, in my opinion, an incredible story, and I reject it.

During the trial of this suit two persons were present in Calcutta, and were available as witnesses to material facts, Mehta Bahadur Chand, and Lila, the propounder of the Will. Mehta Bhadur Chand went into the withess box and in the course of his evidence he gave the following answers to questions put to him.

Q. On the 21st November what was the Raja doing? He was lying on the bed.

Q. Was he sleeping? No he was awake.

Q. Did you have any talk with the Raja? I simply asked the Raja whether it was his Will and he said it was and then I signed it.

Q. How did you find him when you went there? He was ill.

Q. Was he in his senses or unconscious? He was conscious.

Q. Was he talking rationally? I did not have any other talk except asking him whether it was his Will and he said that it was and I signed it.

Q. From what you saw of the Raja on that occasion did it strike you that he was in a fit condition to make a Will, fit physically or mentally? He was sensible enough because a few minutes after he told me that he wanted to shift from this place because it was damp and he wanted me to engage some other house for him. Then I took the Rani with me in a motor car and went to another house on the Mall, Max Mink's house, which was available for rent but they said for a few days it could not be vacated.

Q. Did you see him on the 22nd? Yes.

Q. What was he like? I did not talk to him.

Q. What was he like to look at? He was at rest. He was not asleep, though he was lying down, and I think at that time he was under the care of a nurse.

Q. He was lying on the bed not asleep, resting? Yes.

Q. What was the difference between his condition as you marked it on the 22nd from what it was on the 21st? On the 22nd I did not speak to him, I only waited beside him and remained quiet.

Apart from speaking to you did he present the same physical appearance on the 22nd as on the 21st? No; his condition appeared to be worse.

In what way? His face did not bear that cheerful appearance as it did on the 21st.

He was lying on the bed on each occasion apparently neither asleep nor anxious to talk but the only difference in his appearance apart from not speaking was that he had a cheerful appearance and in his breathing.

Breathing rather hard? Yes on the 22nd he had a less cheerful appearance than on the 21st.

Did you know what his temperature was? No.

Did you know that it was 104 deg? No.

Court: What do you mean by "cheerful appearance." Was he smiling? No. I only saw it was cheerful in comparison with his appearance on the 21st.

If he was not smilling he was lying there on the bed with his eyes shut on both occasions? Yes he was lying on the bed not wishing to speak.

With his eyes shut and not smiling? Yes.

On what ground do you base your statement that he looked cheerful? On the 22nd?

On the 21st? On the 21st his breathing was normal. I use the expression "cheerful" in the sense in which a man in a normal condition, who is not ill.....

Therefore, the only difference was that on the 22nd he was breathing rather hard? Yes.

Now, if it be true that the Kumar's condition, except in respect of his breathing, was the same at 4 P. M. on the 21st November as it was at 4 P. M. on the 22nd November, then this witness's evidence corroborates the view that the deceased was not of sound mental capacity on the 21st November, for upon the 22nd November *ex concessis* the Kumar was incapable of making a Will. But I observed the demeanour of this witness as he gave his evidence, and I was not impressed with the manner in which he did so. He appeared to me to be indisposed to give direct or straightforward answers even to questions the answers to

which could have presented no difficulty to him, and I do not feel that I should be justified in placing reliance upon his testimony. Lila was not called as a witness, although she is the propounder of the Will, and could have given invaluable testimony as to the physical and mental condition of the Kumar at all material times. In answer to an enquiry from me Lila's Counsel stated that if the Court believed the other witnesses called in support of the Will her evidence was unnecessary, and if the Court disbelieved the other witnesses, the Court, in his view, would not be disposed to pronounce in favour of the Will by reason of any evidence which Lila might give. In my opinion, Lila was the most important of all the witnesses, and ought to have been called in support of the Will, and the fact that she was deliberately kept back from the witness-box was made the subject of forcible, and I think justifiable, comment by Counsel for the contesting caveator. From her absence in the witness-box I am disposed to draw, as I am entitled to do, the inference that if she had gone into the witness-box, and had told the truth, her evidence would not have supported the validity of the Will, while if she gave false evidence her actions in connection with the Kumar's affairs would not have borne investigation in a Court of Justice. In these circumstances, I find that the Kumar Guru Prosad Sinha did not execute the document in suit, and that at the time when it was alleged that he did so he was not possessed of sound disposing capacity. I hold that the document in suit is not the Will of the alleged testator Kumar Guru Prosad Sinha and I pronounce against its validity, and direct that Probate do not issue in respect thereof. I do not regard it as either desirable or necessary that I should express any opinion in connection with certain other matters relating to the disposal of the Kumar's estate after his death which were canvassed at the hearing. The main issue which I had to determine in these proceedings was whether or not the Kumar executed the document in suit. I have found that he did not execute this document. In these circumstances the question may be asked, who then did place the name of the Kumar upon the alleged Will? This is a matter as to which further enquiry will have to be made. All the documents in these proceedings will be impounded, and will be forwarded to the proper authorities for further investigation, with a view to ascertaining whether it is advisable or not to institute criminal proceedings against the persons who were concerned in the transactions relating to the document in suit. All the three caveators who have appeared are entitled to have their costs as against the propounder of the Will. As regards any further question of costs, liberty to apply.

Z. K. *Order accordingly.*

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 157 OF 1923.

February 21, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

TIMAPPA GANPAT GUDGAR— APPLICANT

versus

MANJAYA SUBRAYA HEBBAR— OPPONENT.

Limitation Act (IX of 1908), s. 12—Appeal, period of limitation for, computation of—Periods for obtaining copies of judgment and decree—Separate periods, whether can be excluded.

In computing the period of limitation prescribed for filing an appeal, the period spent in obtaining a copy of the judgment and the period spent in obtaining a copy of the decree appealed against must both be excluded under s. 12 of the Limitation Act, where the two periods are quite distinct from each other.

Silamban Chetty v. *Ramanadhan Chetty*, 4 Ind. Cas. 301; 33 M. 256; 7 M. L. T 29; (1910) M. W. N. 141; 21 M. L. J. 152, *Raman Chetti* v. *Kadirvalu*, 8 M. L. J. 148 and *Macmillan & Co.* v. *Cooper*, 87 Ind. Cas. 93; 25 Bom. L. R. 1309; 48 B. 292; (1924) A. I. R. (B.) 185, referred to.

Appeal against an order of the District Judge, Kanara, in Appeal No. 142 of 1922.

Mr. *S. N. Karnad*, for the Applicant.

Mr. *G. P. Murdeshvar*, for the Opponent.

JUDGMENT.—The question in this application for revision is whether the Judge was right in holding that the appeal was time-barred on the ground that two separate periods could not be excluded, one for obtaining a copy of the judgment and another for obtaining a copy of the decree. In this case there was an interval between the two periods. The case, therefore, comes within the decision in *Silamban*

Chetty v. *Ramanadhan Chetty* (1). There the decree was passed on October 12, 1905. The respondent applied for a copy of the decree on October 18, and obtained it on December 19. Then he applied for a copy of the judgment on December 22 and obtained it on February 16, 1906. The Court held that the party was entitled to deduct both the periods, and consequently, the appeal was in time. Reference was made to the case of *Raman Chetty* v. *Kadirvalu* (2), where the two periods overlapped and it was decided that the overlapping period should not be counted twice over.

There is no decision in this Court directly in point. In *Macmillan & Co* v. *Cooper* (3), the unsuccessful party applied for a certified copy of the judgement on June 12, and of the decree on June 30. The certified copies were supplied respectively on July 3, and August 8. It was held that the whole period of time occupied in obtaining certified copies of the judgment and decree appealed from should be excluded. Though that was a case of the two periods overlapping, the decision in *Silamban Chetty* v. *Ramanadhan Chetty* (1) was approved of. We, think, therefore, that these two distinct periods should be excluded in computing the time for the admission of the appeal. The Rule, therefore, must be made absolute and the appeal remanded to the lower Appellate Court for being heard on the merits. Costs costs in the appeal.

Z. K. *Rule made absolute.*

(1) 4 Ind. Cas. 301; 33 M. 256; 7 M. L. T. 29; (1910) M. W. N. 141; 21 M. L. J. 152.
(2) 8 M. L. J. 148.
(3) 87 Ind. Cas. 93; 25 Bom. L. R. 1309; 48 B. 292; (1924) A. I. R. (B.) 185.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1906 OF 1922.

January 15, 1925.

Present :—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

CHANDRA KUMAR KRITIRATNA BHATTACHARJEE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ALAM KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Mortgage by way of conditional sale—Sale, out and out—Principles applicable.

Where a question arises as to whether a document is a deed of mortgage by conditional sale or a deed of sale with the condition of re-purchase attached to it, each case must be decided upon the intrinsic evidence afforded by the terms of the document and upon the consideration of surrounding circumstances. [p. 547, col. 1.]

Narasingerji Gyanagerji v. *Panuganti Parthasaradhi Rayanim Garu*, 82 Ind. Cas. 993; 40 C. L. J. 481; (1924) A. I. R. (P. C.) 226; 47 M. 729; 20 L. W. 701; 10 O. & A. L. R. 1172; 47 M. L. J. 809; (1924) M. W. N. 915; 27 Bom. L. R. 4; 29 C. W. N. 246; 51 I. A. 305; 26 P. L. R. 18; 23 A. L. J. 161; L. R. 6 A. (P. C.) 41; 1 O. W. N. 684 (P. C.), followed.

A deed which purported to be a deed of sale conferred full proprietary rights on the vendee in the first part, but towards the end of the document there was a clause to the effect that if within a period of seven years the consideration mentioned in the document was not re-paid to the vendee, then the vendor would have to give up the land, and in that case the sale would become valid like an absolute sale and it would then divest the vendor of his title and confer upon the vendee the right to make sale or gift with effect from the expiry of the aforesaid period. The consideration money mentioned in the deed represented the actual price of the land at the date when the deed was executed. More than forty years after the date of the deed the vendor brought a suit for redemption on the allegation that the deed was a deed of mortgage by conditional sale :

Held, that the deed was a deed of an-out-and-out sale with a condition of re-purchase and the plaintiff's suit must, therefore, fail. [p. 547, cols. 1 & 2.]

Appeal against a decree of the Subordinate Judge, Second Court, Sylhet, dated the 3rd April 1922, affirming that of the Munsif, Second Court at Molvibazar, dated the 13th June 1921.

Babu *Hemendra Kumar Das*, for the Appellants.

Messrs. *M. Nuruddin Ahmed* and *B. A. S. M. Akram*, for the Respondents.

JUDGMENT.

Mukerji, J.—The only question in this appeal is as to whether the document, Ex. A in the case, is a deed of mortgage by conditional sale or a deed of an out-and-out sale with the condition of re-purchase attached to it. The Courts below have held that the document in question is one of an-out-and-out sale with a condition of re-purchase.

It is contended on behalf of the appellants that this view is not correct and that there are indications which can well be gathered from the terms of the document which go to show that the transaction was really one of mortgage by way of conditional sale. It is stated that in the first part of the document all sorts of rights are undoubtedly conferred upon the vendee but that towards the end of the document there is a clause to the effect that if within a period of seven years a particular amount, namely, the consideration mentioned in the

document was not re-paid then the vendor will have to give up the land and in that case the sale would become valid like an absolute sale and it would then divest the vendors of their title and confer upon the vendee the right to make sale of gift with effect from the expiry of the aforesaid period. It is urged on behalf of the appellants that this latter condition attached to the document shows an intention to the effect that the document is not to be regarded as a document for an out-and-out sale; special reliance is also placed on behalf of the appellants upon the word 'principal' which is used for the consideration money which is to be re-paid within the period of seven years mentioned above. On behalf of the respondents it is contended that the conditions by which all the proprietary rights were conferred upon the vendee clearly show that the intention was to sell the property, and that the condition mentioned in the latter part of the document only had the effect of reserving to the vendors the right to get back the property, in the event of the consideration money being re-paid within a period of seven years. It is not necessary to refer to the cases that have been noticed by the Courts below in their judgments, for, as has been observed by the Judicial Committee in the case of *Narasingerji Gyanagerji* v. *Panuganti Parthasaradhi Rayanim Garu* (1), each case has got to be decided upon the intrinsic evidence afforded by the terms of the document and upon consideration of surrounding circumstances. There are two outstanding features in this case and they have been noticed by the Court of first instance. They are, firstly, that the consideration money mentioned in the document really represents the actual price of the land at the date when the document was executed and secondly, that the plaintiffs have come to Court for obtaining possession of the lands more than 40 years after the date of the document. These undoubtedly, are circumstances which go to show that the intention of the parties was to make an out-and-out sale. With regard to the terms and stipulations relied upon by the learned Vakil appearing for the appellants they are not inconsistent with the transaction which would amount to an out-and-out sale. In the document which formed the subject-matter of discussion in *Chandi Charan Chowdhury* v. *Nabin Chandra De* (2), a Bench of this Court had to deal with terms very similar to those that are to be found in the document before us. In that document also it was mentioned that, the vendee was to enjoy and possess the land by virtue of transaction and that if a particular amount was re-paid within a certain period the vendee would release by a deed of sale all the lands and that if the money could not be paid within that time the deed of sale would be regarded as a deed of absolute sale and then the proprietary rights would accrue upon the vendee. No doubt there was also in that document a specific mention to the effect that the vendee would be entitled to deal with the property under a proprietary right from the date of the document but an absence of mention to that effect, such as there is in the document before us, does not, in my opinion, really affect the substance of the document itself for if the intention of the vendor was that if the money was re-paid within seven years, the property would be re-conveyed to the vendor he would naturally not make a mention of the power to make sale or gift of the property in the meantime specifically. Upon these considerations, I think that the Courts below have come to a right decision and the appeal accordingly fails and is dismissed with costs.

Greaves, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 82 Ind. Cas. 993; 40 C. L. J. 481; (1921) A. I. R. (P. C.) 226; 47 M. 729; 20 L. W. 701; 10 O. & A. L. R. 1172; 47 M. L. J. 809; (1924) M. W. N. 915; 27 Bom L. R. 4; 29 C. W. N. 246; 51 I. A. 305; 26 P. L. R. 18; 23 A. L. J. 161; L. R. 6 A. (P. C.) 41; 1 O. W. N. 684 (P. C.).

(2) 67 Ind. Cas. 113.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 95 OF 1923.

December 9, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

BANSIDHAR DURGADATT AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE TATA POWER COMPANY, LIMITED—PLAINTIFFS—RESPONDENTS.

Fraud—Shares in Company, application for—Misrepresentation, nature of—Deception, proof of—Shares to be taken up by Directors, Agents, etc., meaning of—"Friend", meaning of.

In order to succeed in an action for deceit, a plaintiff must prove that he was actually deceived by the misrepresentation complained of. [p. 551, col. 1.]

Where the prospectus of a Company states that a certain number of shares are to be taken up by the

Directors, Agents and their friends, the statement only means that the Directors, Agents and their friends are ready and willing to take up that number of shares, and not that at the date of the prospectus the stated number of shares has actually been taken up and allotted to the Directors, Agents and their friends. A person applying for shares in a Company on the assumption that the number of shares stated in the prospectus to be taken up by the Directors, Agents and their friends has actually been allotted to the Directors, Agents and their friends acts on a misreading of the prospectus and not on the faith of the representation which is actually made in the prospectus and cannot subsequently complain that he was induced to apply for the shares by a misrepresentation. [p. 551, col. 2.]

The word "friend" in such prospectus means not only a social but also a business friend. The business friend who applies for shares because in the course of his business dealing with the Directors he acquires a knowledge of the project, is correctly described in a prospectus as a "friend." [p. 550. col. 1.]

Where a certain number of shares are reserved for a particular person on the understanding that he will take up some of them himself and dispose of the rest among his friends, it is not a misrepresentation to state in the prospectus that the shares reserved for that particular person are to be taken up by him. [p. 550, col. 2; p. 551, col. 1.]

Appeal from the decision of Mr. Justice Pratt.

Mr. *Munshi* (with him Mr. *Coltman*), for the Appellants.

Mr. *B. J. Desai* (with him Mr. *Kanga*) and Sir *Chimanlal Setalvad*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff Company filed this suit alleging that one Bansidhar Durgadutt (hereinafter called the first defendant) had by two several applications, dated respectively October 3, 1919, and October 11, 1919, applied for 380 ordinary and 120 preference shares in the plaintiff Company subject to the articles and memorandum of association of the Company, remitting with the said applications Rs. 13,000 and Rs. 37,000 respectively as the amounts of deposit in respect of the shares so applied for.

On December 1, 1919, the Board of Directors allotted to the first defendant 190 ordinary and 120 preference shares, and notices of such allotment were sent to the first defendant. The first defendant paid the allotment moneys. A first call of Rs. 100 on each of the ordinary and preference shares was made payable on September 1, 1921, by a resolution of the Board of Directors, dated July 20, 1921, and a notice was sent to the first defendant on August 12, 1921. The first defendant failed to pay the amount due on the first call, and notices were sent to him by the Company and their Solicitors respectively demanding the said amount with interest at nine per cent.

After the institution of the suit the Company were informed that Bansidhar Durgadutt the registered holder of the shares, was not an individual but a firm, and the plaint was consequently amended by adding the firm as second defendant.

A second call of Rs. 100 on the ordinary shares and preference shares payable on April 1, 1922, and a third call of Rs. 200 payable on November 10, 1922, were made by resolutions of the Board on March 10, 1922, and September 27, 1922, respectively, and notices were sent to the defendants. The defendants declined to pay the said calls and the plaint was amended so that the further claim for Rs. 93,000 and interest might be included in the suit.

The total sum claimed was Rs. 1,24,000 with interest at nine per cent. from the date of the various calls on the amount due on each call.

In their written statement the defendants admitted that Bansidhar Durgadutt was the registered holder of the 310 shares but they pleaded that the application for the shares were made on the faith of certain representations made in the prospectus of the Company:—

(1) That the applications would be received only up to Monday October 13, 1919.

(2) That the present issue was of Rs. 10,000 shares of 7½ per cent. cumulative preference shares of Rs. 1,000 each and 35,000 ordinary shares of Rs. 1,000 each. Out of these shares, 7,000 preference and 25,000 ordinary shares were to be taken up by the Directors, Agents and their friends, and the remaining 3,000 preference and 10,000 ordinary shares were for public subscription.

The defendants alleged the said representations were absolutely false. The Company accepted applications long after October 13, 1919. The Company had given to the public 5,000 preference shares instead of 3,000; and 17,000 ordinary shares instead of 10,000, the Directors, Agents and their friends taking up a much smaller number of shares than stated in the prospectus.

The defendants submitted that they were entitled to a rescission of the contract for the purchase of the said shares.

The defendants, therefore, counterclaimed asking (1) for a declaration that the contract for the purchase of 310 shares in the Company was not binding on

the defendants; (2) that the register of share-holders might be rectified by removing the defendants' name therefrom; and (3) that the plaintiff Company might be ordered to pay to the defendants the sum of Rs. 62,000 paid to them for the said shares with interest.

The following issues were raised at the trial.—

1. Whether the applications for shares were made on the faith of the representation in the prospectus referred to in para. 2 of the written statement?

2. Whether the said representations or any of them were false?

3. Whether the defendants are entitled to rescission of the contracts to take shares referred to in the plaint?

4. Whether the defendants are entitled to have their names removed from the register of share-holders of the Company?

5. To what sum, if any, are the plaintiffs entitled on their claim?

6. To what sum, if any are the defendants entitled on their counter-claim?

As far as I can gather from the record the defendants had not disclosed, before the written statement was filed, on what grounds they were objecting to pay the calls.

When the plaintiffs' Solicitors wrote on February 1, 1922, demanding payment of the first call, defendants' Solicitors replied on the 15th referring Messrs. Wadia and Gandhy to their letter of February 14 written on behalf of another client, in which they merely asked for inspection of the register of members commencing from the date of the registration of the Company, and of the minutes of the Directors' meeting when it was decided to make the call.

The learned Judge found as follows on Issues Nos. 1 and 2:

(1) That the applications for shares were not made on the faith of the representations in the prospectus referred to in para. 2 of the written statement.

(2) That the representations were false.

He, therefore, passed a decree as prayed for with costs as of a short cause and dismissed the counter-claim with costs.

The defendants have appealed.

The first alleged misrepresentation in para. 2 of the written statement was not relied upon at the hearing. It was admitted that applications were received up to February 11, 1920, but it was not suggested that this representation in any way induced the defendants to make their applications for shares.

The defendants complained about the second representation on two grounds:

(1) That the number of shares mentioned therein was not true.

(2) Because it gave a wrong impression as to the holding of the Directors, Agents and their friends.

The history of events prior to the flotation of the Company was as follows:—

Messrs. Tata Sons, Ltd., who had already floated two Companies for generating electric energy by water power, had obtained a concession from Government for the development of a third project.

In July 1919, the firm issued a private and confidential circular, Ex. Y, giving an outline of the project both in its techincal and financial aspects to over 100 selected individuals whose names appear in Ex. Z. Thereafter letters were received by the firm from various persons asking for shares to be reserved for them. Oral applitions were also received, and all applications were dealt with under the orders of the partners in the firm, principally by Mr. Billimoria. It was unfortunate, as the evidence in the case shows, that proper care was not exercised in preparing accurate lists showing the number of such applications and the extent to which they were granted.

On September 18, 1919, the Company was registered, and on September 25, 1919, the prospectus was issued. Application forms were sent to reservees which were marked with a letter and figure giving reference to the register of reservations. A circular letter, Ex. I, accompanied the forms asking that the forms should be filled in and returned, together, with the necessary deposit money.

A P. S. to the circular was as follows:—

"You are kindly requested to write your name on the top of every application form in case you have distributed amongst your friends shares out of your holding."

The total number of shares allotted were:—

34,851 ordinary
8,697 preference

which were distributed as follows:—

Ordinary, to Directors, Agents and friends	19,818
to the public	15,043
Preference, to Directors, Agents and friends	5,293
to the public	3,404

The learned Judge was put to very great deal of trouble to ascertain what number of shares had actually been reserved at the date of the prospectus. The evidence relating to the reservation has been carefully set out at great length in the judgment and the conclusion arrived at was that the figures 25,000 ordinary and 7,000 preference shown in round numbers as reserved in the prospectus were substantially accurate, and that as to the numbers stated in the prospectus there was at the date of the prospectus no misrepresentation. The appellants' Counsel in the course of the argument before us did not attempt to contest that finding.

The next question was whether the representation that the 25,000 ordinary and 7,000 preference shares were to be taken up by the Directors, Agents and their friends was true.

It was contended that the term "friends" includes only those persons who were directly influenced by the Directors to apply for reservation of shares. They relied on the case of *Henderson* v. *Lacon* (1), but the facts in that case were peculiar and the misrepresentations in the prospectus were so obvious that it was hardly necessary to place a restricted meaning on the word "friends." The learned Judge was right, therefore, in not putting any emphasis on the word "influenced." I agree with the following passage in the judgment:—

"The word 'friend' is not only a social but a business friend. A business friend who applies for shares because, in the course of his business dealings with the Directors, he acquired a knowledge of the project is correctly described in a prospectus as a 'friend'; and the influence would be merely the fact of that business connection."

But the judgment proceeds:—

"But the plaintiff Company include in the term not merely business friends, but also the friends of these business friends. I think this further extension is inadmissible because whether in social or commercial relations a friend's friend is as often as not an enemy or a rival."

Surely, that remark would equally apply to a business friend. A person who in business had come to know of this project and applied to the agents for a reservation of shares would be, according to the learned Judge's definition, a friend, but in other branches of business he might be a rival. I would prefer not to use the word enemy. Then the learned Judge says:—

"It is true that a friend who receives a reservation might apply for his friends as their nominee. If that had been all there would perhaps be no misrepresentation. But the Company went much further. Exhibit (1). They invited reservees to distribute shares to their friends. They reserved shares not only for individuals but for the business circle which these individuals represented. They deliberately set up centres for private subscription and then described the shares so set apart for private subscription as reserved for their friends."

Now there does not seem to be much difference to my mind between the promoters of a Company saying to *A*, "At your request we will reserve for you so many shares. We know you can dispose of them amongst your friends if you want to after allotment" and their saying to him, "Here are the application forms for the shares reserved for you. You have already told us you do not want to hold them all yourself. So you can get your nominees to fill in the application forms, but put your name on the top so that we can trace the application to the particular reservation in your favour." The only practical difference would be that the reservee would not have to pay the application money and he would be saved the trouble of transferring the shares after allotment.

In other words, would it be misrepresentation if the promoters guaranteed that so many shares were to be taken up by their friends, when they knew perfectly well that those friends intended to make what they could of the favour shown to them by the reservation. I doubt it very much. Promoters may guarantee that shares will be taken up or have been taken up by reservees but they cannot guarantee that the shares will be held by them. Failure to disclose material facts would amount to misrepresentation, but the fact that a holder of shares can sell them is common knowledge.

I will deal with a typical example out of those which have been relied on by the learned Judge to support his conclusion. 675 shares were reserved for Ambalal Sarabhai. The plaintiffs knew that he did not want them all for himself as Mr. Bhabha de-

(1) (1868) 5 Eq. 249; 18 L. T. 527; 16 W. R. 328.

posed that the plaintiffs expected a large list of friends of his from Ahmedabad. The fact remained that Ambalal was a reservee for 675 shares. If he had introduced his friends to the promoters and the promoters had accepted them as reservees, nothing could have been said. As he did not do so, the plaintiffs were entitled to represent him as the friend by whom the shares were to be taken up. It has thus been proved that the promoters had reserved substantially the number of shares given in the prospectus, and I am prepared to say that it was substantially correct to state that they were reserved for friends of the Directors and Agents.

Assuming, however, that the representation was untrue, as the learned Judge has found, the next question is whether the defendants were induced by the misrepresentation to take up the shares, for, in order to succeed in an action for deceit, the plaintiff must prove that he was actually deceived by the misrepresentation complained of: *Smith* v. *Chadwick* (2). I do not think that there is any doubt that it must be inferred from the evidence that Baijnath Bansidhar, the partner in the defendants' firm who made the application, had read the prospectus even if the whole of his story cannot be believed. The prospectus appeared in *The Bombay Chronicle* of September 27, Ex. 22, which would be available in Calcutta on the 29th. Besides the application forms sent in by the defendants would be annexed to copies of the prospectus. Then if Baijnath after reading the prospectus applied for shares, it is for the plaintiffs to rebut the inference that the application was based on the representations made in the prospectus. In *Smith* v. *Chadwick* (2), Jessel M. R. said :—"Unless it is shown in one way or the other that the applicant did not rely on the statement the inference follows." In his evidence Baijnath said :—

"I can read English, I read the advertisement. I discussed with Ramcoover if shares should be taken. I thought that I should purchase the shares as only a small number were left for the public. I made an application on October 3. I got the forms in the shop of Dwarkadas itself. The form was attached to the prospectus...in January 1922 I learnt in Calcutta...there was some upset in the Company. So I came to Bombay to make enquiries. I instructed my Attorneys to write the letter of February 15. I applied for shares as the prospectus stated that Directors, friends and Agents had taken up 25,000 ordinary and 7,000 preference. I thought from that that it must be a profitable concern. I applied as there was only a small number left for the public."

In cross-examination he said:—

"From the first part (*sic*) I understood that the Directors, Agents, and friends had taken up 25,000 and 7,000 shares. I would not have applied if I had understood that they were only ready and willing to take up that number."

This last answer really disposes of the defendants' case. The shares were applied for on a misreading of the prospectus and not on the faith of the representation which was actually made.

The learned Judge, however, has come to the conclusion that the defendants were not induced to apply for the shares by what was represented in the prospectus on another ground which it is more difficult to justify. It is practically impossible to ascertain what is passing in the mind of a man who after reading the prospectus of a Company applies for shares. Apart from his misreading the terms of the prospectus, Baijnath's story as to how he came to apply for the shares would be the natural story of any applicant who had read the prospectus. The fact that the promoters gave out the amount of support they had received in advance for the flotation of the Company would inevitably weigh on the minds of the public, and would influence them when sending in applications for shares. There might also be other considerations, and the learned Judge appears to think that those afforded the real reason for Baijnath's deciding to send in his applications. Undoubtedly in the middle of 1919, when money was plentiful the public were ready to subscribe to any Company promoted by persons of repute. In August 1919, the defendants must have heard of the impending flotation of the plaintiff Company because they sent a cheque for Rs. 2,500 and asked that twenty-five shares should be reserved for them. They were anxious to get shares then before the prospectus was issued to the public, and when they were told that the promoters did not want their money and that they should apply after the prospectus was issu-

(2) (1882) 20 Ch. D. 27 at p. 45; 51 L. J. Ch. 597; 46 L. T. 702; 30 W. R. 661.

ed, they must have realized that the promoters at that time were not prepared to deal with any chance stranger who might apply for a reservation. Even though they asked in October for a far larger number of shares it is not an unfair inference that they made the application because they thought it would be a profitable investment. If they had sent in their application for 500 shares because of the limited number of shares offered to the public, desiring and expecting to be allotted only a proportion of what they had asked for, although, as a matter of fact, Baijnath did not say anything to this effect, they would have no reason to complain as they were only allotted 310 shares, and the suggestion made in the written statement, that, because some of the shares reserved were allotted to the public to the disappointment of some of the reservees, there was a misrepresentation has no substance in it. In fact it counts against the defendants. In the case of another Company floated by the same Agents a few months before the plaintiff Company's project was entertained, there were loud complaints from the public that too many shares were reserved for the promoters and their friends, and so the Directors of the plaintiff Company were anxious to increase the number of shares available for the public to satisfy the demand. If when the business of allotment was going on, the plaintiff Company had told the defendants, "We are reducing the shares reserved for our friends and increasing the shares available for the public, and you may think that a ground for rescinding your contract so thet we will take back your shares." the defendants would only have felt more inclined to hold to what they had got.

I think, therefore, that the true position when the prospectus was issued was this. The defendants were told that only 10,000 ordinary shares out of 35,000 were available for the public and so at the highest they may have applied for more shares than they wanted. The real inducement to invest in the Company was because money awaiting investments was plentiful, the general reputation of the promoters with the public was excellent, and consequently defendants thought they were getting a favourable opportunity for investing their money. When the partly paid shares could not be disposed of at a premium, when large amounts for calls became due, and money was much scarcer, they bethought themselves what was the best way of evading their liability.

We think the judgment appealed against was right and the appeal is dismissed with costs.

Crump, J.—I entirely agree.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 713 OF 1922.

November 27, 1924.

Present:—Mr. Justice Ramesam.

DAKSHINAMURTHI MUDALIAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

DHANAKOTI AMMAL—PLAINTIFF—RESPONDENT.

Specific performance—Agreement to re-sell—Strict compliance with terms—Part-performance, doctrine of, applicability of.

A right to re-purchase reserved in a deed of sale must be exercised according to the strict terms of the covenant. [p. 553, col. 2.]

It is not every kind of part-performance that will attract the operation of the doctrine of part-performance. The acts relied upon as part-performance must be unequivocal and in their own nature referable to some such agreement as that alleged. They must be consistent with the contract alleged and also such as cannot be referred to any other title than the contract, nor must they have been done with any other view or design than to perform the contract. [p. 554, col. 1.]

Where the main contract is one of re-sale and there is a subsidiary contract of tenancy upto the period allowed for the enforcement of the contract of re-sale, and all the acts of part-performance are explainable either as due to some inaction or to a willingness to continue the tenancy as one from month to month, the doctrine of part-performance can have no applicability. [p. 554, col. 2.]

Case-law referred to.

Second appeal against a decree of the Court of the Subordinate Judge, Chingleput, in A. S. No. 79 of 1921 (A. S. No. 105 of 1921, District Court, Chingleput), preferred against that of the Court of the Additional District Munsif, Chingleput, in O. S. No. 292 of 1919.

Mr. *K. Balasubramanya Ayyar*, for the Appellants.

Mr. *P. S. Narayanaswamy Iyer*, for the Respondent.

JUDGMENT.—The facts of this second appeal are simple and may be thus stated.

The plaintiff's husband, Neelavani Naicker, was the original owner of the property. He mortgaged it to a Fund at St. Thomas Mount. Unable to pay the mortgage debt, he sold the house to his brother-in-law Appu Naicker for Rs. 600 (Ex. II), dated 19th September 1907) and paid off the debt. Sometime after, Appu Naicker was in need of Rs. 600 and applied to Neelavani for finding another purchaser. The latter found a willing vendee in the defendant and caused Appu Naicker to sell the property to the defendant (Ex. III, dated 26th November 1909). At the time of the sale, the plaintiff, her husband and the defendant entered into an arrangement that the defendant should execute an agreement in favour of the plaintiff containing the following terms, *viz.*, that the plaintiff should keep the suit house in her possession, that the plaintiff and her husband should pay regularly Rs. 4-8-0 every month or once in two months at the same rate, being the amount due at 12 annas per cent. per mensem for the sale amount of Rs. 600 that the plaintiff should pay the defendant the principal sum of Rs. 600 before the 14th December 1914 and that, *if payment be made in that manner*, the defendant should execute and register a sale-deed for the suit house. Such an agreement was executed but is not forthcoming. The Courts below relying on Ex. I have found that its execution has been proved.

It is now admitted that no money was tendered by plaintiff within 14th December 1914. The plaintiff continued to occupy the house. On 11th June 1918, the defendant issued a notice to quit and the plaintiff replied by Ex. IV-a relying on the agreement and sent Rs 600 and arrears of rent Rs. 22-8-0, but the amount was rejected by the defendant. The present suit for specific performance was filed on 12th March 1919.

The District Munsif dismissed the suit on the ground that as the plaintiff did not tender the amount within 14th December 1914, she is not entitled to specific performance. The District Judge, reviewing the District Munsif's judgment held that time was not of the essence of the contract and gave a decree. The defendant appeals.

If the agreement by the defendant to convey the property to the plaintiff, is an ordinary contract to sell, I would have been inclined to dismiss the second appeal. But, on the allegation of the plaintiff and the findings of the Court below, it is a case of a sale to defendant followed by an agreement to re-sell. The fact that the re-sale was not to be in favour of Appu Naicker or to Neelavani Naicker does not make any difference. It is the plaintiff's husband, even though he sold the property to Appu Naicker, and not Appu Naicker that arranged the sale to the defendant and he stipulated that there shall be a re-sale to his nominee, his wife, the plaintiff. This is substantially a contract of sale with an agreement to re-sell.

It is doubtful whether the principle laid down in *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1) that in contracts of sale of real property, time is not generally of the essence of the contract, is applicable to contracts to re-sell. On the other hand, it was held that the right to re-purchase must be exercised according to the strict terms of the power [*Samarapuri Chettiar* v. *Sutharsana Chettiar* (2), relying on *Joy* v. *Birch* (3), *Ranelagh* v. *Melton* (4) and *Dibbins* v. *Dibbins* (5).] [See also *Maung Po Yin* v. *Maung Shwe Kin* (6).] The same view was taken in *Maung Wala* v. *Mg. Shwe Gun* (7) following *Somarapuri Chettiar* v. *Sutharsana Chettiar* (2). The ground on which relief was given to the purchasers in that case, *viz.*, that the tender at the due date was made impracticable by default of the payee does not arise here. (See also Fry on Specific Performance, s. 1103, 6th Edition, page 515).

Mr. Govindaraghava Iyer contends that there has been a part performance of the contract and, therefore, it does not matter that the purchase money was not tendered within 14th December 1914. The part-performance he relied on is the acceptance of rent beyond 14th December 1914 upto June 1918. He relied on *Vizagapatam Sugar*

(1) 32 Ind. Cas. 246; 40 B. 289; 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 18 Bom. L. R. 163; 23 C. L. J. 358; 20 C. W. N. 744; 43 I. A. 26 (P. C.).

(2) 52 Ind. Cas. 590; 42 M. 802; 27 M. L. J. 109; (1919) M. W. N. 598; 10 L. W. 376; 26 M. L. T. 269.

(3) (1836) 7 E. R. 22; 4 Cl. & F. 57; 10 Bligh (N. S.) 201.

(4) (1864) 62 E. R. 627; 2 Dr. & Sm. 278; 5 N. R. 101; 34 L. J. Ch. 227; 10 Jur. (N. S.) 1141; 11 L. T. 409; 13 W. R. 150; 143 R. R. 115.

(5) (1836) 2 Ch. 348; 65 L. J. Ch. 724; 75 L. T. 137; 44 W. R. 595.

(6) 70 Ind. Cas. 126; 11 L. B. R. 441; (1923) A. I. R. (R.) 42.

(7) 82 Ind. Cas. 610; 1 R. 472; 2 Bur. L. J. 188; (1924) A. I. R. (R.) 57.

DevelopmentCo., Ltd. v. *Muthurama Reddi* (8), *Mehar Ali Khan* v. *Aroatannessa Bibi* (9), *Hiralal Ramanarayan* v. *Shankar Hirachand* (10), *Hodson* v. *Heuland* (11). Following *Biss* v. *Hygate* (12) and *Miller* v. *Finlay* (13). There is no doubt as to the principle of these cases but Mr. Balasubramania Iyer argued that it is not every kind of part-performance that will attract the operation of the principle. In *Maddison* v. *Alderson* (14), Lord Selborne after referring at page 478* to Lord Hardwicke's statement of the rule in *Gunter* v. *Halsey* (15) and his opinion that the payment of purchase-money in whole or in part as a sufficient part-performance and pointing out that his application of the rule was not followed by Lords Cowper and Macclesfield proceeds at page 479*: "All the authorities show that the acts relied upon as part-performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged: *Cooth* v. *Jackson* (16), *Frame* v. *Dawson* (17) and *Morphett* v. *Jones* (18)." 'The acknowledged possession' [said Sir T. Plumer in *Morphett* v. *Jones* (18)] 'of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure.'" "It is in general" said Sir James Wigram [*Dale* v. *Hamilton* (19)] of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract....But an act which though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part-performance taking the case of the Statute of Frauds; as for example, the payment of a sum of money alleged to be purchase-money... [See also *Britain* v. *Rossiter* (20), per Lord Justice Cotton.] The acts of part-performance, exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been (almost, if not quite, universally) relative to the possession, use, or tenure of the land.". At page 484* Lord O'Hagan quotes Sir William Grant in *Frame* v. *Dawson* (17): "The principle of the cases is that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted to show what the agreement is." In *Vizagapatam Sugar Development Co., Ltd.* v. *Muthurama Reddi* (8) possession was delivered in pursuance of the contract. So also in *Hiralal Ramanarayan* v. *Shankar Hirachand* (10). The cases of *Hodson* v. *Heuland* (11), *Biss* v. *Hygate* (12) and *Miller* v. *Finlay* (13) are cases where the main contract itself was one of tenancy and though the entry into possession in the former case was prior to the contract, the continuance of possession was distinctly referable to the contract. These cases cannot help us here when the main contract is one of re-sale and there is a subsidiary contract of tenancy upto the re-sale and all the acts of part-performance are explainable either as due to mere inaction or a willingness to continue the tenancy as one from month to month. The acceptance of rent after 14th December 1914 amounts to no more than a renewal of the tenancy as a tenancy from month to month. I am quite alive to the fact that the rent fixed, *viz.*, Rs. 4-8-0 represented a rate of interest at 9 per cent on the purchase-money stipulated but I do not see how this makes any difference. The defendant might have thought that the tenancy with a rent of Rs. 4-8-0 is as good a letting as any he can otherwise procure. Mr. Balasubrama-

(8) 76 Ind. Cas. 886; 46 M. 919; 45 M. L. J 528; (1924) A. I. R. (M.) 271; 33 M. L. T. 53; (1924) M. W. N. 14.
(9) 67 Ind. Cas. 167; 25 C. W. N. 905.
(10) 62 Ind. Cas. 637; 45 B. 1170; 23 Bom. L. R. 506.
(11) (1896) 2 Ch. 428; 65 L. J. Ch. 754; 74 L. T. 811; 44 W. R. 684.
(12) (1918) 2 K. B. 314; 87 L. J. K. B. 1101; 119 L. T. 284.
(13) (1862) 5 L. T. 510; 128 R. R. 970.
(14) (1883) 8 A. C. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.
(15) (1739) Amb. 586; 27 E. R. 381.
(16) (1800) 6 Ves. Jur. 12 at p. 38; 31 E R. 913; 10 R. R. 190.
(17) (1807) 14 Ves. 386; 9 R. R. 301; 33 E. R. 569.
(18) (1818) 1 Swans. 172 at p. 181; 1 Wils. Ch. 100; 36 E. R. 344; 18 R. R. 48.
(19) (1846) 5 Hare 369 at p. 381; 67 E. R. 955; 16 L. J. Ch. 126; 11 Jur. 163; 71 R. R. 127.
(20) (1883) 11 Q. B. D. 123 at p. 130; 48 L. J. Ex 362; 40 L. T. 240; 27 W. R. 482.

*Pages of (1883) 8 A. C. [*Ed.*]

nia Iyer relied on *Williams* v. *Owen* (21). This case supports him though, as Mr. Gobindaraghava Iyer pointed out, it is a case where the Courts might well have construed the contract (in the light of principles laid down in later cases) to be one of mortgage and not one of sale and agreement to re-sell. On the pleadings and on the facts of this case (the person entitled to the conveyance and the re-sale the plaintiff being different from the original vendor Appu Naicker) that alternative is not open to the plaintiff, it not being suggested that plaintiff is a *benamidar* for her husband.

The principle has been stated in Fry on Specific Performance at page 279 (s. 584): "To make the acts of part-performance effective, to take the contract out of the Statute of Frauds, they must be consistent with the contract alleged and also such as cannot be referred to any other title than a contract, nor have been done with any other view or design than to perform a contract [*Gunter* v. *Hasley* (15)], therefore, if a tenant in possession sues for the specific performance of an alleged contract for a new lease, the mere fact of his continuance in possession will have no weight as an act of part-performance of the contract, being referable to his character as tenant [per Plumer, M. R. in *Morphett* v. *Jones* (18) and other cases and distinguished by *Hodson* v. *Heuland* (11) and *Biss* v. *Hygate* (12) which are not cases of renewal of the lease but of fresh lease. In the present case, the contract of possession can have no weight as an act of part-performance of the contract to re-sell, there being a tenancy and the continuing of possession is explainable as evidence of a willingness to continue the tenancy.

In my opinion, there is no such part-performance as will help the plaintiff. There is no question of limitation in the case.

I may add that Mr. Balasubramania Iyer relying on *Egala Nagappa Naidu* v. *Munisamy Iyer* (22) contended that the agreement to re sell being one-sided is no contract at all. But the present case is distinguishable from *Egala Nagappa Naidu* v. *Munisamy Iyer* (22) in which the agreement to re-sell and the original sale were at different times and were separable. In the present case the whole arrangement constituted one agreement, the option to repurchase is one term of the whole contract. This contention must be disallowed.

For the other reasons given, the plaintiff must fail and the appeal will be allowed and the plaintiff's suit is dismissed with costs throughout.

V. N. V. *Appeal allowed.*
Z. K.

(21) (1840) 41 E. R. 383; 5 My. & Cr. 303; 10 Sim. 386; 9 L. J. Ch. (N. S.) 70; 3 Jur. 1186; 12 L. J. Ch. 207; 5 Jur. 114; 48 R. R. 322.

(22) 65 Ind. Cas. 720; 46 M. 30; 30 M. L. T. 175; 15 L. W. 409; (1922) M. W. N. 201; (1922) A. I. R. (M.) 16; 42 M. L. J. 432.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1597 OF 1922.

January 6, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

NABIN CHANDRA HALDAR—DEFENDANT—APPELLANT

versus

BIPIN CHANDRA HALDAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 18, Sch. I, Art. 166 – Civil Procedure Code (Act V of 1908), O. XXI, r. 90, O. XLIII, r. 1 (j)– Execution of decree – Sale, application to set aside—Limitation—Fraud—Burden of proof – Appeal, second, whether lies.

When a judgment-debtor makes an application to have an execution sale set aside under r. 90 of O. XXI of the C. P. C., after the expiry of 30 days, he must bring his case within s. 18 of the Limitation Act, and to enable him to do so it is not enough for him to show that the execution proceedings were irregular and fraudulent, but he must carry the fraud further and show that the existence of his right to set aside the sale had been kept concealed from his knowledge by the fraud of the decree-holder or the auction-purchaser. Where, however, such fraud is proved it is for the opposite party to show that the judgment-debtor has had clear and definite knowledge of the fact constituting the fraud at a time which is too remote to bring the application within limitation. [p. 556, col. 2.]

Kailash Chandra Haldar v. *Bissonath Paramanic*, 1 C. W. N. 67 and *Rahimbhoy Haribhoy* v. *Charles Agnew Turner*, 17 B. 341; 20 I. A. 1; 6 Sar. P. C. J. 256; 17 Ind. Jur. 40; 9 Ind. Dec. (N. S.) 222 (P. C.), relied on.

A second appeal is not competent against an appellate order passed on an application under O. XXI, r. 90 of the C. P. C. [p. 557, col. 1.]

Appeal against a decree of the Subordinate Judge, First Court, 24-Parganas, dated the 22nd of March 1922, modifying that of the Munsif, Second Court, Baruipur, dated the 30th of June 1920,

Mr. *Narendra Kumar Bose* and Babu *Satyendra Nath Mitter*, for the Appellants.

Babus *Suresh Chandra Taluqdar* and *Mahendra Kumar Ghosh*, for the Respondents.

JUDGMENT.

Mukerji, J.—This appeal arises out of a suit instituted by the plaintiffs for a declaration that the sale held in certain execution case was illegal and also for confirmation of the plaintiff's possession in respect of the land covered by the sale. The sale took place on the 22nd November 1918 and the present suit was instituted on the 21st May 1919. The defence was to the effect that the suit was barred by reason of the provisions of s. 47 of the C. P. C. and that there was no irregularity or illegality in connection with the sale. The First Court held that the suit did not lie and treated the plaint as an application under O. XXI, r. 90, C. P. C., and dismissed the plaintiffs' suit. On appeal by the plaintiffs the Subordinate Judge has found that so far as the plaintiffs' allegation was to the effect that the decree in execution of which the sale took place had been satisfied that allegation was not established. He, however, held that the processes were fraudulently suppressed in the execution case and that the property had been sold at an inadequate price in consequence of the said fraudulent suppression of processes. He found also that the plaintiffs came to know of this fraudulent sale seven or eight days before the institution of the suit and holding that the suit had been properly treated by the Munsif as an application for setting aside the sale and that the application was within time decreed the suit. The defendant appeals to this Court and on his behalf it is contended that the plaint having been filed admittedly more that 30 days from the date of the sale, the plaintiffs should have alleged fraud on the part of the decree-holder or auction-purchaser which kept them out of knowledge of the sale and by reason of which fraud they were prevented from putting in the application within 30 days from the date of the sale and also that there is no finding in the learned Subordinate Judge's judgment that there was fraud on the part of the said decree-holder or auction-purchaser by reason of which the plaintiffs were prevented from coming to Court within such time. On behalf of the appellant reliance has been placed upon the case of *Kailash Chandra Haldar* v. *Bissonath Paramanic* (1). It was laid down in that case that when a judgment-debtor makes an application to have an execution sale set aside under s. 311 of the old C. P. C., after the expiry of 30 days he must bring his case within s. 18 of the Limitation Act and to enable him to do so, it is not enough for him to show that the execution proceedings were irregular and fraudulent but that he must carry the fraud further and show that the existence of his right to set aside the sale has been kept concealed from his knowledge by the fraud of the decree-holder or the auction-purchaser. So far as this principle is concerned there is no dispute whatsoever. But it will be seen that in that case all that was found by the Courts below was that the sale proclamation had not been duly published and this Court held that from that fact alone it could not be inferred that there was any fraud on the part of the decree-holder and upon the evidence the Court was also of opinion that fraud had not been established as against the decree-holder or the auction-purchaser. It has been laid down by the Judicial Committee in the case of *Rahimbhoy Haribbhoy* v. *Charles Agnew Turner* (2) that in order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts constituting the fraud at a time which is too remote for the suit to be brought. In the present case the finding of the lower Appellate Court is to the effect that processes in connection with the execution case had been fraudulently suppressed and the other finding is that the plaintiffs came to know of the fraudulent sale seven or eight days before the institution of the suit. It is not an unreasonable inference to draw from the aforesaid findings that, as a matter of fact, the fraud that had been committed in the execution proceedings continued and by reason of its continuing influence the plaintiffs were kept out of the knowledge of the sale. Although there is no clear finding in the learned Subordinate Judge's judgment on this point, in my opinion,

(1) 1 C. W. N. 67.

(2) 17 B. 341; 20 I. A. 1; 6 Sar. P. C. J. 256; 17 Ind. Jur. 40; 9 Ind. Dec. (N. S.) 222 (P. C.).

the facts found irresistibly lead to the conclusion that the plaintiffs are entitled to the benefit of s. 18 of the Limitation Act. Apart from this there is a further difficulty in the way of the appellant and this is by reason of the fact that the plaint was treated as an application under O. XXI, r. 90. When it was so treated there was only one appeal, allowed by law, from the order passed in it, and consequently the present appeal, in my opinion, is not maintainable. On both these grounds the appeal fails and must be dismissed with costs.

Greaves, J.—I agree.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 111 of 1923.

November 21, 1924.

Present:—Mr. Justice Krishnan.

MACHULLATHIL CHANDUKUTTY NAYAR—DEFENDANT No. 3—APPELLANT

versus

KURUVATHANCHERI KEEZANA NARAYANA NAYAR AND OTHERS—PETITIONERS Nos. 1 AND 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Mortgage—Lease to mortgagor—Suit for arrears of rent and ejectment—Decree for sale of property on non-payment, whether preliminary decree—Final decree, whether necessary.

A usufructuary mortgagee of certain properties leased them to the mortgagor himself on a *kychit*, by which the latter agreed to pay rent and which provided that any arrears of rent which fell due would be a charge on the equity of redemption. The rent fell into arrears and the mortgagee brought a suit for rent and ejectment and obtained a decree which directed that the plaintiff should deposit a certain sum of money into Court on account of the improvements effected by the defendant and that the defendant should surrender possession of the properties and pay up the arrears of rent, the amount decreed in respect of improvements to be set off in execution against the arrears, and that after three months from the date of the decree the plaintiff should recover any deficit which remained unpaid after the set off by sale of the property:

Held, that the direction in the decree with regard to the sale of the property was not in the nature of a preliminary decree requiring a separate final decree before it could be executed, but was in the nature of a money-decree which the decree-holder was authorized to execute against the property in the event mentioned in the decree. [p. 558, col. 1.]

Appeal against an order of the Court of the Subordinate Judge, Tellichery, dated the 3rd November 1922, in Appeal Suit No. 101 of 1922, (A. S. No. 469 of 1921, District Court), preferred against that of the Court of the District Munsif, Quilandy, dated the 19th August 1921, in R. E. P. No. 950 of 1920, in O. S. No. 623 of 1914.

Mr. *T. S. Viswanatha Iyer*, for the Appellant.

Mr. *K. Kuttikrishna Menon*, for the Respondents.

JUDGMENT.—This civil miscellaneous second appeal arises in execution of a decree the construction of which is the question before me. The 5th defendant had obtained a usufructuary mortgage from defendants Nos. 1 to 4 of a property belonging to their *tarwad* and they took back the property on a *kychit* agreeing to pay rent; the plaintiff got an assignment of the right of the 5th defendant. In the *kychit* it is provided that if any arrears of rent fell due those arrears would be a charge upon the equity of redemption of the property mortgaged. As arrears of rent accrued due, the plaintiff brought a suit not only for such arrears but also to eject the defendants from possession of the property and the plaintiff got a decree. It is the construction of that decree, which is before me. The defendants alleged that they made certain improvements on the property while they were in possession, and they claimed in that suit the value of the improvements. The decree provided (1) that plaintiff do deposit in Court the value of improvements Rs. 97-10-10 to the credit of the 4th defendant, (2) defendants Nos. 1 to 4 do surrender to the plaintiff the plaint property described in the Schedule with the improvements, (3) defendants Nos. 3 and 4 do pay plaintiff arrears of rent Rs. 55-5-0, costs Rs. 17-15-0 and future rent at Rs. 15 10-0 per year till date of possession or till the expiry of three years from the date of the decree whichever is earlier, (4) the value of improvements was allowed to be set off in execution and (5) the plaintiff shall recover after three months from the date of decree the deficit if any, after set off, by sale of the *jenm* and other rights of the *tarwad* of defendants Nos. 1 to 4 over the plaint property. The plaintiffs have obtained possession of the property in ejectment by executing the

decree. They are now seeking by execution of the decree to get what they claim to be the amount payable to them under the last cl. (5) of the decree by sale of the equity of redemption of the plaint property. They are met by the defence that cl. (5) is only a preliminary mortgage-decree and is not executable as such and that the plaintiff should have obtained a final executable decree passed in his favour in the case. The First Court gave effect to this contention and dismissed the plaintiff's application for execution. The Subordinate Judge on appeal has held that this clause is not in the nature of a preliminary decree at all but is an executable decree, and as such the plaintiff is entitled to ask for the sale of the equity of redemption of the plaint property for the amount now due to him under the decree. After hearing the arguments of the learned Vakils on both sides, I am inclined to think that the Subordinate Judge's view is correct. In the suit it was pleaded that the defendants were not personally liable for any arrears of rent and that the plaintiff was entitled to get those arrears only from the lands on which the arrears had been charged. Apparently it is because of that plea that the 5th clause in the decree is worded in the manner it is. It provides that any deficit in the arrears of rent after they are set off against the value of improvements should be recovered from the property, meaning thereby that the defendants are not to be personally liable for such sums. I do not consider cl. (5) to be a mortgage-decree at all. It is in the nature of a money-decree which the decree-holder is authorized to execute against the property. We do not find any of the ordinary provisions of a preliminary mortgage-decree in it. There is no direction to the mortgagor to pay money within a certain time and no statement that if the money is not paid, the property would be sold and there is no direction to take accounts to ascertain the amount due. All that is left to execution. Even the set off itself is ordered to be allowed in execution. The decree, therefore, seems to me to be, as the Subordinate Judge holds, an executable decree; it does not require the passing of a final decree to make it executable. It is contended that if this view is correct the plaintiff should attach the property before he can sell it. That, however, does not seem to be necessary in this case. It is not said that any persons have obtained any rights in this property which can be pleaded against the plaintiff's right to proceed against it for the payment of the decree amount As the decree itself makes the property liable it seems to me it is not necessary to insist upon the property being again attached. Attachment can be dispensed with and the property sold in execution of the decree. The order of the Subordinate Judge is, therefore, right. The civil miscellaneous appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*
Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 174 OF 1923.
February 4, 1925.

Present:—Justice Sir Theodore Caro Piggott, KT., and Mr. Justice Mukerji.

SAHU RAGHUNATH SINGH AND OTHERS —PLAINTIFFS—APPELLANTS
versus
MAHABIR PRASAD—DEFENDANT—RESPONDENT.

Landlord and tenant—Wajib-ul-arz, *entry in, describing grove-holders as owners of groves, effect of—Ejectment suit, whether maintainable—Suit for assessment of rent—Finding that defendant holds adversely to plaintiff—Adverse possession.*

The *wajib-ul-arz* of a village contained an entry that certain detached plots of land, which were stated to be groves or flower gardens, were in possession of persons other than the proprietors of the *mahal*, and that the possession of the owners was in their own right and that the *zemindars* had no right to interfere with them. The persons in possession of these plots were, however, entered in the village papers as occupancy tenants:

Held, (1) that the *wajib-ul-arz* recognized the full proprietary rights of the persons in possession of these plots and that they were, therefore, not liable to ejectment at the instance of the *zemindars*; [p. 559, col. 2.]

(2) that the mere fact that the owners of the groves were entered as occupancy tenants in the village papers did not override the provisions of the *wajib-ul-arz* and could not be pressed into service so as to put upon those provisions an interpretation which was contrary to the plain intention of the document. [*ibid.*]

Where a suit by a *zemindar* against certain persons for assessment of rent is dismissed on the ground that the defendants are not liable to assessment of rent as their possession has for many years been adverse to the *zemindar*, from the date of the decision at any rate, the possession of the defendants must be held to be adverse to the *zemindar* in the fullest sense of the word. [p. 560, col. 1.]

Second appeal from a decree of the District Judge, Budaun, dated the 2nd December 1922.

Dr. *K. N. Katju*, for the Appellants.

Messrs. *N. P. Asthana* and *S. B. Johari*, for the Respondent.

JUDGMENT.—This suit arises out of an attempt made by the defendant, who is the *zemindar* of a *mahal*, to eject the plaintiffs from a grove situated on two specified plots of land within the area of the *mahal* of which the defendant is *zemindar*. On being sued for ejectment the owners of the grove pleaded full proprietary title in the same, whereupon they were required to establish the alleged title by suit in the Civil Court. The present suit has, therefore, been brought by the persons in possession of the grove whose ejectment was sought by the defendant *zemindar*.

The Trial Court decreed the suit for the relief sought. The learned District Judge has set aside the decree of the Trial Court and has granted a declaration to the effect that the plaintiffs are the owners of the trees and enjoy the status of grove-holders, but are not proprietors.

In second appeal we have to deal in the main with two contentions. One is that the decision of the District Judge is based upon a misreading of the most important documentary evidence in the case, *viz.*, the *wajib-ul-arz* prepared in the year 1865. Secondly, it is contended before us that the learned District Judge has nowhere dealt with the results of a previous litigation between the predecessor-in-title of the present parties and that the effect of that litigation is to establish the plaintiffs' title as owners of the land and of trees. There is force in both these contentions. The *wajib-ul-arz* distinctly recognizes the existence in this village of two different kinds of groves. In Ch. IV of this Record-of-Rights it is stated that, in respect of the ordinary groves in the village, the persons who planted the same are the owners of the trees, but have no rights over the land. The *zemindar* has a right of re-entry as soon as the land loses the character of a grove and, what is more, he can interfere to prevent the planting of new trees. In substance this clause recognizes in favour of the persons who have planted groves in the village what is ordinarily described as the status of grove-holders. In Ch. III of the same document there is a passage, the correct interpretation of which should determine the result of the present suit. It purports to give a list of certain detached plots of land in respect of which it is noted that they are in possession of persons other than the proprietor or proprietors of the *mahal*. These plots of land are stated to be groves or flower gardens. In respect of these it is definitely stated that the possession of the owner (*malik*) of such a grove is in his own right and that the *zemindars* have no right to interfere with him. It has not been denied in argument that the plots of land with which we are now concerned are referred to in the list of detached plots of land to which the above-mentioned clause of the *wajib-ul-arz* refers. On a fair interpretation of the clause it seems to us that it recognizes full proprietary rights in respect of these detached plots of land in favour of the persons recorded as being in possession of the same. The learned District Judge has refused to interpret the *wajib-ul-arz* in this sense because in the ordinary village papers the present plaintiffs and their predecessors-in-title were recorded as occupancy tenants. We do not think that this fact can either override the provisions of the *wajib-ul-arz*, or be pressed into service so as to put upon those provisions an interpretation which seems to us strained and contrary to the plain intention of the document. Apart from these considerations we think that the lower Appellate Court has gone even more seriously astray in its reference to a certain previous litigation of the year 1908. In that year the proprietor of the *mahal*, who was the father of the defendant-respondent now before us, sued the father of the plaintiffs in the Revenue Court for assessment of rent. We have not got the pleadings before us, but we have got the judgment delivered by the Revenue Court in which this suit was brought. That judgment referred to the provisions of the *wajib-ul-arz*, laid stress upon the long continued possession of the holders of the grove and distinctly found that this possession had for many years been adverse to the *zemindar*. It dismissed the suit for assessment of rent upon this finding, and not upon a mere finding that the persons upon whom rent was sought to be assessed were not liable to such assessment by reason of their status of grove-holders. A curious point was taken in the lower Court, to the effect that this decision

had no force against the present defendant because the father of the said defendant, shortly before instituting these proceedings for assessment of rent, had executed a deed of gift by which he purported to convey the land appertaining to this grove to his son, the defendant. This plea has been sufficiently dealt with by the learned Munsif in his judgment. In any case it seems to us that from the date of this decision the present plaintiffs were beyond question holding the land in suit adversely to the *zemindar* in the fullest sense of the word and, even if they had no valid title before that date, they had perfected a title by adverse possession for the full statutory period before these present proceedings were instituted in the Revenue Court. What the learned District Judge has in effect done is to degrade the plaintiffs from their position of owners of the grove (*malik bagh*) as defined in Ch. III of the *wajib-ul-arz* to that of grove-holders as defined in Ch. IV. For the reasons which we have given we are satisfied that the learned District Judge was wrong.

We set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs throughout, including in this Court fees on the higher scale.

Z. K. *Decree set aside.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 927 OF 1922.

November 28, 1924.

Present :—Mr. Justice Krishnan.

SANKARAN UNNI AND ANOTHER—PETITIONERS—DEFENDANTS

versus

KUMMAKATTIL EAZHUVAN KANDAN'S SON RAMAN—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 1—Compromise decree—Decree directing payment of money by certain date—Court closed on last date for payment—Payment on first date of re-opening, whether compliance with decree.

Where under the terms of a decree, money is to be paid by a party, O. XXI, r. 1 of the C. P. C. gives the party, who is liable to make the payment, the option of making the payment to the other party in person or of making a deposit in Court. [p. 560, col. 2; p. 561, col. 1.]

A party who is prevented from doing a thing not by any default of his own but by the Court itself, is entitled to do that thing at the earliest subsequent opportunity available to him. [p. 561, col. 1.]

Sambasiva Chari v. *Ramasami Reddi*, 22 M. 179; 8 M. L. J. 265; 8 Ind. Dec. (N. S.) 127, followed.

Where under the terms of a decree a party is bound to make a payment to the other party and the last date fixed for the payment happens to be a date on which the Court is closed, the decree is sufficiently complied with if the money is deposited into Court on the first day on which the Court re-opens. [p. 560, col. 2; p. 561, col. 1.]

Wana Ravji v. *Natu Murha*, 7 Ind. Cas. 992; 35 B. 35; 12 Bom. L. R. 818, relied on.

Petition, under s. 25 of Act IX of 1887 and s. 151, C. P. C., and under s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, South Malabar at Palghat, dated the 12th August 1922, on M. P. No. 922 of 1922, in Small Cause Suit No. 502 of 1921 on its file.

Mr. *C. S. Swaminathan*, for the Petitioners.

Mr. *K. Kuttikrishna Menon*, for the Respondent.

JUDGMENT.—In this case the plaintiff obtained a compromise decree by which if money was paid within the 30th Meenom 1097 (12th April 1922) the sum of Rs. 285 was to be taken in full satisfaction of the claim. The decree provided that in default of such payment the defendants were to pay the plaintiff the whole of the plaint amount with costs. The defendant put in an application to the lower Court to have satisfaction entered of the decree on the ground that he tendered the amount of Rs. 285 to the plaintiff on the 12th April 1922 but as the plaintiff did not receive that amount he sent it by money order to the plaintiff which again was refused and he, therefore had the money ready with him to be deposited in Court and asked the Court to give a *challan* to make that deposit. That was on the re-opening day of the Court after the mid-summer holidays on the 12th June 1922. The *challan* was granted and the money was deposited on the re-opening day. The lower Court has found that the alleged tender out of Court is not true and in revision I must accept that finding. But it has not considered the question whether the deposit into Court on the re-opening day was not a sufficient compliance with the terms of the decree. No doubt the compromise decree says that the money is to be paid to the plaintiff. But when under a decree money is to be paid to a party, O. XXI, r. (1), C. P. C., lays down that money shall be paid either to the party in person

or shall be deposited into Court. The defendant, therefore, in this case had the option either of paying the money to the plaintiff or of depositing the money into Court; and if he had deposited into Court before 12th April, no question could have arisen and the defendant would have been held to have complied with the terms of the decree. Having had that option, the question then is whether the defendants were not in time when they deposited the money at the earliest possible opportunity into Court. As 12th April was a holiday, the mid-summer recess having commenced by that time, the earliest day on which the money could be paid into Court after the 12th April was the 12th June, and the defendant complied with that condition. It seems to me, therefore, that there was a sufficient compliance with the decree on the part of the defendant and that the lower Court should have directed the money to be paid over to the plaintiff and entered up satisfaction of the decree. A question similar to this arose in Bombay and it was held by the learned Judges of the Bombay High Court in *Wana Ravji* v. *Natu Murha* (1), that if the plaintiff chose to pay the money into Court and he found that the Court was closed on the due date and he paid it on the earliest day on which the Court re-opened, such a payment would be a proper compliance with the terms of the decree. Order XXI, r. 1 of the C. P. C., says that the payment may be made into Court or into the hands of the party. It is contended that this ruling should not be relied upon by me because the learned Judges of the Bombay High Court have misapplied s. 10 of the General Clauses Act. It is quite true that the General Clauses Act deals with the general rules of construction of Statutes and the words of s. 10 can hardly be applied to a case where a certain thing is directed to be done by a decree of Court. But as pointed out in *Sambasiva Chari* v. *Kamasami Reddi* (2), there is a generally recognized principle of law under which parties who are prevented from doing a thing, not by any default of their own, but by the Court itself are entitled to do it at the earliest subsequent opportunity. That is the general principle of equity quite apart from the terms of s. 10 of the General Clause Act. In fact s. 10 is based upon that principle. In this case the defendant had the option to pay either to the plaintiff directly or into Court. He was entitled to choose between the two. He was prevented from paying into Court because the Court was closed on the due date. His payment, therefore, on the re-opening day must, I think, be held to be a sufficient compliance with the terms of the decree. In this view, the order of the lower Court must be set aside and the revision petition should be allowed. The decree will be entered as satisfied and the money deposited will be paid over to the plaintiff. The petitioner before me will have his costs in this Court and each party will bear his or their own costs in the lower Court.

V. N. V. *Petition allowed.*
Z. K.

(1) 7 Ind. Cas. 992; 35 B. 35; 12 Bom. L. R. 818.
(2) 22 M. 179; 8 M. L. J. 265; 8 Ind. Dec. (N. S.) 127.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 376 OF 1923.
January 5, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

MADHUSHUDAN KOWOR—PETITIONER —APPELLANT
versus
GIRINDRA NARAYAN SINGHA—OBJECTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Execution of decree—Objections—Dismissal of execution—Objection case, pendency of—Limitation.

An application for execution of a decree may be treated as one in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless. [p. 563, col. 2.]

Case-law referred to.

An application for execution was filed on 12th June 1918. The judgment-debtor filed objections to the execution which were dismissed on 21st February 1919 and on that date the execution case was also dismissed, but not for any default of the decree-holder. The judgment-debtor appealed against the order dismissing the objections and the case was remanded by the Appellate Court for re-hearing. The case was re-heard and the objections were again dismissed on 20th May 1920. The judgment-debtor appealed and this appeal was dismissed on 4th April 1921. The decree-holder made an application for execution on the 19th June 1922:

Held, that the application for execution was not barred by time inasmuch as,

(a) the order dismissing the execution case on 21st February 1919 was not a final order in the sense that it barred the right of the decree-holder to continue the execution without presenting a fresh application for execution and the present application must, therefore, be treated as a continuation of the previous application ; [p. 564, col. 1.]

(b) the time occupied in the proceedings started by the judgment-debtor against the order dismissing his objections which terminated either on 20th May 1920 when his objections were finally dismissed or on 4th April 1921 when the appeal from the order of dismissal was also dismissed, must either be deducted in computing the period of limitation or a fresh start of time must be reckoned from one of those dates. [p. 564, col. 1.]

Appeal against an order of the District Judge, Burdwan, dated the 4th of August 1923, affirming that of the Munsif, First Court at Katwa, dated the 25th January 1923.

Babu *Baranasibasi Mukherjee*, for the Appellant.

Babus *Mahendra Nath Ray* and *Gopendra Nath Das*, for the Respondent.

JUDGMENT.

Suhrawardy, J.—The only substantial question argued in this appeal is one of limitation. The decree sought to be executed in the present proceeding was passed on the 13th June 1912. It was executed in 1915 and on the 12th June 1918 another application for execution was put in by the decree-holder. The judgment-debtor filed objections to the execution on the ground that he had satisfied the decree in full out of Court and that the decree was incapable of execution. These objections were heard and dismissed on the 21st February 1919 on which date the Execution Court dismissed the execution also and passed the following order: Miscellaneous Case No. 200 of 1918 is rejected. This case "is dismissed" The judgment-debtor, however, appealed against this order dismissing his objections and the case was remanded by the appellate Court for re-hearing. The miscellaneous case started on the objection of the judgment-debtor was re-heard and again dismissed on the 20th May 1920. He again appealed against the second order of dismissal and this appeal also was dismissed on the 4th April 1921. The present application for execution was filed on the 19th June 1922. It is, therefore, contended that since it was filed more than three years after the date on which the previous application was dismissed, namely, the 21st February 1919, the present application for execution was barred by limitation. Both the Courts below have held that the application filed on the 19th June 1922 was in continuation of the previous application dismissed on the 21st February 1919.

In order to appreciate the position of the parties and the various proceedings, it is necessary to understand the full import of the order passed on the 21st February 1919. The learned District Judge in the Court of Appeal below has found that it is clear that the order of dismissal of the former proceeding of the 21st February 1919, was passed not for any default of the decree-holder but for the convenience of the Court, as the execution case was old. The effect of this finding is that the execution case was struck off or dismissed not for any fault of the decree-holder but to clear the file of the Court and to suit its convenience. That different interpretations can be put upon an order dismissing an execution case according to different circumstances was noticed so long ago as 1873 by the Judicial Committee of the Privy Council in the case of *Puddomonee Dossee* v. *Koy Muthooranath Chowdhry* (1). In our judgment the order dismissing the execution case on the 21st February 1919 must be taken to mean that the defendant's objections having been dismissed, the decree was held to be capable of execution and the Court in order to keep its record in proper form dismissed the case.

Reliance has, however, been placed in this connection on the case of *Kristo Coomar Nag* v. *Mahabat Khan* (2). That case apparently supports the appellants' contention. But the question on which the attention of the Court was centred on that occasion was whether the appearance of the decree-holder as respondent in an appeal preferred by the judgment-debtor against an order holding that the decree was liable to be executed was a step-in-aid of execution. There has been a number of decisions subsequent to the *Kristo Kumar's case* (2) and the law at the present moment has to be determined on a consideration of those decisions. There are two points which really have to be considered in deciding the question of limitation. The first is with regard to the interpretation to be put upon the order passed on the 21st February 1919, and secondly, how for the question of limitation is affected by the judgment-debtor appealing from the order passed against

(1) 20 W. R. 133; 12 B. L. R. 411 (P. C.).
(2) 5 C. 595; 2 Ind. Dec. (N. S.) 986.

him on the 21st February 1919 and the final dismissal of the appeal. With regard to the first point the learned Judge of the Court below has held that the order of dismissal passed on the 21st February 1919 was not at the instance of the decree-holder but for the convenience of the Court, with regard to the second point we are inclined to hold on the authorities that the right to execute the decree was suspended by the subsequent conduct of the judgment-debtor. In support of this view reference may be made to the case of *Qamar-ud-din Ahmad* v. *Jawahir Lal* (3) in which their Lordships of the Judicial Committee relied partly on the principle of suspension of the right to execute a decree on account of proceedings pending in connection with it. The facts of that case are not exactly similar to the present but the principle laid down therein may be applicable to the present case. There a decree was sent to the Civil Court by the Collector, before whom a sale of property was sought, for determination of the question as to whether the property was ancestral and liable to be sold in execution of the decree. The Civil Court found that the property was ancestral and ordered that the case should be struck off the file and the papers transferred to the Court of the Collector for the completion of the sale proceedings on the decree-holder depositing the necessary costs for transmission of the order. The decree-holder not having deposited the necessary amount on the 23rd December 1889 an order was passed by the Civil Court that the papers should not be sent to the Collector for taking the sale proceedings. Meanwhile the judgment-debtor carried on the appeal up to the Privy Council against the decision passed against him as to the property being ancestral. These proceedings were finally disposed of on the 12th December 1894. On the 23rd November 1897 an application was made for revival of the execution case instituted in 1888. On these facts their Lordships held that the execution was not barred. On the ground that the order passed on the 23rd December 1889 was not a final order and also on the ground that if the appeal to the High Court against those proceedings and the judgment of that Court and the appeal to Her Majesty in Council rendered necessary by that judgment had not intervened to interrupt the cause of execution there was nothing in the terms of the order to preclude the decree-holder from coming again to the Court, and the application for execution made in 1897 was in substance as well as in form an application to revive and convey through a pending execution, suspended by no act or default of the decree-holder and not an application to initiate a new one. This principle was re-iterated by the Judicial Committee in *Rameshwar Singh Bahadur* v. *Hameshwar Singh* (4). The case of *Ajodhya Nath Pahary* v. *Srinath Chandra Pahary* (5), is illustrative of the application of this principle. In that case though an application was made within three years from the last order of dismissal, the question whether the subsequent application was a continuation or revival of the previous application was considered. It was held that the order of dismissal in that case, which was similar to the present case, should be treated as equivalent to an order for striking off the case or removing it from the file for the convenience of the Court; and the following passage was quoted with approval from the judgment in the case of *Madhab Moni Dasi* v. *Pamela Lambert* (6). "An application for execution of a decree may be treated as one in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless or has been suspended by reason of an injunction or like obstruction." The principle thus laid down is not a new one and was adopted in the case of *Raghunath Sahay Singh* v. *Lalji Singh* (7). That case is a much stronger case than the present one. There a property was sold in execution of a decree whereupon the decree-holder made an application on the 12th November 1891 asking the Court to set aside the sale as the property was purchased in the *benami* of the judgment-debter. The First Court found that the purchase was not *benami* and confirmed

(3) 27 A. 334; 2 A. L. J. 397; 1 C. L. J 381; 9 C. W. N. 601; 15 M. L. J. 258; 7 Bom. L. R. 433; 32 I. A. 102; 8 Sar. P. C. J. 810 (P. C.).

(4) 59 Ind. Cas. 636; 25 C. W. N. 337; 1 P. L. T. 731; 19 A. L. J. 26; 40 M. L. J. 1; (1921) M. W. N. 21; 33 C. L. J. 109; 13 L. W. 546; 6 P. L. J. 132; 23 Bom. L. R. 721; 30 M. L. T. 189; 48 I. A. 17 (P. C.).

(5) 68 Ind. Cas. 207; 35 C. L. J. 84; 26 C. W. N. 338.

(6) 6 Ind. Cas. 537; 37 C. 796; 12 C. L. J. 323; 15 C W. N. 337.

(7) 23 C. 397; 12 Ind. Dec. (N. S.) 264.

the sale. The Appellate Court came to a contrary conclusion which was upheld by the High Court on the 4th August 1893. On the application for execution made on the 3rd December 1894, objections were raised on the ground of limitation. There it was held that the last application must be held to be a continuation of the application of the 12th November 1891, for re-sale of the property and that the time occupied in the proceedings relating to the nature of the sale though started by the decree-holder should be left out of consideration. Applying the principle laid down in these cases to the facts of the present case we must hold that the present application is not barred by limitation, firstly, on the ground that order dismissing the execution case passed on the 21st February 1919 was not a final order in the sense that it barred the right of the decree-holder to continue the execution without presenting a fresh application for execution; and also on the ground, that the time occupied in the proceedings started by the judgment-debtor-appellant against that portion of the order of the 21st February 1919 dismissing his objection which terminated either on the 20th May 1920 when his objection were finally dismissed or on the 4th April 1921 when the appeal from the order of dismissal was also dismissed should either be deducted in computing the period of limitation or a fresh start of time should be reckoned from any of these dates.

The result, therefore, is that the order of the Court below is upheld and this appeal is dismissed with costs, one gold *mohur*.

Cuming, J.—I agree.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 518 OF 1923.

December 15, 1924.

Present:—Mr. Justice Mukerji and Mr. Justice Daniels.

Masammat BHUTA—JUDGMENT-DEBTOR—APPELLANT

versus

BISHESHAR SINGH AND OTHERS—DECREE HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), 60 (c)—Agriculturist, who is—Person subsisting on agriculture—Person who has ceased to cultivate land, whether agriculturist.

If a case comes within the language of s. 60 (*c*) of the C. P. C. the exemption therein mentioned must be granted. [p. 565, col. 1.]

Where it appears that the only means of livelihood of a judgment-debtor is agriculture and that he has no other means of livelihood and he occupies the house which is sought to be attached by the decree-holder, the case comes within the purview of s. 60 (*c*) of the C. P. C. and the house is exempt from attachment. [*ibid.*]

Per *Mukerji, J.*—Although a person has lost his agricultural land he does not cease to be an agriculturist if he continues to cultivate soil for remuneration. [*ibid.*]

Devare Hadge v. *Vaikant Subaya*, 39 Ind. Cas. 639; 41 B. 475; 19 Bom. L. R. 281, relied on.

Per *Daniels, J.*—Where it is proved that a judgment-debtor has no cultivation at all, his house would not be the house of an agriculturist within the meaning of s. 60 (*c*) of the C. P. C., merely because he had a fixed rate holding up to a few years of the date when the objection in execution was taken. [p. 565, col. 2.]

Execution first appeal against a decree of the Subordinate Judge, Benares, dated the 24th October 1923.

Dr. *K. N. Katju*, for the Appellant.

Mr. *Harendra Krishna Mukerji*, for the Respondents.

JUDGMENT.

Mukerjee, J.—The appellant in this case was a judgment-debtor in the lower Court. There is a decree for money against her, and in execution of it, her two houses were attached. She came to Court with the allegations that she was an agriculturist and the houses were occupied by her and that, therefore, these were exempt under s. 60 cl. (*c*) of the C. P. C. from attachment.

The decree-holder in his reply did not state at all what was her occupation, if the judgment-debtor was not an agriculturist. He simply stated that the judgment-debts were due and she was bound to pay. The learned Subordinate Judge examined evidence and came to the conclusion that the appellant had ceased to be an agriculturist inasmuch as she had sold her fixed rate tenancy in 1919.

In this Court it has been urged that the evidence has been wrongly weighed by the lower Court and that it does establish that the appellant is an agriculturist.

It appears that the decree-holder himself was examined at a previous stage in this very litigation. This was on the 11th of November 1922. It further appears that some body else had laid claim to one of three houses originally attach-

ed. Then the decree-holder stated the whole history of the residence of the appellant in the village Kanta. He said that the appellent was unhappy in her husband's house and came to live in her father's village Kanta. There she was given some land to live on, and her father built these houses for her. He also stated that the appellant owned two pairs of bullocks for cultivation. Besides this admission of the decree-holder, there is evidence of the appellant herself and some *patwari's* papers. Two *patwaris* were examined and they said that in their papers the appellant was still recorded as a fixed rate tenant of certain lands and as a *shikmi* tenant of three years standing of others. The appellant also summoned one Jageshar, who deposed that she had 18 or 20 *bighas* of land of her own and had taken some *shikmi* land from him on rent. But when the appellant was asked by the decree-holder if she knew Jageshar, she denied. From this fact an inference has been drawn that the story of Jageshar's sub-letting any land is untrue. I am unable to agree with this view. It is admitted that although the appellnat belongs to an agricultural caste, namely, Kurmi, she lives more or less in seclusion and her son looks after her cultivation. On evidence, I am satisfied that the only means of livelihood of appellant is agriculture and she has no other means of livelihood.

The suggestion of the decree-holder that the appellant may be livinig on the charity of her son has neither been alleged nor proved. The evidence is all one way and should be accepted.

The exemption that is granted is based on the language of law and, if the case comes within the language of the law, the exemption must be granted. The question is whether the appellant is an agriculturist and whether she occupies these houses. The Bombay High Court in the case of *Devare Hadge* v. *Vaikant Subaya* (1) held that although a certain person had lost his agricultural land, he did not cease to be an agriculturist if he was cultivating soil for remuneration. As the appellant has got no other source of livelihood, as she did cultivate land and as she has still got some *shikmi* land, I think she must succeed. I would, therefore, allow the appeal, set aside the decree of the Court below and exempt the houses from attachment.

(1) 39 Ind. Cas. 639; 41 B. 475 19 Bom. L. R. 281.

Daniels, J,—I concur with considerable hesitation. The burden of proving that the case falls under s. 60, C. P. C., lies on the objector. It is not for the decree-holder to prove what her occupation is. It is for her to show that she is an agriculturist. I do like reversing the decree of the Court below on a question of fact when the evidence adduced by the objector that she still has cultivation has been found by the Court below to be false and that finding is not seriously challenged in this appeal. If the oral evidence is false the entries in the *patwari* papers can carry very little weight.

The only fact which induces me to agree to the decree proposed by my learned colleague is the admission of the *zemindar*, made in answer to a previous objection. It may be that the statement was made for the purpose of the objection which was then pending, but this cannot be assumed and the decree-holder cannot complain if it is used as strong evidence against him.

If it were poved that the applicant had no cultivation at all her house would not be the house of an agriculturist within the meaning of s. 60 (c) C. P. C., merely because she had a fixed rate holding up to the year 1919, four years before the period to which the present objection relates.

By the Court.—We allow the appeal, set aside the decree of the Court below and dismiss the application of the decree-holder so far as it goes for the attachment of the houses objected to. The appellant will have her costs in both the Courts. In this Court, having regard to the fact that the value of the houses attached is not much we assess the Counsel's fee for the successful appellant at the sum of Rs. 20.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 814 AND 846 OF 1921.

January 5, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

JNANENDRA NATH ROY AND ANOTHER —DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

NALINI MOHAN GHOSE AND OTHERS— PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 29—En-

hancement of rent—Jama *amalgamated with fictitious* jama, *whether can be recovered—Estoppel—Burden of proof, importance of.*

There cannot be any estoppel against a Statute, nor can the parties contract themselves out of any Statute. [p. 567, col. 2.]

The language of s. 29 of the Bengal Tenancy Act is imperative and provides that rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the *raiyat*. This prohibition is not qualified by any provision calculated to save a contract or agreement between the parties. [*ibid.*]

A *kabuliyat* purported to enhance the *jama* of a holding within the limit permitted by s. 29 of the Bengal Tenancy Act and then purported to amalgamate with it the *jama* of another piece of land which had no existence and the *jama* of which was entirely fictitious. The *jamas* relating to certain other holdings were also enhanced and then the total of all the *jamas* was described. The total of all the *jamas* including the fictitious *jama* exceeded the amount to which the rent of the holdings could be enhanced under the provisions of s. 29. In a suit to recover the *jamas* mentioned in the *kabuliyat*:

Held, (1) that the landlord was entitled to treat the *jamas* of those holdings which were not amalgamated with the fictitious *jama* as separate and his suit with regard to the recovery of those *jamas* must succeed; [p. 567, col. 1.]

(2) that the amount of the *jama* which was amalgamated with the fictitious *jama* being in excess of the amount which could be recovered under the provisions of s. 29 of the Bengal Tenancy Act, the suit with regard to the amalgamated *jama* was not maintainable. [p. 567, col. 2.]

The question of onus ordinarily becomes of very little importance when the whole evidence is considered by the Appellate Court. [*ibid.*]

Appeal against a decree of the District Judge, Birbhum, dated the 11th of December 1920, affirming that (in S. A. No. 814) of the Munsif, Second Court at Rampurhat, dated the 22nd of December 1919 and (in S. A. No. 846) of the Munsif Second Court at Bolpur, dated the 16th of January 1920.

Babu *Gopendra Nath Das*, for the Appellant.

Babus *Ram Chandra Majumdar* and *Tarkeshwar Pal Chowdhury*, for the Respondent.

JUDGMENT.

Suhrawardy, J.—These two appeals arise out of two suits for rent in respect of four holdings or, to be more correct, in respect of three holdings, the last two holdings being amalgamated into one. The four holdings were originally held by the defendants on lower *jamas*. On the 21st February 1916 the defendants executed a *kabuliyat* in favour of the landlords agreeing to pay enhanced rent for the *jamas* within the statutory limit, namely, not more than two annas in the rupee. In respect of the first *jama* which was for a plot of land measuring 4 *bighas* 12 *cottas* 8 *chattacks*, it is stated in the *kabuliyat* that the *jama* was increased by two annas in the rupee to Rs. 10-2-6 In schedule *kha* attached to the *kabuliyat* another *jama* is mentioned which is described as one *bigha* of land "for which an agreed quantity of paddy was to be delivered but which mode of payment was converted into the money rent of Rs. 5-3-9, and this sum is amalgamated with the enhanced annual *jama* Rs. 10 2 6. The rent for the aggregate lands in the said Bhogpur *Mouza* as per schedules (*ka*) and (*kha*) is fixed at Rs. 15-6-7 only." With regard to the other *jamas* the enhancement agreed upon by the parties is not in contravention of the provisions of s. 29, Bengal Tenancy Act.

The suit out of which S. A. No. 814 of 1921 arises is in respect of the last two *jamas* mentioned in schedule (*gha*) of the *kabuliyat* consolidated into one *jama* of Rs. 33-9-9. This suit has been decreed by both the Courts below. It is argued on behalf of the appellant before us that the *kabuliyat* being one and indivisible the claim cannot be enforced even in respect of the last two *jamas* because one of the *jamas*, namely, the *jama* mentioned in schedule *kha* is fictitious and was added solely for the purpose of avoiding the limitation mentioned in s. 29, Bengal Tenancy Act, and hence the whole contract must be considered to the void. The learned Vakil for the appellant has drawn our attention to some passages in the *kabuliyat*. Towards the end of the *kabuliyat* it is said that the aggregate *jama* recoverable under the *kabuliyat* is Rs 52-4 7. He, therefore, argues that all the four *jamas* must be taken to be amalgamated and formed into one *jama* of Rs. 52 and odd and that the original total of the rent payable in respect of all the *jamas* being Rs. 41 and odd there has been an increase of more than two annas in the rupee and, therefore, the plaintiffs are not entitled to maintain the suit even for a portion of the *jama* secured by the *kabuliyat*. We are unable to agree with the construction that is attempted to be put upon the *kabuliyat*. Reading it as a whole it appears to us that the *jama* mentioned in schedule *kha* of Rs 5 was amalgamated only with the first *jama* of Rs. 10 and odd mentioned in schedule *ka* The other two *jamas* were kept separate though they are treated under the same document. The Courts below

have decreed the plaintiff's suit in respect of the last *jama* of Rs. 33 and odd holding that the contract in respect of these *jamas* was separate from that of any other *jama*. We think that the view taken by the Court below is correct and this appeal is dismissed with costs in all the Courts.

Then with regard to S. A. No. 846 of 1921.—It arises from the suit in respect of the *jama* as mentioned in schedule *ka*, *kha* and *ga*. As we have observed the original *jama* of schedule (*ka*) land was Rs. 9-5-6. It was raised by two annas in the rupee to Rs. 10-2-6. To this was added the *jama* mentioned in schedule *kha* and the total was taken to be Rs. 15-6-7. To this is added the claim for rent for plot *ga* the original rent of which Rs. 2-14-6 was increased by two annas in the rupee to Rs. 3-4-3. The main objection taken by the defendants to the suit was that the land mentioned in schedule (*kha*) had no real existence and that it was surreptitiously included in the *kabuliyat* in order to allow the landlord to realise enhanced rent from the tenants in excess of the limit put by s. 29, Bengal Tenancy Act. The First Court found that the land of schedule (*kha*) really existed and was held by the defendants. In that view it decreed the plaintiff's suit. On appeal, the learned District Judge disagreed with the Munsif on the finding as to the existence of the land of schedule (*kha*) and held that it never existed and was falsely included in the *kabuliyat*. The learned Judge then goes on to consider the effect of this fraudulent recital in the *kabuliyat*, and held that in the absence of any undue influence the contract entered into by the defendant with their eyes open must be held to be a good one and binding on them they being joint authors of the alleged fraudulent act. In this view he agreed with the First Court in decreeing the plaintiff's suit. It is argued on behalf of the appellant in this appeal that the *jama* mentioned in schedule (*kha*) being fictitious and added for the purpose of increasing the rent payable by the defendants to the plaintiffs by more than two annas in the rupee rendered the entire contract void and the suit ought to have been dismissed. We are of opinion that this contention must succeed in part. As we have held, the *kabuliyat* does not create one consolidated *jama* in respect of all the holdings but it purports to amalgamate the first two *jamas* mentioned in schedules *ka* and *kha* and to treat the other three *jamas* separately. In this view it must be held that the *jama* mentioned in schedule *kha* having been found to be fictitious and non-existent, the *jama* of schedule (*ka*) which was Rs. 9 was fraudulently increased to Rs. 15 and odd, that is, more than two annas in the rupee. This contract is, therefore, unsustainable in law and the suit, so far as it relates to the claim in respect of rent of the holdings mentioned in schedules (*ka*) and (*kha*), must fail.

It is, however, argued by the learned Vakil appearing for the respondents in the line adopted by the lower Appellate Court that the defendants are estopped from questioning the validity of the contract. It is not necessary to say that there cannot be any estoppel, against a Statute nor can the parties contract themselves out of any Statute. The words of the section are imperative and it provides that the rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the *raiyat*. This prohibitory law is not qualified by any provision calculated to save a contract or agreement between the parties.

It is next argued by the respondent that the Judge was wrong in placing the onus upon the plaintiff of proving that the *jama* of schedule (*kha*) really did not exist. The learned District Judge has considered the whole evidence, has disbelieved the plaintiff's evidence and has come to the conclusion that it was not proved to his satisfaction that the holding even existed. The question of onus ordinary becomes of very little importance when the whole evidence is considered especially by the Appellate Court.

The view we take leads us to the following conclusion. The suit so far as it relates to the *jama* bearing a rental of Rs. 15-6-7 must be dismissed and in so far as it relates to the *jama* of Rs. 3-4-3 should be decreed. This appeal is accordingly allowed in part. We make no order as to costs in any of the Courts. The parties will bear their own costs throughout.

Cuming, J.—I agree.

Z. K. *Appeal partly allowed.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 151 OF 1924.

December 12, 1924.

Present:—Mr. Justice Devadoss and Mr. Justice Wallace.

In re AKKI GURU BASAPPA AND ANOTHER —APPELLANTS.

Transfer of Property Act (IV of 1882), s. 52—Registration Act (XVI of 1908), ss. 17, 47—Lis pendens, doctrine of, applicability of—Sale-deed executed before but registered after filing of suit.

A sale-deed executed before but registered after the filing of a suit is not affected by the doctrine of *lis pendens*. [p. 568, col. 2.]

Pingali Venkataramana Reddi v. *Kotigari Rangiah Chetti*, 70 Ind. Cas. 212; 41 M. L. J. 399; (1922) M. W. N. 15; (1922) A. I. R. (M.) 249, relied on.

Tilkdhari Singh v. *Gour Narain*, 59 Ind. Cas. 290; 5 P. L. J. 715; 2 P. L. T. 95; (1921) Pat. 122, dissented from.

Ram Prasad v. *Bhikari Das*, 26 A. 464; A. W. N. (1904) 108 and *Papireddi* v. *Narasareddi*, 16 M. 464; 5 Ind. Dec. (N. s.) 1030, distinguished.

It is not the registration of a document which operates to create title but it is the document itself. The Registration Act makes valid such documents as soon as they are registered but the right conveyed or transferred is the right which exists in the transferor on the date of the document. When the document is presented for registration, the executant simply admits execution whereupon the document is registered and if the executant does not admit execution or if he refuses to appear before the Registrar, the law provides for compulsory registration of the document. In such a case it cannot be said that the executant by any act of his gives validity to the document. [*ibid.*]

Letters Patent Appeal against the judgment of Mr. Justice Madhavan Nair, in Second Appeal No. 535 of 1921, printed as 83 Ind. Cas. 133, preferred against the decree of the Court of the Subordinate Judge, Bellary, in A. S. No. 24 of 1920, (O. S. No. 482 of 1918 on the file of the District Munsif's Court, Hospet).

Mr. *V. S. Narasimhachariar*, for the Appellants.

JUDGMENT.—The only point raised in this Letters Patent appeal is "Is a sale-deed executed before but registered after the filing of a suit affected by the doctrine of *lis pendens*"?

The contention of Mr. Narasimhachari for the appellant is that on the date of the filing of the plaint, the property had not passed to the plaintiff inasmuch as the sale-deed was not registered and that the registration of the sale-deed, subsequent to the filing of the plaint, amounted to a transfer of the property in suit and, therefore, s. 52 of the Transfer of Property Act applies to the case. In the case of a conveyance or a document creating title to immoveable property, registration is necessary to give validity to such document but the question is whether a document creates title from the date of its execution or whether it creates title only from the date of its registration. Section 47 of the Indian Registration Act makes it clear that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration." In a competition between two documents creating title to immoveable property, the document earlier in date has precedence over another document later in date but registered before the former document. It is not the registration of a document which operates to create title but it is the document itself. The Registration Act makes valid such documents as soon as they are registered but the right conveyed or transferred is the right which exists in the transferor on the date of the document. When the document is presented for registration, the executant simply admits execution whereupon the document is registered and if the executant does not admit execution or if he refuses to appear before the Registrar, the law provides for compulsory registration of the document. In such a case it cannot be said that the executant by any act of his gives validity to the document.

The contention of Mr. Narasimhachari is that a sale can be effected only by a registered instrument and that before the date of registration there was no sale and, therefore, the suit which was filed before the date of registration does stand in the way of the executant registering the document. This argument overlooks the fact that the vendee has a right to compel a vendor to execute a sale-deed in his favour and if he refuses, to ask the Court to execute the document. If a document has already been executed, he could present it for registration within four months and if no document has been executed he could sue for specific performance of the contract of sale. Such a contract would not be affected by the doctrine of *lis pendens* on account of the filing of a suit subsequent to its date.

Under s. 52 of the Transfer of Property Act any transfer or other dealing with the property in a suit or proceeding is affected by the doctrine of *lis pendens*. Mere registration of the document cannot be said to be a transfer of the property or dealing with the property in suit. Section 52

therefore, can have no application to the present case where the sale-deed was executed before the date of the filing of the suit.

Mr. Narasimhachariar relies upon the case of *Tilkdhari Singh* v. *Gour Narain* (1). There the learned Judges held that a mortgage executed before a suit was filed in respect of the property covered by the mortgage but registered after the filing of the suit was affected by the doctrine of *lis pendens*. With great respect we are unable to agree with the reasoning of the learned Judges. They rely upon the case of *Ram Prasad* v. *Bhikari Das* (2) as fully supporting the view they take. There was no question of the doctrine of *lis pendens* in the case in *Ram Prasad* v. *Bhikari Das* (2) and it is difficult to see how that case could support the reasoning of the learned Judges in the case in *Tilkdhari Singh* v. *Gour Narain* (1).

In *Pingali Venkataramana Reddi* v. *Kotigari Rangiah Chetti* (3) Sadasiva Iyer and Spencer, JJ., held that a document creating title in immoveable property executed before the date of the filing of the suit but registered afterwards was not affected by the doctrine of *lis pendens*. The case in *Tilkdhari Singh* v. *Gour Narain* (1) was quoted before the learned Judges and they declined to follow it. It is contended by Mr. Narasimhachariar that the learned Judge's observation as regards the doctrine of *lis pendens* is only *obiter* and not binding upon us. Even if the point was *res integra* we should have no hesitation in holding that the doctrine of *lis pendens* does not apply to the case of a document creating title in immoveable property executed before the filing of the suit but registered after. We fully concur with the reasoning of Spencer, J., in *Pingali Venkataramana Reddi* v. *Kotigari Rangiah Chetti* (3).

The decision in *Papireddi* v. *Narasareddi* (4) does not apply to the present case. All that was decided in that case was that title to immoveable property could be created only by a properly registered instrument. It is by the execution of a registered instrument that title to immoveable property actually passes but that is not a ground for saying that the title passes only on the date of registration. No doubt registration is necessary for giving validity to a document but the right to, or the title to, the property passes from the date of the document even though it be registered sometime after its execution or in other words, in a competition between two documents one earlier and the other later in date the later document, if registered earlier than the former, would have no priority over the former. The mere filing of a plaint either by the executant or by a third person in respect of the property already conveyed would not prevent the vendee from enforcing his rights under the document either by means of compulsory registration or by suing for specific performance. Though under the Indian Law the mere contract of sale does not create a title in the vendee, yet he has the right to enforce the contract; and his right is as on the date of the contract and not on the date when he enforces it. That being so, the mere fact that a vendor admits the execution of the conveyance before the Registration Officer would not bring his act within the purview of s. 52 of the Transfer of Property Act.

We have no hesitation in holding that the document in question is not affected by the doctrine of *lis pendens*. The Letters Patent Appeal is dismissed.

V. N. V. *Appeal dismissed.*

(1) 59 Ind. Cas. 290; 5 P. L. J. 715; 2 P. L. T. 95; (1921) Pat. 122.
(2) 26 A. 464; A. W. N. (1904) 108.
(3) 70 Ind. Cas. 212; 41 M. L. J. 399; (1922) M. W. N. 15; (1922) A. I. R. (M.) 249.
(4) 16 M. 464; 5 Ind. Dec. (N. S.) 1030.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 425 OF 1923.
February 20, 1925.
Present:—Mr. Justice Mukerji and Mr. Justice Boys.

LALLA BABU AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
B. LAL BAHADUR—DEFENDANT—RESPONDENT.

Pensions Act (XXIII of 1871), s. 4—Assignment of land revenue—Subsequent settlement of proprietary rights—Merger—Mortgage—Decree for sale—Right to receive revenue, whether can be sold.

Government assigned the right to receive the revenue in respect of two villages to the predecessors-in-title of the defendants. Subsequently the proprietors of the soil died out or became extinct and a settlement of the proprietary rights was made with the assignees of the land revenue, but no grant of the

land was made in their favour. The defendants mortgaged the villages and the mortgagees obtained a decree on foot of the mortgage. In execution of the decree:

Held, (1) that the mortgagors held two separate capacities with respect to the village in question, that is to say, that they were assignees of land revenue and also the holders of the proprietary right; [p. 571, col. 1.]

(2) that in the absence of a revenue-free grant from the Government, it could not be said that there was a merger of the two different rights. [*ibid.*]

(3) that the pure *zamindari* rights of the defendants in the villages could be sold in execution of the mortgage-decree but that their right to receive the Government revenue as assignees thereof was protected from sale by the provisions of s. 4 of the Pensions Act. [*ibid.*]

Second appeal from a decree of the District Judge, Badaun, dated the 12th December 1922.

Messrs. *N. P. Asthana*, *Harnandan Prasad* and *Baleshwari Prasad*, for the Appellants.

Messrs. *K. Varma* and *S. B. Johari*, for the Respondent.

JUDGMENT.—This appeal concerns itself only with the question, *viz.*, what is the property that is going to be sold?

Certain persons being members of a joint Hindu family with the appellants mortgaged their property described in the plaint as *Mouza* Muhammadpur Bayar, *Pargana* Budaun, comprising a 15-*biswas* share entered in the *khewat* as holding No. 1, bearing a *jama* of Rs. 931-6-6. Certain issues arose between the parties and one of the questions raised was whether the mortgagors had any interest in the property which was not liable to be sold. The nature of that interest claimed as unsaleable, will be considered presently. A second appeal was heard by this Court and after an amendment of the decree appealed against, the appeal was remanded for disposal of the issue which is now to be finally disposed of by this Court.

It appears from the judgment of the lower Appellate Court, that is to say, the judgment under appeal, that the ancestors of the mortgagors were originally assignees of the Government revenue in respect of the two villages, *viz.*, Muhammadpur Bayar and Lakhanpur. The learned Judge found that whatever might be the true history of the grant, "undoubtedly these two villages had been held by the ancestors of the appellants as assignees of the revenues during the Mogul times and originally the history of Lakhanpur and that of Muhammadpur Bayar was identical." The learned Judge found, in respect of Lakhanpur, that there were *zemindars*, with whom the settlement was made by the Government, and that the appellants had been realising the land revenue from the *zemindars* of Lakhanpur, as assignees of the same. With respect to Muhammadpur, the learned Judge finds that there were certain persons with whom the Moguls and the early British officers made settlements, but later on, when regular settlements came to be made, these persons disappeared and the settlement was made with the assignees of Government revenue themselves. The result was, finds the Judge, that for the last half a century or more the appellants have been treated as the proprietors of the village paying the land revenue to themselves. On these facts, the lower Appellate Court remarked as follows:—"Thus the corpus of village of Muhammadpur Bayar passed into the possession of the *muafidar*. Act XXIII of 1871, on which the present appellants place reliance, does not refer to immoveable property but only to grants of revenue and money." The learned Judge, accordingly, held that the property mortgaged was saleable.

To start with, we may point out that if the property, as described in the plaint, be sold the purchaser will, on the face of it, be liable to pay a revenue of Rs. 931-6-6. The property is not described in the plaint as being revenue free. It is not said that whoever purchases the property will be exempt from payment of land revenue. In this view, if we simply affirm the decree appealed from, the purchaser would be liable to pay the land revenue, whether the same be payable to the appellants, the mortgagors, or to the Government.

However, the controversy having arisen as to what is the property that is to be sold, we proceed to discuss the question.

Under the Pensions Act, "no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted." (Section 4 of Act XXIII of 1871). It is clear that a grant of immoveable property is not to be treated as 'pension' within the Pensions Act. This is not

controverted. It is for this reason that the mortgagees are anxious to induce the Court to hold that the mortgagors are not mere assignees of the land revenue, enjoying a certain sum of money annually, but are the proprietors of the entire village although they do not pay any land revenue. It is conceded on behalf of the plaintiffs, *vide* document No. 83A dated the 1st of June, 1920, that originally the mortgagors were nothing but assignees of land revenue. When the proprietors of the soil died or became extinct, a settlement was made with the pensioners themselves. That being so, it appears to us there are two separate capacities held by the mortgagors. The fact that the Government made the settlement with the pensioners did not convert the pensioners into "grantees of revenue free immoveable property." The nature of the grant must depend on what the Government gives and not on what may happen irrespective of the wishes of the Government. If the Government gave only the land revenue, any acquisition of the lands by the pensioners themselves cannot make them "a grantee of the immoveable property." This, in our opinion is the criterion for the decision.

It has been urged that the mortgagors have been long in possession as *zemindars* and that, therefore, the two rights which they possessed have merged into one another. We do not think that there is a merger. The two rights are entirely different. The owner of the soil can enjoy it but subject to payment of the land revenue. That land revenue must be paid to the Government. The Government may choose that the land revenue would be paid, instead of to themselves, to somebody else. So long as the Government does not make a revenue free grant of the land, it cannot be said that there is a merger of the two different rights. The two rights may very well lie in the same person, without merger. We consider that in this case there has been no merger at all.

The result is that, we declare that the property to be sold is the pure *zemindari* rights which the mortgagors have in the property and their right to the realisation of the Government revenue as assignees thereof are not liable to be sold.

We allow the appeal, modify the decree of the Court below and order that the property as described above be sold. Having regard to all the circumstances of the case, we order that the parties bear their own costs in this Court.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 256 OF 1921.

August 15, 1924.

Present:—Sir Charles Gordon Spencer, Officiating Chief Justice, and Mr. Justice Srinivasa Iyengar.

Sri Raja BOMMADEVARA RAJA LAKSHMI DEVI AMMA GARU—PLAINTIFF—APPELLANT

versus

Sri Raja B. NAGANNA NAIDU BAHADUR ZEMINDAR GARU AND ANOTHER—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Hindu Law—Maintenance—Wife living separately from husband, whether entitled to maintenance—Heirs of husband, liability of.

A Hindu wife left her husband's house on account of the ill-treatment and indignities to which she was subjected and, after several years, during which she made unsuccessful attempts to be received back into the house of her husband, she brought a suit for arrears of maintenance against her husband and the other members of his family. During the pendency of the suit the husband died:

Held, (1) that the plaintiff had not under the circumstances of the case become disentitled to maintenance on account of her voluntary separation from her husband; [p. 573, col. 2.]

(2) that the plaintiff's right to maintenance was not put an end to by the death of her husband pending the suit but survived against his heirs-at-law whether they succeeded by right of survivorship or by inheritance. [*ibid.*]

Per *Spencer, Offg. C. J.*—The obligation of a Hindu husband to maintain his wife is one arising out of the status of marriage. It is a liability created by the Hindu Law in respect of the jural relations of the Hindu family. Where there is no contract between the parties to a marriage, as among the Hindus, a suit by the wife for maintenance is not a suit based upon contract but is a suit arising out of a civil relation resembling with a contract which is specially provided for in Art. 128 of Sch. I to the Limitation Act. The heirs of a Hindu who is liable for maintenance are equally bound by the obligation which binds him. [*ibid.*]

Per *Srinivasa Iyengar, J.*—Under the Hindu Law the wives of co-parceners are also members of the joint family, though they may not be entitled to shares in the estate of the family or to enforce partition thereof, and the family is bound to maintain all the members of the family. It is true that the Hindu Law imposes an obligation on a Hindu husband to support his wife without reference to any property or share possessed by him, but when the joint family is possess-

ed of property a claim by a wife against her husband need not be regarded merely as a suit for enforcement of any personal obligation but may well be regarded as a suit against the family itself, represented by the husband through whom alone, so long as he is alive, she has to obtain the relief. On his death the true legal representatives in the action would be the surviving co-parceners of the family, if any, or else the personal legal representatives of the deceased husband. [p. 575, col. 2.]

The arrears of maintenance due and payable to a wife by her husband may be regarded as a debt within the meaning of the Hindu Law which is binding on the family. [p. 575, col. 1.]

Appeal against a decree of the Court of the Additional Subordinate Judge, Ellore, in O. S. No. 36 of 1919 (O. S. No. 22 of 1918 on the file of the Court of the Subordinate Judge of Ellore).

Messrs. *D. Appa Rao* and *C. S. Venkatachariar*, for the Appellant.

Messrs. *V. Ramadoss* and *P. Somasundaram*, for the Respondent.

JUDGMENT.

Spencer, Offg. C. J.—This is a suit to recover 12 years' arrears of maintenance. The first defendant, who was the *zemindar* of Vallur, died after the institution of the suit and his sons were brought on the record, as second and third defendants. He married two wives, who were sisters of each other. The plaintiff is the senior wife. She bore two sons and a daughter, but the sons died young. She claimed maintenance at the rate of Rs. 500 per month, for the last 12 years. She was living apart from her husband, for the last 23 years; but, as her claim for more than 12 years' maintenance is barred under Art. 128 of the Limitation Act, she makes no claim for the remaining eleven years.

It appears from Exs. G, G2, G3, G4 and G9 which are letters written by the *zemindar*, that he was fond of his wife at first and grateful to her for letting him marry her sister. In 1890 she went away to Cocanada from Pangidigudem, her husband's residence, but returned. In November, 1894, she and her sister both went away to Cocanada taking their children with them. By that time, the *zemindar* had brought a concubine named Mahalakshmi to Pangidigudem and, during his absence at Hyderabad, they found poison in the food that was cooked for them, which was the immediate occasion for their leaving the protection of his house. The learned Subordinate Judge regards the poisoning story as a myth. I see no reason to suppose that it was unfounded. It is not proved that the *zemindar*, who was absent in Hyderabad, ordered poison to be put in his wife's food, but that there was poison is proved by the uncontradicted fact that a dog which ate the curry died soon afterwards. The plaintiff, in her evidence, taken on commission, has told the story as to the poisoning, and her daughter in her evidence, as D. W. No. 1, corroborates it; and the truth of the story is not discounted by the Subordinate Judge's observation, "It is not known how the pills did not dissolve in the curry", for nothing is known or attempted to be proved about the composition of the pills. Anyhow, the presence of a concubine in the Pangidigudem Fort and the poisoning incident were quite sufficient to make the women go somewhere, where they would not run the risk of being poisoned and were sure of being kindly treated. After the wives had gone to Cocanada, the *zemindar* sued them both for the custody of the children and obtained a decree, but the decree, Ex. VII, was not executed. Attempts were made to take the children by force, in which the plaintiff's brother received injuries. The *zemindar* accused his wives and his brother of stealing estate jewellery. The District Magistrate, Mr. Brodie, dismissed the complaint in his order Ex. A. He found that the jewellery taken by the plaintiff and her sister consisted only of those jewels, which they were wearing and that they acted without any dishonest intention, and he observed that the "complainant had not allowed any of the accused one pie for their maintenance, since they left Pangidigudem". The High Court in dealing with an appeal, Ex. Z, inferred from the *zemindar's* conduct that the estate jewels were really secreted by him and that the criminal proceedings instituted against his senior wife were a mere blind. After this, the *zemindar* made peace with his junior wife and took her back together with her children. She was plaintiff's sister and his third wife, the second wife having died in the first year of her marriage. After this, the plaintiff was continually demanding maintenance from her husband and she came occasionally to Pangidigudem and asked him to let her stay there and live with him as before, but he was constantly putting her off with some excuse or promise that he would make arrangements. Exs. III (*m*), III (11) and J (1) show that the plaintiff was occasionally going to

Pangidigudem, and D. W. No. 5 admits seeing her there, but in a letter Ex. N and a telegram Ex. N (1) the *zemindar* said that he had no desire to see her and that she should not come. In Ex. K a notice sent to the first defendant before the suit, she mentions that he finally told her not to entertain any hope of being taken into the fort and when she went in person to visit him and be-sought him to take her back, he gave her a lodging outside the fort only and treated her with much indignity.

The Subordinate Judge has found that the plaintiff is not estopped from suing for maintenance, but he holds that she was not justified in living separately. He says he has come to the conclusion that the plaintiff voluntarily lived at Cocanada without sufficient justification and that the first defendant felt a sort of antipathy towards her and that he was annoyed with her, for getting their daughter married to a Barrister, who already had one wife living. I am unable to find from the evidence in the case anything to justify the theory that the plaintiff waived her right to maintenace. All the correspondence that passed between the *zemindar* and his daughter shows that he was very fond of his daughter; and the daughter herself, examined as D. W. No. 1, says that her father did not object to the Barrister, but that it was her aunt who raised objections to the marriage, because she wanted to get the Barrister as a husband to her daughter. Ex. F (1) is a letter written by the first defendant to the plaintiff in 1898, on the subject of this marriage. There is no statement in this letter to suggest that he was opposed to the bridegroom personally, but he says that he is not feeling well, and that he cannot do any business until his mind becomes more steady. The lower Court has discredited the witnesses examined by the plaintiff. The statements made by the plaintiff herself and her daughter have an air of truth about them and should not, in my opinion, have been rejected by the Subordinate Judge, without better reasons. P. W. No. 2, a tutor, and P. W. No. 3, a relation of the parties and P. Ws. Nos. 4, 5 and 6 whom the Subordinate Judge describes as "petty servants", are persons who would be likely to know of the nature of the feelings between the parties and the fact that the plaintiff was from time to time coming to Pangidigudem and asking her husband to support her. P. Ws. Nos. 3 and 4 state that the Rajah promised to consider the request after sometime, but refused to take plaintiff at once, because there were disputes between the senior and junior wives. There is no evidence that the plaintiff stayed away from her husband on account of her dislike for him. The evidence of P. W. No. 3 has been disbelieved as being interested. Ex. C (1), the letter, written by the first defendant to him, shows that he offered to correct his omission of the honorific title, and the incident of its omission was a very trivial one. On the whole, I am unable to accept the Subordinate Judge's finding that the plaintiff disentitled herself to maintenance, on account of her voluntary separation from her husband. The most probable explanation for the plaintiff's failure to sue for maintenance earlier is that she was ever hopeful of being one day taken back to her husband's house and that she was fearful of causing a final break from him. Meanwhile she supported herself on the proceeds of the sale of her own jewellery.

It is argued on behalf of the respondents that they are not liable for arrears of maintenance, as the plaintiff's right consisted of a personal action for tort against the husband, for his neglect to maintain her. In *Sidlingappa* v. *Sidava* (1) the obligation of a husband to maintain his wife is described as one arising out of the status of marriage. It is a liability created by the Hindu Law in respect of the jural relations of the Hindu family. Where there is no contract between the parties to a marriage, as among Hindus, a suit for maintenance is not a suit based upon contract, but it is a suit arising out of a civil relation resembling that of a contract which is specially provided for in Art. 128 of the Limitation Act. Mr. Mayne in his book on Hindu Law says that the heirs of a Hindu who is liable for maintenance are equally bound by the obligation which binds him. I have no hesitation in holding that the plaintiff's right of maintenance was not terminated by the death of the 1st defendant and that the right survives as against the 2nd and 3rd defendants who are his heirs in law irrespective of whether they succeeded by right of survivorship or by inheritance.

(1) 2 B. 624; 3 Ind. Jur. 216; 1 Ind. Dec. (N. S.) 837.

The lower Court has found that Rs. 300 per mensem would be a suitable rate of maintenance in case maintenance is awarded. The plaintiff as appellant does not now claim more than Rs. 300. The appeal is allowed and a decree will be passed for maintenance at the rate of Rs. 300 per mensem for twelve years with costs calculated thereon in both Courts.

Srinivasa Iyengar, J.—The circumstances under which a Hindu wife leaves her husband's house and goes to her parent's house to live with her parents are, generally speaking, sufficiently indicative of the cause of such an untoward act. Once in the year 1890 both the wives of the deceased first defendant (plaintiff and her sister) left his house and went to their parent's house. They came back. Again in the year 1894 both of them left together. It is in evidence that at any rate by that time the first defendant had come under the influence of a concubine called Mahalakshmi. There is considerable evidence of ill-treatment of both the plaintiff and her sister by the first defendant which, if believed, would undoubtedly be sufficient to justify the plaintiff in living apart from her husband and claiming separate maintenance. The cruelty of a husband towards his wife varies in kind and degree according to the customs and habits of the people and the status of the family. When the woman of a particular family observe a kind of *quasi gosha*, as they do in most *zemindari* families, it is not possible to obtain such direct evidence to illtreatment or cruelty as may be possible in other cases. Further the ill-treatment is not likely to be open or brutal but insidious and much more galling. It has been suggested that both the wives left the husband's house in 1894 in order to help their husband's brother to institute against their husband a suit for partition. It may be that the discontented wives leaving their husband's house to take refuge in their parent's house were accorded some sympathy and possibly some help by the discontented brother of their husband. It is incredible that the plaintiff's sister the younger wife of the 1st defendant who had sons born to her of the first defendant should have acted from any such motive. What followed puts the matter beyond all doubt. A criminal prosecution with the inevitable search warrants and other terrors is launched by the first defendant against both his wives and a suit is also instituted by him for the recovery of his children. The story of the execution of the decree obtained by him in that suit is itself sufficiently harassing. It seems to me that till this point it must be conceded that there was abundant justification for the plaintiff staying away from her husband. If thereafter there was any change in the attitude of the husband so as to change the situation and take away the justification, the burden of proving it is heavily on those who represent the husband. The husband foiled in his attempt to get back his sons and being afraid of another suit for partition at the instance of his sons makes it up with his second wife and takes her back leaving the plaintiff alone in her parent's house. The evidence is that the plaintiff also wished to be taken back on that occasion but the first defendant would not. I agree with my Lord the Chief Justice that from that time forth during all these years that succeeded, the plaintiff has been endeavouring to be taken back and hoping that some day sooner or later she would be. There is reason to believe that though after the compromise effected by her husband with the second wife the ascendency of the concubine over him diminished, still the second wife had herself acquired such ascendency and was jealously safe-guarding it. From all the correspondence in the case and the evidence before us, I have come to the conclusion that the first defendant who was a master in the art of putting off managed to put off the plaintiff and her repeated requests to be taken back or to be afforded a separate maintenance while at the same time not finally killing in her the hope of reconciliation some day. Having regard to all the circumstances and the evidence in the case, it seems to me impossible not to come to the conclusion that the plaintiff had to stay away in her parent's house not because she wished it or willed it but only because she was being persistently put off with gentle promises of some kind of satisfactory arrangement by and by.

I consider that the sum of Rs. 300 per mensem fixed by the lower Court is reasonable having regard to the income of the estate.

Mr. Rama Doss the learned Vakil for the respondent, argued that a suit for arrears of maintenance by a Hindu wife against

her husband was in the nature of a personal action and abated on the death of her husband. The principle apparently that was sought to be applied was the rule of Civil law *Actio personalis moritur cum persona*. The expression 'personal action' is technical and has been limited to actions in respect of what are called personal wrongs or torts. The principle underlying this rule has been much questioned and shakened in recent years. I see no reason whatever for extending the rule to an action which as the learned Chief Justice has put it, is based on an obligation arising out of status. I may also add that the true view of the Hindu Law would seem to be that the wives of co-parceners are also members of the joint family though they may not be entitled to shares in the estate of the family or to enforce any partition. The obligation of the family and of its estate to maintain all the members cannot possibly be doubted. It is true that the Hindu Law imposes an obligation on the Hindu husband to support his wife without any reference to any property or share possessed by him, even as it imposes similar obligations on sons to maintain their mother and father. But when the joint family is possessed of property, a claim by a wife against her husband need not be regarded merely as a suit for the enforcement of any personal obligation but may well be regarded as a suit against the family itself represented to her by her husband through whom alone so long as he is alive she has to obtain the relief. On his death the true legal representatives in the action would be the surviving co-parceners of the family, if any, or else the personal legal representatives of the deceased husband.

There is also no reason to suppose why the arrears of maintenance due and payable to a wife by her husband should not be held to be a debt within the meaning of the Hindu Law which has regard only to undischarged obligations and to which the distinction between debts and damage is foreign.

I agree with the learned Chief Justice that the appeal should be allowed and the plaintiffs suit decreed on the terms set out by bim.

V. N. V. *Petition allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 416 1923.

January 21, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

UMESH NARAIN CHOWDHURY—AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 23, O. XLIII, r. 1 (u)—Remand, when can be made—Inherent power of Court—Appeal—Pleadings—Issues, framing of—Amendment of issues.

The right of appeal should not be curtailed except on very clear proof of circumstances justifying such curtailment. [p. 576, col. 1.]

Where an order of remand does not specify under what provision of law it is made, the Court should be slow to hold that the order is not made under the provisions of O. XLI, r. 23 of the C. P. C. The order will ordinarily be open to appeal under O. XLIII, r. 1 (*u*). [*ibid.*]

Radha Krishna Saha v. *Kamal Kamini Debya*, 70 Ind. Cas. 547; 35 C. L. J. 345; (1922) A. I. R. (C.) 456, followed.

The powers of an Appellate Court to remand are not restricted to the case specified in O. XLI, r. 23 of the C. P. C. The Court may by reason of its inherent jurisdiction vested in it by s. 151 of the Code, make an order of remand in any case other than the case specified in O. XLI, r. 23 if it be necessary for the ends of justice to do so. [p. 577, col. 1.]

Abdul Karim Abu Ahmad. Khan Ghaznavi v. *Allahabad Bank, Limited*, 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49 (F. B.), followed.

An issue may be framed not merely by reference to the pleadings but also by reference to other matters, and so long as any amendment that is made does not prejudice the parties, it cannot be said that the trial held upon the amended issue was not a proper trial. [p. 577, col. 2.]

Appeal against an order of the First Additional District Judge, Dacca, dated the 30th of July 1923, reversing that of the Subordinate Judge, Fifth Court of that District, dated the 20th of December 1920.

Mr *Atul Chandra Gupta* and Babu *Bireswar Bagchi*, for the Appellants.

Mr. *M. Nuruddin Ahmad*, for the Respondent.

JUDGMENT.

Mukerji, J.—This appeal arises out of a suit for a declaration of the plaintiffs title to certain lands and also for a declaration that the said lands are not liable to assessment of revenue under the provisions of Act IX of 1847. The suit was decreed by the Court of first instance. On appeal preferred by the defendant the lower Appellate Court set aside the decree passed by the Court of first instance in favour of the plaintiffs and made an order

of remand which is questioned before us in the present appeal, which has been preferred by the plaintiffs.

A preliminary objection has been taken on behalf of the respondent to the effect that the order in question was not passed by the learned Judge under the provisions of O. XLI, r. 23, and that, therefore, no appeal lies to this Court from that order. As to this preliminary objection it will be observed that the learned Judge does not say anywhere in his judgment under what provisions of law he purported to pass the order and I am not prepared to hold in the absence of anything definitely stated by the learned Judge that the order was not passed under the provisions of O. XLI, r. 23 of the C. P. C. To hold otherwise would be to curtail the right of appeal which should not be done except upon very clear proof of circumstances justifying such curtailment. Assuming, therefore, that the learned Judge made the order under the provisions of O. XLI, r. 23, although it may not be that the provisions of that rule strictly justify the order in question, I am of opinion, following the decision in the case of *Radha Krishna Saha* v. *Kamal Kamini Debya* (1) that an appeal lies to this Court from that order. The preliminary objection, therefore, in my opinion, fails.

Then as to the appeal itself the learned Advocate appearing on behalf of the appellants has urged two points for our consideration. The first is that the order of remand is not one contemplated by law and that the findings of the learned Judge do not disclose any opinion for reversing the decision of the Court of first instance in this matter and that if the learned Judge was of opinion that the proper issues had not been framed or had not been tried he should have made an order under the provisions of O. XLI, r. 25 or if he was of opinion that additional evidence was necessary he should have made an order under the provisions of O. XLI, r. 27. The second contention put forward on behalf of the appellants is that the learned Judge was wrong in directing certain amendment to be made in respect of one of the issues framed in the suit, namely, issue No. 7.

So far as the first contention is concerned, in order to judge of its worth it is necessary to examine a little closely the judgment of the learned Judge and the findings which were recorded in that judgment. The learned Judge observed in his judgment that upon the evidence in the case, it was not possible to hold that the lands in suit formed part of the plaintiffs' permanently settled estate which had been assessed to revenue. He held that it lay upon the plaintiffs to prove that the disputed lands were specifically included in the estate as settled with the plaintiffs' predecessors in 1793 and were assessed to revenue then. He then dealt with Rennell's map which was one of the documents relied upon by the plaintiffs for the purposes of their case. He discussed certain authorities dealing with the question as to the value of Rennell's map as a guide for determining the boundaries of estates and ultimately he observed that the map was of very little evidentiary value as regards the position and boundaries of villages and estates and that it did not show the state of things at the time of the Permanent Settlement. He further observed, that it could not be said that Rennell's map was correctly relaid or correctly superimposed on the case map with reference to any fixed point, in both those maps, for there is no fixed point in the case map. Then he recorded certain findings to the effect that both the parties were in default in the matter of production of evidence which was necessary for the purposes of their respective cases. He was of opinion that the evidence that was on the record was neither complete nor satisfactory; and being of opinion that though the onus was upon the plaintiffs to prove their case, the defendants could as well have filed their papers in order to disprove the plaintiffs' case and he was not inclined to throw out the plaintiffs' case on that ground of their failure to produce evidence and he thought that there should be a fresh trial of the suit. With regard to the trial of the suit in the Court of first instance he remarked that the learned Subordinate Judge who tried the suit did not discuss the facts and law in such a way as might be of any assistance to the Appellate Court and that the findings of fact at which the learned Subordinate Judge had arrived were arrived at in a cursory way and that the oral and the documentary evidence had neither been fully nor fairly discussed. Being of that opinion he made the order

(1) 70 Ind. Cas. 547; 35 C. L. J. 345; (1922) A. I. R. (C.) 456.

which is now complained of on behalf of the appellants in this appeal.

The question is whether upon circumstances such as these it was open to the lower Appellate Court not to make an order strictly in accordance with the provisions of O. XLI r. 23 or O. XLI, r. 25 or O. XLI, r. 27, but to make an order of remand setting aside the decision of the Court of first instance and directing a fresh trial to be held. Now it has been held by this Court in the case of *Abdul Karim Abu Ahmad Khan Ghaznavi* v. *Allahabad Bank, Limited* (2) that the powers of the Appellate Court as regards remand are not restricted to the case specified in O. XLI, r. 23 but that the Court by reason of its inherent jurisdiction vested in it by s. 151 of the C. P. C. may remand in any case other than the case specified in O. XLI, r. 23, if it be necessary for the ends of justice to do so. The order passed by the learned Subordinate Judge in the present case although it may not be justified by the terms of O. XLI, r. 23 may very well be justified as having been passed under the inherent powers vested in a Court by s. 151, C. P. C. I am of opinion, that the order was a just and proper order having regard to the facts and circumstances of this particular case and that it should not be disturbed.

With regard to the next contention, namely, as to the order of the Subordinate Judge directing that issue No. 7 should be amended, the position is this. The plaintiffs' suit as laid in the plaint was to the effect that the lands in question formed part of the plaintiffs' permanently settled estate. The defence set out in the written statement was to the effect that the lands were outside the ambit of any of the plaintiffs' settled estates and that they had been rightly and legally assessed to revenue. On these pleadings issues were framed and it is necessary to refer only to two of them. Issue No. 7, as originally framed, was "Whether the lands in suit or any part thereof are reformations *in situ* of the plaintiffs or any other permanently settled estates and are covered by the *Thakbust* boundaries of any of the plaintiffs' *mouzas*." Issue No. 8 was in these words: "Whether the lands in suit have been rightly and legally resumed and assessed by Government?" Before the suit came on for hearing the plaintiffs brought to the notice of the Court that issue No. 7 as originally framed required an amendment. There was a good reason why this prayer was made. It is clear and it cannot be disputed, whether the lands appertain to the plaintiffs' estate or not, if it can be shown that they formed part of their estate permanently settled, that they could not be assessed to revenue and upon this ground this application was made for amendment of issue No. 7. This amendment appears to have been allowed presumably without opposition from the defendant and evidence was led upon the issue so amended. On such amendment the issue was worded thus: "Whether the lands in suit or any part thereof are reformations in suit of the plaintiffs or any other permanently settled estate, and are covered by the *thakbust* boundaries of any of the plaintiffs' or other *mouzas*." The Court of first instance came to the conclusion upon the evidence that although the plaintiffs had failed to prove that the lands formed part of their permanently settled estate they must have been included in some one or other of the *mouzas* that were permanently settled. The learned Judge on appeal, however, thought that the suit should have been tried upon the issues as originally framed. I am unable to find any justification for ordering an amendment of the issues upon which the suit had already been tried without any objection of any of the parties and for directing that the suit might be re-tried upon imperfect issue framed on the pleadings of the parties. It cannot be disputed that an issue may be framed not merely by reference to the pleadings but also by reference to other matters and so long as any amendment, that is made, does not prejudice the parties it cannot be said that the trial held upon the issue amended in that way was not a proper trial. I am, therefore, of opinion that this part of the order of the learned Additional District Judge directing an amendment of the issue No. 7 should be set aside.

With this modification the appeal, in my opinion, should be dismissed.

Each party will bear its own costs in this appeal.

Greaves, J.—I agree.

Z. K. *Appeal dismissed.*

(2) 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49 (F. B.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1510 OF 1922.

November 6, 1924.

Present:—Mr. Justice Venkatasubba Rao.

VEETIPARAMBIL AHAMMAD—DEFENDANT No. 2—APPELLANT

versus.

CHERIATH CHENNAMANGALATH MANAKKAL KARNAVAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 134—Mortgage—Mortgagee, transfer by—Transferee acknowledging title of mortgagor—Person claiming under transferee, position of—Ejectment suit—Limitation.

Where a mortgagee in possession of the mortgaged property sells it to a third person as if he was the absolute owner thereof, but the transferee deals with the mortgagor, acknowledges his title throughout, assumes his own possession to be only that of a mortgagee tenant and pays rent to the mortgagor; he is liable to be ejected at the instance of the mortgagor and Art. 134 of Sch. I to the Limitation Act has no application to such a case. A person claiming title from such a transferee stands on no higher footing than the transferee himself. [p. 579, col. 1.]

Second appeal against a decree of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 142 of 1921 (A. S. No. 303 of 1921 on the file of the District Court of South Malabar), preferred against the decree of the Court of the District Munsif, Poonani, in Revised Original Suit No. 117 of 1916.

Mr. *K. Kollekrishna Menon*, for the Appellant.

Mr. *K. P. M. Menon*, for the Respondent.

JUDGMENT.—The facts are somewhat complicated and I think it is unnecessary to state them in great detail. Chiyamu was apparently the original owner of the property, but by Ex. B, dated the 15th January 1888, he acknowledged the plaintiff's title and obtained a *kanom* (mortgage) of the property. Whatever the rights originally of the parties were, that on the date of Ex. B the plaintiff became the owner of it there is no question. Chiyamu who was thus only a mortgagee executed a deed of sale Ex. 3 on the 8th February 1897 in favour of his son-in-law, Mooppan. The sale was made on the footing that Chiyamu was absolutely entitled to the property. In October or November of the same year Chiyamu died and on the 23rd of June 1898, a partition, Ex. G, was effected among his heirs and the *kanom* right of Chiyamu over the property in question fell to the share of Aiyasabi, his daughter. The sale in favour of Mooppan was thus ignored in the deed of partition and it is equally important to notice that the only right which Chiyamu was assumed to possess was the *kanom* right. Ex G was attested by Mooppan, the brother-in-law of Aiyasabi. The next transaction is the transfer in favour of Mooppan by Ex. K dated the 2nd August 1898, of the *kanom* right which fell to the share of Aiyasabi. It is suggested that Ex. K is not a genuine document. The Subordinate Judge assumes that it is genuine, but does not record any definite finding. The question is not, however, of much importance as Mooppan recognised subsequent to Exs. G and K the *jenm* right (absolute title) of the plaintiff and paid him rent on the footing that he was only a *kanomdar*. Payment of rent is evidenced by Ex. P series. That rent was paid, is found as a question of fact by the Subordinate Judge. Whether Mooppan came into possession of the property under the conveyance to him, Ex. 3, or under Ex. K is not distinctly found. This again, in my opinion, is not material. It is established beyond doubt that the right which he claimed over the property was that of a *kanomdar* and that he admitted the absolute right of the plaintiff and paid him rent. Mooppan's possession, therefore, even subsequent to Ex. 3 was that of a tenant.

I must now refer to another set of transactions in virtue of which the 2nd defendant claims the property. Mooppan, by Ex. 6, dated the 19th June 1906, professing to be the owner of the property, mortgaged it by way of hypothecation to one Parangodan. Possession remained with Mooppan and Parangodan assigned the hypothecation to Kunhi Bava. The latter filed Suit No. 695 of 1909 against Mooppan to enforce his mortgage and obtained a decree and brought the property to sale. The second defendant became the purchaser at the Court auction. It is not disputed that the 2nd defendant has not been in possession of the property for 12 years.

The short question to be decided is, whether *Art. 134 of the Limitation Act* is applicable. It runs thus:—

"To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards *transferred* by the trustee or mortgagee for valuable consideration, 12 years from the date of transfer."

The contention of the 2nd defendant is, that Chiyamu was the mortgagee and he transferred it to Mooppan and that therefore, the suit which was instituted more than 12 years after the date of Ex. 3 (the sale in favour of Mooppan) is barred. Unless the transfer in favour of Mooppan was for valuable consideration. Art. 134 would not apply. Although the circumstances of the case make it highly probable that Mooppan did not pay consideration, I do not propose to rest my judgment on that, as the lower Appellate Court has not given a definite finding on the point. Then did Mooppan get into possession of the property under Ex. 3 or under Ex. K? Though on this question again, I am inclined to think that he came into possession under Ex. K, I do not desire to make this, the basis of my judgment. Were it necessary, I would have called for findings on these questions. I think, however, it is unnecessary to put the parties to further expense and permit further time to be taken up. Mooppan, notwithstanding the fact that he took the sale-deed, admitted the *jenm* right of the plaintiff, dealt with him on the footing that he was the mortgagor-landlord, acknowledged his title, paid him rent and constituted himself mortgagee-tenant, and throughout assumed his possession to be that of a tenant; Mooppan then would have had no defence to the action of the plaintiff. He would not have been in a position to rely upon Art. 134. The 2nd defendant claims through Mooppan and he cannot be in a better position than Mooppan was. On this short ground, I am clearly of the opinion that Art. 134 is not applicable.

If the plaintiff by his conduct had led the 2nd defendant to believe that Mooppan was the owner of the property, the plaintiff might under *s. 41 of the Transfer of Property Act*, be precluded from disputing the title of Mooppan. But it is not pretended that the plaintiff has done any act which might produce this result.

A subsidiary contention was raised in regard to the apportionment of the *kanom* amount. The Counsel for the respondent, however, in order to avoid a further enquiry, has agreed to pay the full *kanom* amount, namely, Rs. 61-1-2 although the amount payable in respect of the suit property has been held to be only Rs. 28-14-11.

The appellant's learned Vakil has contended that he disputes the amount of *purapad* allowed. No argument appears to have been put forward in regard to this before the lower Appellate Court. To induce me to send this case back, this contention has now been raised. I overrule it.

Subject to the modification, that the *kanom* amount is raised from Rs. 28-14-11 to Rs. 61-1-2, the second appeal fails and is dismissed with costs. Time for redemption is extended by three months.

V. N. V. *Appeal dismissed.*
Z. K.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 216 OF 1924.
February 16, 1925.
Present:—Mr. Justice Mukerji.
G. I. P. RAILWAY—DEFENDANT—APPLICANT
versus
FIRM RADHEY LAL-MANNI LAL—PLAINTIFF—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Arts. 30, 31—Railways Act (IX of 1890), s. 56—Goods consigned to Railway Company for carriage—Suit for compensation for non-delivery—Limitation, commencement of—Delivery refused by Railway Company—Sale of goods—Plaintiff, whether entitled to recover market value—Company, whether can dispute title of consignor—Estoppel.

On 4th November 1922 plaintiff consigned certain goods in nine bags to the defendant Railway Company for carriage. When the goods arrived at their destination it was found that two of the bags were missing. On 5th December 1922 the consignee who went to take delivery of the goods and discovered the loss of the two bags offered to take delivery of the seven bags but the Station Master refused to allow this. Later on the higher Railway Officials agreed to let the consignee have delivery of the seven bags but delivery was again refused by the Station Master. Subsequently, the plaintiff was called upon to take delivery of the goods but he failed to do so and the goods were consequently sold by the Railway Company. On 3rd December 1923, plaintiff brought a suit to recover from the Company the market value of the goods:

Held, (1) that the suit was governed by Art. 31 of Sch. I to the Limitation Act and that the limitation began to run from the 5th December 1922, when the Station Master refused to deliver the goods to the plaintiff and consequently the suit was within time; [p. 580, cols. 1 & 2.]

(2) that even if it were assumed that with regard to the value of the two bags which were missing the suit was governed by Art. 30 of Sch. I to the Limitation Act, as there was nothing to show that the two bags, which were missing on the 5th of December 1922, had really been lost earlier than that date, the suit was still within time, the burden of proof being on the defendants to prove when the

actual loss took place as the matter was within their peculiar knowledge; [p. 580,col. 2.]

(3) that the defendants having twice refused to give delivery to the plaintiff, the plaintiff was not bound to take delivery on the 3rd occasion when called upon by the defendant Company to do so, and that, therefore, he was entitled to recover the market value of the goods and not merely the price fetched by the sale held at the instance of the defendant Company. [*ibid.*]

Section 56 of the Railways Act does not apply where a consignee, at the request of the Railway Company itself, wanted to remove the goods but was not allowed by the Railway Company to do so. [*ibid.*]

In a suit for recovery of compensation for the non-delivery of goods consigned to a Railway Company for carriage, the Company cannot, as between themselves and the consignor, dispute the title of the consignor to the goods. [p. 581, col. 1.]

Civil revision from an order of the Judge of the Court of Small Causes at Cawnpore, dated the 8th of September 1924.

Mr. *Ladli Prasad Zutshi*, for the Applicant.

Mr. *S. C. Das*, for the Opposite Party.

JUDGMENT.—This is an application to revise a judgment of the Court of Small Causes at Cawnpore.

The respondents consigned goods in nine bags to Salamatpur from a Railway Station at Cawnpore. When the goods arrived at Salamatpur, it was found that two of the packages sent were not the same as had been consigned at Cawnpore. The person who wanted to take delivery on behalf of the consignees proposed that seven of the bags should be handed over to him and the two remaining bags, which did not belong to the consignment, should be left there. The Station Master did not agree to this arrangement. Later on, higher Railway Officials wrote agreeing to this arrangement. Even then the Station Master at Salamatpur would not agree that the seven bags admitted to be a part of the consignment should be removed. Thereafter, there was some correspondence and the suit was brought. Several defences were taken including a plea of limitation and they have all been decided against the defendants, hence this petition in revision.

Three points were urged and I will consider them.

The question of limitation arises in this way. The goods were booked on the 21st of November 1922. On the 5th of December 1922 the consignees went to the Railway Station and wanted to take away seven of the packages but the Station Master refused. On the 3rd of December 1923, the suit was brought. Thus the suit was within one year of the failure of the Railwey Company to deliver goods (*vide* Art. 31 of the Limitation Act). It is said that as regards two of the packages Art. 30 would apply. Even if Art. 30 applied, there is nothing to show that the two packages which were missing on the 5th of December, 1922, had really been lost earlier than that date. The matter was within the peculiar knowledge of the defendants and it was for the defendants to have proved when the actual loss took place. The point of limitation, therefore, fails.

The second question is whether the defendants were justified in selling the goods and offering the sale price to the plaintiffs after deducting the costs due to them. As already stated above, the plaintiffs or their men made two attempts to obtain delivery of their goods. On the second occasion they went to the spot at the request of the Railway Company themselves. It is true that on the third and fourth occasions, *viz.*, on the 10th of April 1923, and the 20th April 1923, the Railway Company again asked the plaintiffs to take delivery of the seven packages. The question is whether the plaintiffs could very well say that they were not going to hear the Railway Company after two attempts of obtaining delivery had failed. No hard and fast rule can be laid down for all cases. But, in this case, it appears to me that the plaintiffs could very well say that they made two honest attempts to obtain delivery of goods and if the Railway Company retained the goods at the time, they did so at their own risk. I agree with the Court below that the plaintiffs are entitled to recover the market value of the goods consigned and are not bound to accept such price as was fetched by the sale held at the instance of the Railway Administration.

I may mention here that I read s. 56 of the Railways Act. It applies to ordinary cases. It does not apply where the plaintiffs, at the request of the Railway Company themselves, wanted to remove the goods, but was not allowed to do so

The last point urged is that the plaintiffs have no right to sue. This point was taken by way of an amendment of the written statement. The argument is based, in this Court, on the rule of law that a railway receipt is a mercantile document of title and it passes title in the goods to which it relates, on an endorsement. This does not appear to have been exactly the point raised in the Court below. Indeed,

the judgment of the Court below does not bear any indication of any such argument having been brought forward before it. The fourth ground of appeal which alone relates to the right to maintain the suit does not cover the point. The question involves questions of fact and I decline to entertain it without proper findings.

The lower Court found that the plaintiffs consinged not only their own goods but some goods which their customer purchased for himself and had asked them to consign with the plaintiff's own goods. An argument was based on this fact, *viz.*, the plaintiffs were not the owners of the entire goods and that, therefore, they could not maintain the suit. To this argument the clear answer was that as between the Railway Company on the one hand and the plaintiffs, the consignors on the other, the Railway Company could not dispute the title of the consignors to the goods.

The petition in revision fails and it is hereby dismissed with costs.

Z. K. *Petition dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1020 AND 1131 TO 1133 OF 1920.

January 19, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

BAMA CHARAN KAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

PYARI MOHAN GANTAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Estates Partition Act (V B. C. of 1897), ss. 7, 83, 99—Ejectment suit—Tenure, existence of—Burden of proof—Private arrangement, effect of.

Where after a partition under the Estates Partition Act a proprietor brings a suit for ejectment and the defendant pleads the existence of a tenure in answer to the suit and proves such existence, it is for the plaintiff to make out circumstances which would entitle him to a decree. That is to say, he must make out a case under s. 99 of the Act, and in order to do so he must prove that the estate that has been partitioned was held in common tenancy and that the tenure was not created by him. If he succeeds in proving this he will get a decree for *khas* possession or joint possession with the defendants to the extent of his share, according as he is the sole owner or only a co-sharer in the estate from which he seeks to eject the defendant. The fact that the estate was held in common tenancy has to be proved by the plaintiff. The existence of the tenure has to be proved by the defendant. The plaintiff has to prove that the tenure was not created by him. If the defendant can prove that it was created by any other proprietor of the estate, it will hold good as regards the lands finally allotted to the share of such proprietor. [p. 584, col. 1.]

There is no presumption in law that because an estate has been partitioned under the Estates Partition Act, it must necessarily have been held by the proprietors in common tenancy and not in severalty. [*ibid.*]

The private arrangement described in s. 7 of the Estates Partition Act is not necessarily the same private arrangement that would prevent the application of s. 99 of the Act. If it is found that the estate was held not in common tenancy but in severalty in pursuance of some private arrangement amongst the parties, s. 99 will not have any application. [p. 584, col. 2.]

Unless the plaintiff who is suing in ejectment can bring his case within s. 99 of the Act, he must take his estate subject to the tenure of the defendant. [*ibid.*]

Case-law referred to.

Appeals against the decrees of the Additional Subordinate Judge, Faridpur, dated the 15th of January 1920, affirming those of the Munsif, Second Court at Madaripur, dated the 31st of August 1918.

Mr. *Gunada Charan Sen* and Babu *Prosanta Bhusan Gupta*, for the Appellants.

Babus *Brojo Lal Chakravarti*, *Nil Kanta Ghose* and *Hari Narain Roy Choudhry*, for the Respondents.

Babu *Biraj Mohan Majumdar*, for the Deputy Registrar.

JUDGMENT.

Mukerji, J.—These four appeals arise out of as many suits instituted by the plaintiffs for recovery of possession of certain lands upon declaration that the plaintiffs have got *zemindari* right therein and that the defendants have no tenure appertaining thereto.

Pargana Kotalipara bore *Touzi* No. 4515 of the Faridpur Collectorate. This estate was partitioned by the Collector under the Estates Partition Act into 28 *sahams*, and each *saham* was formed into a separate estate bearing a separate number. The plaintiff in one of the suits is the owner of 16-annas of one of the separate estates, and the plaintiffs in the other three suits are entitled to shares in some of the other separate estates. The plaintiffs seek to eject the defendants in these suits, in three of which the other co-sharers of these separate estates have been made *pro forma* defendants, on the ground that the principal defendants hold the lands under certain fictitious tenures which they have managed to get recorded in the last Cadastral Survey

and Settlement proceedings as appertaining to the *zemindari* without the plaintiff's knowledge.

The principal defendants claim to hold the lands in all the suits as owners of a *sikmi taluq* Nanadram Choudhry and in one of the suits also as owners of a *howla* Nobo Kumar Das. They contend that the tenures are not fictitious but real, that there was a private partition and arrangement amongst the co-sharers of the estate *Touzi* No. 4515 by which the said co-sharers were in possession of separate lands, that the *sikmi taluq* was created by all the proprietors, that the *sikmi taluq* as well as the *howla* have been existing from before the Permanent Settlement and that all the co-sharers of the *zemindari* have all along recognized these tenures, and that the defendants are not liable to eviction.

The Court of first instance decreed the suits. These decrees were evicting the defendants in such of the suits in which the plaintiffs are owners of the entire separate estates and in such of the suits in which the plaintiffs are only fractional owners, the decrees awarded the plaintiffs joint possession to the extent of their shares with the defendants in these suits. On appeals preferred by the principal defendants the said decrees were affirmed by the Court of Appeal below. The lower Appellate Court found that the *sikmi taluq* Nandaram Choudhury existed from before the Permanent Settlement, that the *howla* Nobo Kumar Das was created long after the Permanent Settlement, that there was no evidence that the tenures were created by all the proprietors and that the tenures were not proved to have been recognized by all the proprietors. It was further found that it was not established that the predecessors of the present plaintiffs had given their share or shares in the *taluq* or the *howla* to the predecessors of the present defendants or that the lands in suit in this way appertain to those tenures. The said Court, therefore, upheld the decision of the Court of the first instance decreeing the suits, and further held "that these tenures shall hold goods as regards the lands finally allotted to the share or shares that have been formed into separate estates of those proprietors whose predecessors created the same."

The first ground urged on behalf of the appellants is that the finding of the Court of Appeal below to the effect that there is no evidence to show that the tenures were created by all the proprietors and that it has not been proved that they were recognized by all the proprietors, was arrived at without considering several relevant documents that had been adduced in evidence on behalf of the defendants and which were on the record. Mr. Sen appearing on behalf of the appellants had drawn our attention to several documents as supporting a finding contrary to that at which the learned Subordinate Judge has arrived, but on a careful examination of those documents I am unable to hold that they really assist his client in this respect. Then it would appear that some of these documents, *e. g.*, Ex. A., Ex. B. and Ex. S. (1) are specifically referred to by the learned Subordinate Judge in his judgment; while as to the others, although they are not so mentioned, the learned Subordinate Judge did take them into consideration, for he has referred to the fact that they are noticed in brief in the judgment of the Court of first instance. I have no reason to think that the learned Subordinate Judge did not consider their bearing on the case, though no detailed examination of their contents appears in his judgment. There is no substance, in my opinion, in this contention and it must accordingly fail.

The next point urged by Mr. Sen on behalf of the appellants is that it has not been found that *Pargana* Kotalipara, that is to say the parent estate, was held in common tenancy and not held in severalty in pursuance of a private arrangement amongst the proprietors and that such a finding is necessary so as to entitle the plaintiffs to a declaration that the tenures in question should hold good as regards the lands finally allotted to the share of the proprietors who may have created them and to such lands only. In other words it is contended that although it has been found that there was not such a division formally made and agreed to by all the proprietors as would attract the operation of s. 7 of the Act, it has not been found that the estate was held, in fact, in common tenancy so as to entitle the plaintiffs to evict the defendants by the operation of s. 99 of the Act. It is urged, in substance, that the plaintiffs must bring their case within the terms of that section before they can succeed in evicting the defendants and

that the findings necessary for that purpose are wanting.

Mr. Chakravarti, on behalf of the respondents, contends, on the other hand, that the findings are sufficient and that no finding as to the estate having been held in common tenancy is necessary. He contends that what was pleaded in the written statement was that the partition effected by the Collector was void by reason of the provisions of s. 7 of the Estates Partition Act and that there is a clear finding negativing the existence of the conditions mentioned in that section. He says it was for the defendants to show that the estate was not a common tenancy but in severalty by virtue of some private arrangement amongst co-owners and that the defendants failed to prove the same. He furthermore distinctly and definitely urges that it is not necessary for the plaintiffs to rely on s. 99 of the Act, but that under the general law the plaintiffs, upon the findings that have been arrived at, are entitled to a decree for possession.

The question, therefore, ultimately reduces itself into one of sufficiency or otherwise of the findings arrived at by the Court below and also as to what is necessary to be proved in order to justify decrees for possession, such as have been passed in these suits.

Mr Chakravarti, as I have stated, relies upon what he says to be the general law. He says that the plaintiffs are *zemindars*, and as such they have *prima facie* title to the gross collections from all the *mouzas* within their *zemindari* and it is for the defendants, if they desire to remain upon the land, to prove their right. He relies upon the case of *Rajah Sahib Perhlad Sein* v. *Maharajah Rajendar Kishore Singh* (1), where their Lordships of the Judicial Committee observed as follows: "The appellant is the *zemindar*; and as such he has a *prima facie* title to the gross collections from all the *mouzas* within his *zemindari*. It lay upon the respondents to defeat that right by proving the grant of an intermediate tenure. In their Lordships' opinion, there is in the record before them no satisfactory proof of the deed relied upon, or of any right or interest in these villages beyond, at most, the lifetime of Madan Mohan Tewari." There can be no dispute as to the proposition of law enunciated as above; but can it be said that the defendants have failed to prove their right in this case? Upon the findings of the learned Subordinate Judge, the defendants have succeeded in proving the existence of the two tenures, one from before the Permanent Settlement and the other since then—tenures the character of which was impugned as fictitious, but which have been proved to be real tenancies. The only thing which the defendants have failed to prove is either that the plaintiff's predecessor or the whole body of the proprietors created them. It may be amply inferred from the findings, more especially from the portion of the judgment quoted above, that the tenures were, in fact, created by some one or more of the proprietors. Their right the defendants have established, though they have been unable to point out the particular person or persons who created that right in its inception. To hold that under such circumstances the plaintiff can eject the defendants without proof of any other circumstances would be to hold that the effect of a partition under the Estates Partition Act is to annul all tenures, leases and encumbrances unless the holders thereof can point out the particular individual or individuals out of the entire body of co-proprietors who may have created the same. To hold that this is the law would also lead to this position that it will be open to the *zemindars* if they are so minded, to annul all tenures or leases and encumbrances by combining together and getting a partition effected under the Estates Partition Act. In that case the owner of a separate estate formed after partition under the Estates Partition Act would get perhaps higher rights than a purchaser at a revenue sale. This, in my opinion, is not the law, and could never have been the intention of the Legislature.

The defendants attempted to prove that the tenures in question existed from before the Permanent Settlement and were created by all the proprietors of the estate or were admitted by all the proprietors to have been so created. This, they did in order to show that the rents payable on these tenures were assets within the meaning of s. 3 sub-s. (1), of the Act, which should have been taken into consideration in making the partition, and also for availing of the benefit of the provisions of s. 83

(1) 12 M. I. A. 292 at p. 331; 2 Suth. P. C. J. 225; 2 Sar. P. C. J. 430; 20 E. R. 349.

of the Act. The onus with regard to this was undoubtedly on the defendants, and they failed to charge the same. That, however, does not put an end to their rights. The character of the tenures having been found to be real and not fictitious as alleged on behalf of the plaintiffs, it is for the plaintiffs, who are suing in ejectment, to make out circumstances which would entitle them to a decree. They must make out a case under s. 99 of the Act.

What then are matters that have to be proved in order to make out a case under that section. It has to be proved in the first place that the estate that has been partitioned was held in common tenancy; there is no presumption in law that because an estate has been partitioned under the Estates Partition Act, it must necessarily have been held by the proprietors in common tenancy and not in severalty. In the next place, it has to be proved that the tenure, lease or encumbrance was not created by the plaintiff. Then the plaintiff will get a decree for *khas* possession or joint possession with the defendants to the extent of his share according as he is the sole owner or only a co-sharer in the estate from which he seeks to eject the defendant. The fact that the estate was held in common tenancy has to be proved by the plaintiff. The existence of the tenure, lease or encumbrance has to be proved by the defendant. The plaintiff has to prove that it was not created by him. If the defendant can prove that it was created by any proprietor of the estate, it will hold good as regards the lands finally allotted to the share of such proprietor.

Now what are the findings of the learned Subordinate Judge in the present case? The learned Judge's finding is in these words "In the circumstances I am inclined to hold that the estate was virtually held in common tenancy and it was never partitioned by any private arrangement formally made and agreed to by all the proprietors as contemplated by s. 7 of the Estates Partition Act and that the several proprietors consequently did not take possession in pursuance of such arrangement of separate lands to be held in severalty as representing their individual interest in the estate." This is a finding disposing of the defendants' objection to the validity of the partition based upon s. 7 of the Act. The learned Judge rightly pointed out in his judgment that the defendants wanted "to make out that there was a private partition amongst the proprietors formally made and agreed to by all of them under s. 7 of the Estates Partition Act." This finding disposes of that objection. But it is not a finding to the effect that the estate was held in common tenancy as required by the terms of s. 99 of the Act. The private arrangement described in s. 7 of the Act is not necessarily the same private arrangement that would prevent the application of s. 99; and if it is found that the estate was held not in common tenancy but in severalty in pursuance of some private arrangement amongst the parties s. 99 will not have any application: *Hridoy Nath Shaha* v. *Bibee Mohobutnessa* (2) and *Abdul Latif* v. *Amanaddi* (3).

It is not that the fact of a common tenancy was admitted on behalf of the defendants. In their written statements they distinctly averred that there was a private arrangement effected with mutual admission and consent amongst the proprietors for upwards of a century, to hold the *zemindari* in distinctly separate *hisyas*. No doubt they went further and alleged that such private arrangements led to a formal partition resulting in the different co-sharers holding the lands according to their respective shares such as would come within s. 7 of the Act; but all the same the denial of a common tenancy was there and it was for the plaintiffs to prove that the estate was a common tenancy. The Court of Appeal below has come to no finding on this question.

I am, therefore, of opinion that the findings are not sufficient to entitle the plaintiffs to the decrees they have obtained in these suits. I am clearly of opinion that the plaintiffs cannot succeed unless they can avail themselves of the benefit of s. 99 of the Act, and as Mr. Chakravarti contends that they do not wish to do so, and as on the findings the plaintiffs failed to prove that the tenures are fictitious, these suits should have been dimissed. Unless the plaintiffs who are suing in ejectment, can bring their case within s. 99 of the Act they must take their estates subject to the tenures of the defendants. If any authority were needed for this position, reference may be made to the observation of this Court in the case of *Nogendra Mohan Roy*

(2) 20 C. 285; 10 Ind. Dec. (N. S.) 194.
(3) 9 Ind. Cas. 539; 15 C. W. N. 426.

v. *Pyari Mohan Saha* (4), where in a suit for ejectment under somewhat similar circumstances it having been found that s. 99 of the Act had no application, it was held that "the inference follows that the plaintiffs have taken the disputed lands subject to the tenure of the defendant and was not entitled to eject them."

With all deference to Mr. Chakravarti's arguments, however, I am not sure that the plaintiffs do not intend to rely upon s. 99 of the Act. The Court of first instance held that it was by virtue of s. 99 of the Act that the the tenures were ,as that Court put it, "annulled." One of the questions formulated by the learned Subordinate Judge for his determination was "Has s. 99 of the Act any application to the case?" I, therefore, think that the proper order for us to make in these appeals would be to set aside the decree of the lower Appellate Court and send back the cases to that Court to deal with and dispose of the appeals on determining the following questions: First, whether the estate *Touzi* No. 4515 was held by the proprietors in common tenancy within the meaning of s. 99 of the Estates Partition Act, and the lands of the estate were not held in severatly by the proprietors in pursuance of any private arrangement amongst themselves? Second, whether the plaintiffs in each of these suits or their predecessors-in-interest were parties to the creation of the tenures in question? The plaintiffs in each of the suits will be entitled to a decree in the event of the first question being answered in the affirmative and the second one in the negative. Such decree will be one for eviction of or for joint possession with the principal defendants accordingly as the plaintiffs are sole or fractional owners of the separate estates.

There are indications in this case that the parties failed to realize the legal effect of their pleadings. I would accordingly direct that they be allowed to adduce such further evidence on the questions formulated as above in the lower Appellate Court.

The costs of these appeals should abide the result.

Greaves, J.—I agree.

Z. K. *Appeals allowed; Cases remanded.*

(4) 30 Ind. Cas. 420; 43 C. 103 at p. 114; 21 C. L. J. 605; 20 C. W. N. 319.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1696 of 1922.

December 18, 1924.

Present:—Mr. Justice Mukerji and Mr. Justice Daniels.

Babu SHEODARSHAN SINGH—OPPOSITE PARTY—APPELLANT

versus

BENI CHAUDHRI AND OTHERS—APPLICANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 7—Redemption, suit for—Decree, construction of—Costs, whether charge on mortgaged land—Payment of decretal amount without costs, whether compliance with decree.

The decree of an Appellate Court in a suit for redemption increased the amount of money declared to be payable to the mortgagee by the First Court by a certain sum and went on to state that a certain specified sum was payable by the plaintiff to the defendant on or before a certain date. The decree further stated that certain costs were payable by the plaintiff to the defendant and continued that if the plaintiff paid the "sum aforesaid" to the defendant within a certain date, etc.:

Held, per *Mukerji, J.*—That it was not the intention of the Court to make the costs as stated in the decree a charge on the property and that if the plaintiff paid the sum mentioned in the earlier portion of the decree as payable by him to the defendant it was a sufficient compliance with the decree. [p. 586, col. 2.]

Per *Daniels, J.*—That the operative part of the decree clearly directed that the plaintiff must pay the sum mentioned in the decree and the costs and that if the plaintiff failed to pay the costs along with the mortgage-money within the time limited by the decree, the decree was not satisfied. [p. 587, col. 2.]

Per *Mukerji, J.*—It is open to an Appellate Court in a mortgage suit either to pass a personal decree for costs against the unsuccessful party or to make the costs payable out of the mortgaged property. In every case it is a matter of interpretation what was intended by the Appellate Court. [p. 586, col. 2.]

Per *Daniels, J.*—Under O. XXXIV, r. 7 of the C. P. C. the Court must direct that an account be taken of what is due to the defendant for principal and interest on the mortgage and for his costs of the suit, if awarded to him. The form of the decree prescribed by the Code under the rule contemplates that the costs of the suit shall be a charge on the mortgaged property and shall be regarded as such. [p. 587, cols. 1 & 2.]

Case-law discussed.

Appeal against a decree of the District Judge, Ghazipur, dated the 26th June 1922.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.

Mukerji, J.—The facts of this case briefly are these:—The original plaintiff who is the appellant before this Court, *viz.*, Sheodarshan Singh brought a suit for redemption in the Court of the Munsif of Ballia. He obtained a decree on the 22nd of April 1919 on condition of payment of

Rs. 1,747-8-6 for principal mortgage money and interest and Rs. 69-2-0 costs. In all he was declared entitled to obtain possession of the property on payment of Rs. 1,816-10-6. This sum was deposited in Court. The mortgagees, however, did not acquiesce in this decree and appealed. In the meanwhile the final decree was prepared on the 26th of June 1919 in accordance with the preliminary decree passed by the First Court. The plaintiff obtained delivery of possession on the 15th of July 1919. The Appellate Court by its decree dated the 2nd of December 1920 varied the decree of the Court of first instance and the main question to be decided in this appeal is what is the true interpretation of that decree.

The Appellate Court directed that a further sum ought to be paid to the defendants in the case and extended the time for payment up to the 2nd of March 1921. Within this period, it is common ground, a further sum of Rs. 175 was paid by the plaintiff. The question is whether he ought to have paid as a condition precedent to his obtaining delivery of possession a further sum of Rs. 45-6 0.

The defendants alleging that the total sum payable to them had not been paid within the time allowed by the Court of Appeal came to the Court asking for redelivery of possession to them and they also asked for mesne profits. Possession has not so far been re-delivered to the mortgagees. But they have been awarded Rs. 800 as mesne profits for two years. This period of two years is the period between the 15th of July 1919, the date of the delivery of possession and the 18th of June 1921, the date of the defendants' application for restitution.

It is contended on behalf of the plaintiff-appellant who has appealed against the decree of the lower Court directing him to pay mesne profits that he has really complied with the terms of the decree. His contention is that the decree did not make the payment of extra costs with which he was saddled a condition precedent to redemption. In the case of *Amina Bibi* v. *Rama Shankar Misar* (1), two learned Judges of this Court discussed the question how far the costs awarded by a Court of Appeal were a charge on the property mortgaged. The learned Judges, as I read those judgments, were of opinion that it was open to the Appellate Court either to pass a personal decree against the unsuccessful party or to make the costs payable out of the mortgaged property. The learned Judges thought that in every case it was a matter of interpretation what was intended by the Appellate Court. Mr. Justice Piggott said in his separate judgment in the case of *Amina Bibi* v. *Rama Shankar Misar* (1): " If these propositions of law are sound.....the question . . . resolves itself into one of the interpretation of the decree actually passed by the Appellate Court." I am of the same opinion as those learned Judges. It is entirely a matter of interpretation of a decree as to whether the Appellate Court in a particular decree made the costs payable out of the mortgaged property or by the mortgagor personally.

Coming to the particular decree before us, we find that the Appellate Court said that it was increasing the amount of the money payable to the mortgagees by a sum of Rs. 175. Then it said that a total sum of Rs. 1,991-10-6 was payable by the plaintiff to the defendants on or before the 2nd of March 1921. After having said so much, the Court went on to say that certain costs were payable by one party to another. After making these statements the decree went on to say: "If the plaintiff paid the "sum aforesaid" within the 2nd of March 1921 etc." Now the question is whether the decree meant that over and above the sum of Rs. 1,991-10-6 mentioned in a lump sum, the sums mentioned as costs in the cause were also to be paid as a condition precedent to redemption. As I read the decree it was not the intention of the Court to make the costs as stated in the decree a charge on the property. My reasons are two-fold. In the beginning of the decree the Court distinctly said that the amount payable to the mortgagees was being increased by a sum of Rs. 175. That was very definite. Then the Court fixed the amount payable by the mortgegees at a definite sum. Furth.r, I am confirmed in my view from this fact that the sum of Rs. 1,991-10-6 already included the sum of Rs. 69-2-0 costs awarded to the mortgagees against the mortgagor by the Court of first instance. If we read the decree as awarding to the mortgagees not only the

(1) 50 Ind. Cas. 730; 17 A. L. J. 582; at p. 587; 41 A. 473.

sum of Rs. 1,991-10-6 but also the amounts of costs mentioned therein we are forced to the conclusion that the Appellate Court meant that the sum of Rs. 69-2-0 costs awarded by the Court of first instance to the mortgagees was to be paid twice over. It is nobody's contention that this sum was to be paid twice over. All that is contended for on behalf of the respondents is that after an adjustment of the costs a sum of Rs. 45-6-0 would stand decreed to the mortgagees on account of costs and this additional sum had to be paid. But it does not follow that the sum of Rs. 45-6-0 was a charge on the property. I am, therefore, forced to the conclusion that the Appellate Court's decree meant this only and nothing more than this that redemption was to be had on payment of this sum, *viz.*, Rs. 1,991-10-6 if the said sum was paid within the 2nd of March 1921.

In this view the mortgagor was right in paying only the sum of Rs. 1,991-10-6 within the 2nd of March 1921.

The result of my view is that the mortgagees are entitled to mesne profits only for the period between the 15th of July 1919, and the 2nd of March 1921. It was during this period only that the mortgagor's possession was unlawful and it was during this period that the mortgagees should have continued in possession.

I would, therefore, remand an issue to the Appellate Court to find out the amount of mesne profits for this period.

Daniels, J.—I greatly regret that I am unable to agree with the judgment just delivered. In my opinion the appellant has no case and his appeal should be dismissed.

I would note at the outset that the point on which my learned brother would allow the appeal in part was not originally taken by the appellant in argument at all. The appellant's learned Counsel stated in answer to a question by the Court that he was obliged to concede that the interest awarded by the decree was legally a charge on the mortgaged property. He contended that the appellant had been misled by the form in which the decree was passed and, therefore, mesne profits should not have been awarded against him.

The decree was one under O. XXXIV, r. 7. Under that decree the Court is directed to take an account of what is due to the defendant for principal and interest on the mortgage and for his costs of the suit if awarded to him. The form of decree prescribed by the Code distinctly contemplates that the costs of the suit shall be a charge on the mortgaged property and shall be recoverable as such. The decree in this case stated the sum of Rs. 1,991-10-6 to be due up to 2nd March 1921, then states the further sum which was due on account of costs and finally directs that if the aforesaid sum is not paid by a date three months in advance the property was to be sold.

The operative part of the decree clearly, therefore, directs that the property was to be sold unless the entire sum was paid into Court. It is quite true, as has been pointed out by the appellant, that some portion of the costs has been included twice over, being included both in the sum of Rs. 1,991 and in the sum specified as being due on account of costs in addition to this. This clerical mistake, for it is nothing more, does not in my mind affect the merits of the appeal. If anything it makes the case of the appellant worse, for if the decree be read literally and not in connection with the judgment, the deficiency in the amount deposited by him would be appreciably greater than it has been found by the Court below to be.

Even if it be possible to read the words "the aforesaid sum" as referring only to the sum of Rs. 1991, that construction of the decree should be adopted which is in accordance with the law as laid down under O. XXXIV, r. 7 and the universal practice of the Courts in such cases which directs that the costs of the suit shall form part of the sum payable in order to effect redemption. (Even costs incurred after the decree can be recovered by the mortgagee at the time of redemption under O. XXXIV, r. 10.) This was decided in a reasoned judgment in *Damber Singh* v. *Kalyan Singh* (2), where it was held that though the order of the Court merely directed the respondent to pay to the appellant a certain sum incurred on account of costs, the effect of the decree was to make this sum legally recoverable from the mortgaged property. It is suggested that this ruling has not been followed in *Amina Bibi* v. *Rama Shankar Misar* (1). I do not so read this case. The point in that case was not whether the amount could be re-

(2) 43 Ind. Cas. 557; 40 A. 109; 15 A. L. J. 914.

covered from the mortgaged property but whether the decree-holder had any remedy to recover the amount of costs as a personal liability from the decree-holder. The learned Judges held that in the case before them he had such a remedy. They carefully guarded themselves from suggesting that the case of *Damber Singh* v. *Kalyan Singh* (2) had been wrongly decided. Mr. Justice Walsh says in the course of his judgment :—

"The ordinary rule in equity is that a mortgagee is entitled to recover against a mortgagor all the costs and expenses of maintaining or enforcing the security provided he acts reasonably and according to law, and further to add them to his security, that is to say, *he is given both remedies*, the personal remedy against the debtor and the remedy in *specie* against his security."

Mr. Justice Piggott in his concurring judgment says :—

"In a suit on a mortgage no one denies that the plaintiff is entitled to add to his mortgage debt and to recover as against the mortgage security any costs to which he may be put in enforcing the said security . . . As regards the costs incurred in prosecuting or defending an appeal against a preliminary decree for sale, I think some learned Judges of this Court have used language suggesting a doubt as to whether such costs are covered at all by the provisions of O. XXXIV, r. 10, above-mentioned, but I do not understand that the general principle as to the right of the mortgagee to claim to have these costs included in the final decree for sale against the property, where such final decree is sought and obtained after the decision of the appeal in which those costs were incurred, has been doubted."

He held that at the same time the Court had consistently held that it was in the discretion of an Appellate Court to award the costs also as a personal money decree.

The appellant, therefore, in my judgment failed to deposit the full amount required by the decree and was, therefore, not entitled to recover possession of the property. His attention was called on 13th May 1921 by the decree-holders to the fact that the sum paid in was insufficient but he did not up to the time when the suit was instituted, or indeed up to the present time, make any attempt to make good the deficiency. I would, therefore, dismiss the appeal with costs including in this Court fees on the higher scale.

By the Court.—The result is that the appeal is dismissed with costs which will include in this Court, Counsel's fees on the higher scale.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.
FULL BENCH.

APPEAL FROM ORDER No. 56 OF 1923.

December 11, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, Mr. Justice Pratt and Mr. Justice Crump.

AMARSANGJI DUNGARJI JHALA—DEFENDANT—APPELLANT

versus

DEEPSANGJI RAVABHAI JHALA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 11, 100 — Gujarat Talukdars' Act (VI of 1888), ss. 11, 15, 16—Talukdari Settlement Officer, order of—Appeal, second, whether competent—Order, whether operates as res judicata.

The Talukdari Settlement Officer is not a Court exercising original jurisdiction, and it cannot be said that because s. 16 of the Gujarat Talukdars' Act gives a right of appeal to the District Judge from the decision of the Talukdari Settlement Officer under s. 15 of the Act, that decision is a decree within the definition in s. 2 (2) of the C. P. C. The District Court hears the appeal as if it were an appeal from a decree of a Court from whose decision the District Court is authorized to hear appeals, but that is a specific right of appeal based on an analogy and the analogy cannot be extended further so as to entitle a party who is dissatisfied with the decision of the District Judge to take a second appeal to the High Court. [p. 589, col. 2.]

The Talukdari Settlement Officer is an administrative officer and not a Court. An order passed by him, therefore, under s. 15 of the Gujarat Talukdars' Act does not operate as *res judicata* in a subsequent suit between the parties in the Civil Court. [p. 590, col. 2.]

In considering the question of *res judicata* the Court must look to the powers of the Court in which the previous suit was instituted and not to the powers of the Court by which that suit was decided on appeal. [*ibid.*]

Appeal from an order passed by the First Class Subordinate Judge, A. P., at Ahmedabad, in Appeal No. 404 of 1921, reversing the decree passed by the Subordinate Judge at Dhandhuka, in Civil Suit No. 118 of 1920.

Mr. *H. V. Divatia*, for the Appellant.

Mr. *G. S. Rao* (with him Mr. *M. K. Thakore*), for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiffs sued for a declaration that the decision in the Suit No. 2 of 1913 before the Talukdari Settlement Officer, in appeal No. 541 of 1916 of the District Court and Second Appeal No. 919 of 1919 in the High Court, was without jurisdiction, null and void, and not binding on the plaintiffs. That the plaintiffs owned one-thirty-sixths in Tajabhai Surasanji's property in Jalia village and that they were entitled to have the shares separated. The defendants pleaded that the suit was barred on the principle of *res judicata* owing to the proceedings before the Talukdari Settlement Officer. The Trial Court held that the plaintiffs' suit was barred by *res judicata* and dismissed it. On appeal the First Class Subordinate Judge with appellate powers reversed the decision of the Trial Court on the issue of *res judicata* and sent the suit back for trial on the remaining issues.

Defendants Nos. 1 to 12 have appealed to the High Court. Defendants Nos. 1 to 12 made an application No. 2 of 1913 to the Talukdari Settlement Officer, under s. 11 of the Gujarat Talukdars' Act, for partition and separate possession of their shares in the village of Jalia, a Talukdari village, as recorded in the Settlement Register prepared under s. 5 of the Act. The present plaintiff and others disputed their title to the share claimed by them. The Talukdari Settlement Officer held the applicants to be entitled to the share specified in the Settlement Register as claimed by them. On appeal to the District Judge, under s. 16 of the Act, the decision of the Talukdari Settlement Officer was confirmed. A Second Appeal No. 919 of 1919 was filed in the High Court but was dismissed under O. XLI, r. 11. As the plaintiffs now ask for a declaration that the decision in that second appeal was without jurisdiction it is necessary for us to consider whether an appeal lies to the High Court from a decision of the District Judge under s. 16 of the Act.

In *Jamsang Devabhai* v. *Goyabhai Kikabhai* (1), it was held that the decision of the District Court on appeal from the Talukdari Settlement Officer was subject to a second appeal to the High Court. Sargent, C. J., said (page 413): "We think that the effect of the concluding words of s. 16 of Act VI of 1888 is to give the decision of the District Court on appeal from the Talukdari Officer the same character in all respects as a decree from an ordinary suit before a subordinate officer, and that, therefore, like all such decrees, such decision is subject to second appeal to this Court. This view is assisted by the concluding words of s. 21, which shows that they must, if possible, be construed so as not to affect the High Court's jurisdiction." With the greatest respect we cannot agree. The High Court has jurisdiction to hear second appeals by virtue of the provisions of s. 100 of the C. P. C., which enacts that save when otherwise expressly provided in the body of the Code or by any other law for the time being in force an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court on any of the grounds therein mentioned. Under s. 99 an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court. The Talukdari Settlement Officer is not a Court exercising original jurisdiction, and it cannot be said that because s. 16 of the Act gives a right of appeal to the District Judge from his decision, that decision is a decree within the definition in s. 2 (2) of the C. P. C. The District Court hears the appeal as if it were an appeal from a decree of a Court from whose decision the District Court is authorized to hear appeals, but that is a specific right of appeal based on an analogy, and the analogy cannot, be extended further so as to entitle a dissatisfied party to take a second appeal to the High Court.

In *Hari* v. *Secretary of State for India* (2), it was held that the appellate jurisdiction could only come into play where there had been a decision of a Court, and that although a right of appeal to the High Court was given by s. 48 (*ii*) of the City of Bombay Improvement Trusts Act from a decision of the Tribunal of Appeal if the President granted a certificate, the appeal was not competent because the Local Legislature had no power to control or affect by these Acts the jurisdiction or procedure of the High Court. Again, under s. 54 of the Land Acquisition Act I of 1894, an appeal lies to the High Court from the award of the Court in any proceedings under the Act, subject to the provisions

(1) 16 B. 408; 8 Ind. Dec. (N. S.) 751.

*Page of 16 B.—[*Ed.*]

(2) 27 B. 424; 5 Bom. L. R. 431.

of the C. P. C., applicable to appeals from original decrees. For many years appeals were admitted by the Judicial Committee of the Privy Council from appellate decisions of the High Court under that section, but in *Rangoon Botatoung Company* v. *Collector, Rangoon* (3), it was decided that such an appeal was not competent. Lord Macnaghten said (page 839*): "That section seems to carry the appellants no further. It only applies to proceedings in the course of an appeal to the High Court. Its force is exhausted when the appeal to the High Court is heard. Their Lordships cannot accept the argument or suggestion that when once the claimant is admitted to the High Court he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in course of its ordinary jurisdiction." This decision is directly in point and we must hold that the decision in *Jamsang Devabai* v. *Goyabhai Kikabhai* (1) cannot be supported.

Whether the decision of the District Court under s. 16 of the Act or the decision of the High Court, assuming a second appeal lies, bars a regular suit on the principle of *res judicata* was considered in *Malubhai* v. *Sursangji* (4).

The facts were similar to those in the case before us.

There had been an original application to the Talukdari Settlement Officer under s. 11 of the Act. From his decision an appeal was preferred under s. 16 to the District Court and from that decree there was an appeal to the High Court.

The question of the competency of the High Court to hear that appeal was considered as concluded by the decision in *Jamsang Devabhai* v. *Goyabhai Kikabhai* (1). The plaintiffs then filed a suit to obtain the final decree of a Court of competent jurisdiction declaring them to be entitled to a share of a *talukdari* estate. It was contended that the decision in the previous proceedings constituted *res judicata* at any rate so far as concerned the present litigants who were parties to those proeeedings. Jenkins, C. J. said, (page 224)†: "The law of *res judicata* is to be found in s. 13 of the C. P. C., and to make its terms applicable it must be shown that the Talukdari Settlement Officer is a Court of jurisdiction competent to try this suit. But this he clearly is not: he is an administrative officer and not a Court: and by no straining of words can he be described as a Court of jurisdiction competent to try this suit." It was further held, following *Toponidhee Dhirj Gir Gosain* v. *Sreeputty Sahanee* (5) and *Bharasi Lal Chowdhry* v. *Sarat Chunder Dass* (6) that in considering a question of *res judicata* a Court must look to the powers of the Court in which the suit was instituted and not to the powers of the Court by which that suit was decided on appeal. The correctness of those propositions cannot be disputed. Reference may also be made to s. 11, Explanation II, of the C. P. C. Consequently the principle of *res judicata* cannot apply to the previous proceedings between the parties to this suit, and the decision of the Appellate Court was right.

The appeal is dismissed with costs.

Pratt, J.—I agree.

Crump, J.—I agree.

Z. K. *Appeal dismissed.*

(3) 16 Ind. Cas. 188; 14 Bom. L. R. 833; 16 C. W. N. 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J. 276; 10 A. L. J. 271; 5 Bur. L. T. 205; 40 C. 21; 6 L. B. R. 150; 39 I. A. 197 (P. C.).

(4) 30 B. 220; 7 Bom. L. R. 821.

(5) 5 C. 832; 6 C. L. R. 305; 2 Ind. Dec. (N. S.) 1138.

(6) 23 C. 415, 12 Ind. Dec (N. S.) 276.

*Page of 14 Bom. L. R.—[*Ed.*]

†Page of 30 B.—[*Ed.*]

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 375 OF 1923.

December 19, 1924.

Present:—Mr. Justice Kanhaiya Lal.

MATA DIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Babu ANAND MADHO—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 34, applicability of—Suit against person who came into occupation with consent of landlord.

Section 34 of the Agra Tenancy Act refers to suits brought against persons whose occupation began without the consent of the landlord. It has no application to a suit in which it is found that the defendant was initially in occupation with the consent of the landlord.

Second appeal against a decree of the District Judge, Mainpuri, dated the 6th of December 1922.

Mr. *A. P. Dube*, for the Appellants.

Mr. *Baleshwari Prasad*, for the Respondent.

JUDGMENT.—The dispute in this appeal relates to plot No. 364 *khasra* measuring ·72 in *Mouza* Iknaur and the question for consideration is whether the plaintiff is entitled to treat the said land as having been held by the defendants without the consent of the plaintiff within the meaning of s. 34 of the U. P. Act II of 1901.

The land in question appears to have formed a part of a large grove, of which a portion still exists on plot No. 365 *khasra* and the rest has been denuded of trees. The allegation of the defendants was that they held the said grove land as a *muafi* tenure free from any liability for the payment of rent for over two generations and that they are not liable to ejectment. There is a finding that the land was held under a grove tenure but no finding as to when the portion in dispute was denuded of trees and brought under cultivation, and how long the defendants have been in occupation of the same, and in what capacity. In 1833 grove No. 389 old *khasra* measuring 5 *bighas* 15 *biswas* was recorded in the name of Bishan Nath as a *muafidar*. There was also a reference to the grove in the *wajib-ul-arz* of that year. In the *jamabandi* of 1873 *Fasli* grove No. 246 measuring 2 *bighas* 11 *biswas* was entered in the name of Kishori, son of Sobha Ram, and Mata Din, but it is not clear whether that plot was the same or formed a part of the old No. 389 *khasra*, and what became of the rest of the land, if it did so. In the *khasra* for 1317 *Fasli* grove no 246 measuring 2 *bighas* 11 *biswas* was again recorded in the name of Kuraru, Mehta and Gauri Shankar sons of Kishori and Mata Din and Chhotey Lal, sons of Munni. But it is not stated what happened to the rest of the land which was included in No. 389 old *khasra*. The evidence of the *patwari* shows that old No. 246/1 *khasra* measuring ·72 is now represented by No. 364 and old No. 246/2 measuring ·74 is now represented by No. 365, and that at the Settlement of 1319 *Fasli* plot No. 364 *khasra* was recorded as an occupancy holding under the cultivation of the defendants without any rent being assessed thereon. It cannot be said in these circumstances that the defendants were in occupation of plot No. 364 *khasra* initially without the consent of the landlord, and as held in *Kamta Prasad* v. *Panna Lal* (1) and *Sheogopal Pande* v. *Baldeo Singh* (2), s. 34 of the U. P. Tenancy Act has no application. That section refers to suits brought against persons, whose occupation began without the consent of the landlord. But that is not so here.

The learned Counsel for the plaintiff-respondent, however, contends that the word "land" as defined in the U. P. Tenancy, Act means land let for agricultural purposes and his argument is that this land was never let for agricultural purposes and must, therefore, be deemed in law to have been occupied, *i. e.*, brought under cultivation without the consent of the plaintiff. The complaint in other words is that the land, so held under a grove tenure and, therefore, not liable to rent, can, by reason of its having been brought under cultivation, become now liable for the payment of rent. But before that matter can be decided it is necessary to ascertain when it was so brought under cultivation and what was the nature of the tenure under which it was held before that date. The lower Appellate Court is, therefore, directed to determine after taking such additional evidence as the parties may adduce. (1) when was the land in dispute brought under cultivations (2) how long has it been held by the defendants or their predecessors-in-title and in what capacity and on what terms?

Three months are allowed for the return of the findings. Ten days will be allowed for filing objections after the receipt of the findings.

The finding of the lower Appellate Court on the issue remitted is in favour of the plaintiff-respondent. To that finding no objection has been taken. The appeal is, therefore, dismissed with costs including fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

(1) 18 Ind. Cas. 575; 35 A. 123 at p. 125; 11 A. L. J. 29.

(2) 12 Ind. Cas. 180: 8 A. L. J. 1087 at p. 1088.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1033 OF 1923.

March 4, 1925.

Present:—Mr. Justice Broadway and Mr. Justice Jailal.

THE FIRM GULAB RAI-LAHORI MAL—PLAINTIFF—APPELLANT

versus

EAST INDIAN RAILWAY COMPANY, CALCUTTA—DEFENDANT—RESPONDENT.

Railway Company—Carriage of goods—Risk Note Form "B"—Loss of goods—Wilful neglect—Burden of proof—"Robbery," whether synonymous with "theft."

Certain goods were consigned for carriage to the defendant Railway Company under Risk Note Form "B." When the wagon containing the goods arrived at an intermediate station, it was found that the seals had been broken. Fresh seals were thereupon fixed on the wagon and it was shunted to a siding. Three days afterwards the wagon was opened by the Railway officials and its contents were checked whereupon a part of the goods were found missing. In a suit by the consignee to recover the price of the missing goods:

Held, that the action of the Railway officials at the intermediate station did not amount to wilful neglect and that the plaintiff having failed to prove that the loss had been caused through theft by the Railway servants he was not entitled to recover.

The word "robbery" in the proviso to Risk Note Form "B" is synonymous with the word "theft" which appears in the earlier portion of the Risk Note.

E. I. R. Co. v. *Nathumal-Behari Lal*, 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321, *G. I. P. Railway Co.* v. *Bhola Nath-Debi Das*, 70 Ind. Cas. 854; 45 A. 56; (1923) A. I. R. (A.) 79, *Firm Gopal Rai-Phul Chand* v. *Great Indian Peninsula Railway* 82 Ind. Cas. 313; 46 A. 837; (1924) A. I. R. (A.) 621; L. R. 5 A. 575 Civ., and *B. B. and C. I. Railway Co.* v. *Ranchhodlal Chhotalal*, 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L. R. 779, relied on.

Second appeal from a decree of the District Judge, Karnal, dated the 4th February 1923, affirming that of the Senior Subordinate Judge, Rohtak, dated the 24th November 1922.

Mr. *Shamair Chand*, for the Appellant.

Kanwar *Dalip Singh*, Government Advocate, for the Respondent.

JUDGMENT.—Messrs. Sheo Chand Rai Naurang Rai of Calcutta sent 100 bags of *java* sugar to Gulab Rai-Lahori Mal at Rohtak by the East Indian Railway. A Risk Note in Form "B" was signed. The wagon containing the sugar on arriving at Buxar was found to have its seals broken. The Railway officials at Buxar took the precaution of fixing fresh seals on the wagon which was then shunted to a siding. This was on the 8th of May 1921. On the 11th of May 1921, the wagon was opened by the Railway officials and its contents checked and 31 bags of sugar were found missing. The Railway Police made an investigation of the occurrence and came to the conclusion that the loss was due to a running train theft.

Gulab Rai-Lahori Mal instituted a suit against the East Indian Railway claiming a sum of Rs. 2,470, being the price of 31 bags of sugar. The Courts below have held that the loss had taken place before the wagon arrived at Buxar and that as the consignor had signed a Risk Note Form "B" the Railway Administration was exempt from all liability.

The plaintiffs have now come up to this Court in second appeal through Mr. Shamair Chand who has contended that it was "wilful neglect" on the part of the Railway Administration, acting through its servants, not to have checked the contents of the wagon on its arrival at Buxar when the seals were found broken; and further it was wilful neglect to have left this wagon in a siding till the 11th of May with only the seals thereon. Further, it was contended that the use of the expression "robbery" in the proviso appearing in the Risk Note Form "B" was not synonymous with the word "theft" which appears in the earlier portion of the said Risk Note. On the findings arrived at by the Courts below, it is perfectly clear that the plaintiffs have failed to prove that the loss have been caused through theft by any Railway servant; and we are in agreement with the view taken that the action of the Railway officials at Buxar did not amount to wilful neglect. With regard to the third point the matter appears to us to be concluded by authority, see in this connection *E. I. R. Co.* v. *Nathumal-Behari Lal* (1), *G. I. P. Railway Co.* v. *Bhola Nath-Debi Das* (2), *Firm Gopal Rai-Phul Chand* v. *Great Indian Peninsula Railway* (3) and *B. B. and C. I. Railway Co.* v. *Ranchhodlal-Chhotalal* (4).

In this view of the case we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321.
(2) 70 Ind. Cas. 854; 45 A. 56; (1923) A. I. R. (A.) 79.
(3) 82 Ind. Cas. 313; 46 A. 837; (1924) A. I. R. (A.) 621; L. R. 5 A. 575 Civ.
(4) 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L. R. 779.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 104 OF 1924.

May 1, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett.

ANAJI VENKATESH MUJUMDAR AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 30—Criminal Procedure Code (Act V of 1898), s. 476, inquiry under—Confession made during inquiry, whether admissible against co-accused.

An enquiry was commenced under s. 476 of the Cr. P. C. with a view to ascertain whether a complaint should be lodged against an accused person with regard to a document produced by him in the course of certain judicial proceedings. In the course of the enquiry the accused made a confession implicating himself and certain other persons in the commission of the offence. As a result of the confession the accused and the persons named by him were placed on their trial for forgery and cognate offences :

Held, that the confession made by the accused in the course of the enquiry under s. 476 of the Cr. P. C. was made by him while he was in the position of an accused person, and was admissible in evidence against him under s. 30 of the Evidence Act. [p. 594, col. 2.]

Criminal appeal from convictions and sentences passed by the Sessions Judge, Belguam.

Messrs. *K. H. Kelkar*, *A. G. Desai*, *S. G. Desai*, for *H. B. Gumaste* and *S. B. Jathar*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Macleod, C. J.—The four accused were charged before the Sessions Judge of Belguam, first of all, with having conspired together and forged a document purporting to be a Will passed by one Sanganbasaveshwar Swami of Chikodi, in fovour of accused No. 3 on December 15, 1919; secondly, accused No. 3 with having fraudulently and dishonestly used the said Will as genuine by producing it in support of his claim in the Chikodi Magistrate's Court on December 23, 1921, knowing then or having reason to believe it to be a forged document; and thirdly, accused Nos. 1, 2 and 4 with having instigated and abetted accused No. 3 to so use it, and, thereby committed an offence punishable under ss. 467, 471 and 109, Indian Penal Code. The Judge convicted all the accused. Agreeing with all four assessors he found accused No. 3 guilty of forgery of the Will Ex. 13, and of using it as genuine. Agreeing with all four assessors he found accused No. 4 guilty of forgery of the Will and agreeing with three assessors and disagreeing with the fourth he found accused No. 4 abetted accused No. 3's use of the Will as genuine. Agreeing with three assessors and disagreeing with the fourth he found accused No. 2 guilty of forgery of the Will and abetting accused No. 3's use of the Will as genuine. Agreeing with one assessor and disagreeing with the other three he found accused No. 1 guilty of forgery of the Will and of abetting accused No. 3's use of the Will as genuine. He did not think there was any reason to make a difference in awarding punishment to the accused, as he thought they were all equally involved. So he sentenced all the accused to five years' rigorous imprisonment each.

Sanganbasaveshwar Swami of Chikodi died about August 9, 1921, and the Will, the subject-matter of the charge against the accused, was put forward by accused No. 3 to support his succession to the Math.

In September, 1921, one Gurushidaya applied for proceedings being taken under s. 145, Cr. P. C., with regard to the obstruction to his possession and enjoyment of a certain Survey Number belonging to the *math*. It was in the course of those proceedings that the accused produced the document which he asserted proved his title to the *math* property. While these proceedings were going on Gurushiddaya, after the Will had been produced by the third accused, charged him with having forged it. Accused No. 3 was arrested but was released on his own recognizance, and on February 27, 1922, that complaint was for some reason or other dismissed. On April 5, the Magistrate decided the proceedings under s. 145, Cr. P. C., in favour of the applicant, and directed an inquiry under s. 476, Cr. P. C., with regard to the Will which was alleged to be a forgery. On April 6, the date on which those proceedings commenced, the third accused made a statement before the Magistrate Mr. Shirali in which he confessed that the document he produced was a forged one and that he produced it with the knowledge that it was forged. He then detailed how the document came to be prepared, and it was in consequence of information then given by the third accused that the present

prosecution was instituted. The story he had told to Mr. Shirali was briefly to this effect. The Swami died on the night of August 9, 1921. He was buried on Wednesday, and on Thursday the second accused came to the *math* and took him to his house which was next door. The second accused said that the third accused had been doing *vahivat* of the *math* for many years, and that he should cause application to be made enabling him to succeed to the *math*. The third accused asked him how he could succeed when the Swami had installed a disciple. The second accused told the third accused that he would succeed if he (the third accused) said that the instalation ceremony was performed after the death of the Swami. Eight days later accused No. 2 took accused No. 3 to the house of accused No. 4, and also brought the first accused. An application was then prepared to be sent to the Collector to the effect that Sanganbasaveshwar Swami was dead and that the name of the third accused should be registered as his successor. As no answer was received another application was sent a week later. The first application was then received back with an endorsement that the third accused should have applied to the *mamlatdar*. An application was made to the *mamlatdar* and that was returned asking the third accused to apply to the village officers of the different villages direct.

Meanwhile Gurushiddaya had preferred his application, with the result that the conspirators changed their tactics and decided that the document was to be prepared. Accordingly as described by the third accused, on a date which, as far as it could be fixed, would be about December 15, 1921, the document was ready, and accused No. 3 detailed how the signatures of two persons Bhimappa and Balgauda as witnesses were obtained, while all four of the accused were sitting in the house of the second accused at Chikodi.

Now it has been objected that that confession is not admissible in evidence, and cannot be taken into consideration against the co-accused under s. 30 of the Indian Evidence Act. Section 30 says:—

"When more persons than one are being tried jointly for the same offence, and a confessson made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against th person who makes such confession."

It is difficult to see how one can avoid coming to the conclusion that this statement made before Mr. Shirali was a confession. An inquiry was commenced under s. 476, Cr. P. C., with a view to ascertain whether a complaint should be lodged against the third accused with regard to a document produced by him, and any statement made by the third accused, who was then in the position of an accused person, and liable to having a charge made against him of forgery, detailing the circumstances under which the document was forged, would amount to a confession, and the Court would be entitled to take that into consideration as against the other persons who had been jointly tried with him. The confession would have to be tested in order to ascertain whether it was voluntarily made in the first instance, but there is nothing whatever to show that there was any pressure placed upon the third accused to induce him to make the statement before Mr. Sherali. Mr. Sherali gave evidence before the Sessions Judge in which he said:—

"The proceedings ended on April 5, 1922, in my decision in Gurushiddaya's favour. My order is below Ex. 3. In that I directed further proceedings against accused No. 3 under s. 476; Cr. P. C. I communicated the order to accused No. 3. He began to cry. He said he had committed a fault at the instigation of others and began to make a statement. It was then late, so I told him to appear next day. Abut noon on April 6, 1922, he appeared and I took his statement. Accused No. 3 made the statement voluntarily. I gave him neither threat nor inducement. The statement was recorded in the vernacular by my clerk and in English by myself. The vernacular statement was then read out to him and was admitted by him to be correct. He made his signature on every page of the vernacular statement in my presence. I also initialled every page and made my signature at the end. I recorded the statement as a statement in my inquiry under s. 476, Cr. P. C., and not as a confession of an accused person. I consequently did not comply with the provisions of cl. 3 of s. 164, Cr. P. C."

It seems to me perfectly clear that Mr. Shirali was speaking the truth when he says that accused No. 3 as soon as he found

that proceedings were going to be commenced under s. 476, Cr. P. C., decided that it was no use persisting in relying on the Will, and that the safest course for him to take was to make a clean breast of what had been done, and as far as I can see there is not a word in the cross-examination of Mr. Shirali which was directed to show that Mr. Shirali as a Magistrate had been guilty of any improper conduct in conducting the inquiry under s. 476. It seems to me, therefore, that the Judge was perfectly entitled to admit this confession and to hold that in the main it was true with regard to the third accused. But it would not be justifiable, in fact the Court could not rely upon it, with regard to the other accused, if that was the only evidence against them. Therefore, the evidence given before the Sessions Judge by the other witnesses has to be considered, to see whether it affords any support in material particulars to the story which was told by the third accused to Mr. Shirali.

With regard to the third accused his contention is that he was not aware that the document he put forward was a forgery and that he was an innocent victim of the machinations of other persons. There is no foundation on the record for that suggestion, and it is difficult to believe that the third accused would have produced the document handed to him by certain persons who were anxious to secure his succession to the *math* by entering into a criminal conspiracy, without making some inquiry or without having any conversation beforehand with those persons, and without satisfying himself that the document was genuine. It must also be remembered that the evidence shows that before the Swami died one Nilkanthaswami was installed as a Swami and the third accused was perfectly well aware of that installation, and consequently the Court is entitled to conclude that when he produced his forged document in order to support his succession to the *math*, he must have known what the character of the document was. Besides there is the evidence of several witnesses to prove the co-operation of the third accused in bringing about the forgery. I think, therefore, that the third accused was certainly guilty of using a document which he knew to be forged as genuine, and that he certainly took part in procuring the signatures of the two attesting witnesses. It makes no difference really whether he was found guilty of forging the Will, or using it as genuine knowing it to be forged. The conviction on the latter charge was sufficient. * * * * * * * * * Therefore, after giving the very fullest consideration to all that has been said by the Pleaders on behalf of the accused, it seems to me that a perfectly clear case has been made on the evidence for their conviction on charges of forging a Will and using it as genuine, and abetting each other. We do not interfere with the sentences imposed on accused Nos. 1, 2 and 4 having regard to the serious nature of the offence. But with regard to accused No. 3 considering his confession and other circumstances in the case we reduce the sentence to three years. In my opinion with this exception the appeals should be dismissed.

Fawcett, J.—I agree. I would only add that accused No. 3's confession to Mr. Shirali substantially implicates himself to the same extent as the other co-accused, and that is, therefore, another reason for giving it full effect against his co-accused under s. 30 of the Indian Evidence Act.

Z. K. *Appeals dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 133 OF 1924.

October 23, 1924.

Present:—Mr. Neave, A. J. C.

MAKHDUM THATER—APPLICANT

versus

EMPEROR THROUGH JANKI PERSHAD —OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195 (6)—Sanction, grant of—Refusal to revoke sanction—Period of six months, commencement of.

A sanction cannot be said to have been "given" within the meaning of cl. (6) of s. 195 of the Cr. P. C., by a Court which did not originally grant the sanction but which merely refused to revoke that sanction when it had been granted. The period of six months mentioned in the clause, therefore, begins to run from the date of the order granting the sanction and not from the date of the order of a superior Court subsequently refusing to revoke the sanction. [p. 596, cols. 1 & 2.]

Public Prosecutor v. *Raver Unithiri*, 21 Ind. Cas 115; 26 M. L. J. 511; 15 M. L. T. 403; 15 Cr. L. J. 409, dissented from.

Tilak Ram v. *Dalip Singh*, 44 Ind. Cas. 739; 40 A. 338; 16 A. L. J. 223; 19 Cr. L. J. 387, relied on.

Criminal revision against an order of the Sessions Judge, Fyzabad, dated the 2nd August 1924, in Criminal Revision No. 31 of 1924, filed against an order, of the Magistrate, First Class, Sultanpur, dated the 15th July, 1924.

Mr. *Nazir-ud-Din*, for the Applicant.

Mr. *S. N. Sinha*, for the Opposite Party.

ORDER.—This is an application for the revision of an order passed under ss. 435-439 of the Cr. P. C., by the Sessions Judge of Fyzabad. The Opposite Party obtained on the 16th of August 1922 a sanction under s. 195, Cr. P. C., for the prosecution of the applicant under s. 471 Indian Penal Code. No action was taken by the Opposite Party for some months, and the applicant applied to the Sessions Judge to have the order of sanction revoked. On the 22nd May 1923 this application was rejected. The opposite party still held his hand for two months, and it was not till the 21st of July 1923 that he filed a complaint on the basis of the sanction in Court. For some reason the case was not taken up. Three months later on the 24th October the complainant applied to this Court under s. 195 (6) for an extension of time. This application was rejected on the ground that under the revised Code the Court had no jurisdiction to extend the time. In consequence of the order of this Court, the Magistrate discharged the present applicant, holding that the case had become barred by time. The opposite party went in revision to the Sessions Judge, who relying on a ruling of the Madras High Court in *Public Prosecutor* v. *Raver Unithiri* (1) held that the date from which the six months' limitation prescribed in s. 195 (6) begins to run was the date on which the application for revocation of the sanction was rejected by this Court, that is to say, the 22nd of May 1923, and that consequently when the complaint was filed on the 22nd July 1923, it was within time.

The applicant now seeks to have the order of the Sessions Judge set aside. He cites a ruling of the Allahabad High Court in *Tilak Ram* v. *Dalip Singh* (2). In this the ruling relied on by the Sessions Judge has been dissented from. I agree with the view taken by the Allahabad High Court that it is impossible to hold "on the clear meaning of the words of cl. 6 of s. 195 that the sanction can possibly be said to have been given", by the Court which did not originally grant the sanction, but which merely refused to revoke that sanction when it had been granted. The opposite party has been unable to give any satisfactory explanation of his inordinate delay in filing his complaint. The application is allowed, the order of the Sessions Judge is set aside, and that of the Magistrate is restored.

Z. K. *Application allowed.*

(1) 24 Ind. Cas. 145; 26 M. L. J. 511; 15 M. L. T. 403; 15 Cr. L. J. 409.

(2) 44 Ind. Cas. 739; 40 A. 338; 16 A. L. J. 223; 19 Cr. L. J. 387.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 86 OF 1924.

December 8, 1924.

Present:—Mr. Justice Marten and Mr. Justice Pratt.

In re MARUTI VITHU—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), ss. 345, 435—Record called by District Magistrate for transfer of case to another Magistrate—Magistrate, former, whether has jurisdiction to record composition.

When a District Magistrate calls for the papers of a case under s. 435 of the Cr. P. C. with a view to withdraw the case from the file of the Magistrate before whom it is pending and to refer it for trial to another Magistrate, the case is no longer on the file of the former Magistrate and his jurisdiction over the case is suspended. An order made by that Magistrate recording a composition of the offence and acquitting the accused under s. 345 of the Cr. P. C. after the order of the District Magistrate calling for the record is void and of no effect.

Criminal reference made by the District Magistrate, Nasik.

JUDGMENT.—The complainant filed a complaint on July 2, 1924, against two accused of various compoundable offences. On July 15, 1924, the District Magistrate in revision called for the papers, under s. 435 of the Cr. P. C., with a view to withdraw the case from the First Class Magistrate and refer it for trial to another Magistrate. As a matter of fact he did so order on August 15. But in the meanwhile on July 31, the Magistrate recorded a composition of the offence and acquitted the accused under s. 345, Cr. P. C.

The District Magistrate refers the case to us on the ground that the jurisdiction

of the First Class Magistrate, Mr. Deshpande, ceased after the order had been made calling for the papers. We think the contention of the District Magistrate is correct. When the order was made calling for the record and proceedings with a view to withdrawing the case and transferring it to another Magistrate the case was no longer on the file of the Magistrate and his jurisdiction was suspended. We, therefore, think that the order of acquittal made on July 31 is void and of no effect.

We, therefore, return the record and proceedings with a direction that the case should now proceed before the Court of the Sub-Divisional Magistrate at Nasik to whom it was referred by the District Magistrate. This is, of course, without prejudice to the rights of the parties to effect a fresh composition before that Magistrate.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 622 OF 1924.

December 2, 1924.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Sulaiman.

AJODHIA PRASAD AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 99, 100—Attack, previous knowledge of—Right of private defence, whether exists.

Where a party of men become aware that they are about to be attacked and they know that they can avoid the attack by dispersing or running away, it is their duty to get out of the way of their enemies until the anger and resentment of the latter have subsided. If, however, they have a reasonable belief that if they separate they will be pursued and attacked individually they have every right to keep together or to come together and to repel the attack when it is made with every means in their power. [p. 599, col. 2.]

Accused received information that they were about to be attacked by a hostile section in the village. They believed that if they separated they would be pursued and attacked individually and under this belief they collected together and awaited the attack. Their enemies then appeared on the scene and one of them fired a pistol and hit one of the accused. One of the accused then fired a pistol and hit the man who had first fired, and then a fight with *lathis* commenced during the course of which one member of each party was killed :

Held, that under the circumstances of the case the accused were entitled to exercise the right of private defence and it could not be said that they had exceeded that right. [*ibid.*]

Criminal appeal from an order of the Sessions Judge, Shahjahanpur, dated the 8th of July 1924.

Mr. *H. Cecil Desanges*, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.—These are two appeals against convictions for rioting in a fight which is said to have taken place between two rival factions at the village of Kundri in the Shahjahanpur District. There are in all ten appellants before us. There appears to have been a long standing quarrel between what in this Court has been called group A and group B. Group A in this Court consists of Ajudhia Prased, Misri Lal, Chetram, Jwala Prasad and Jangi Lal: group B of Hardwari, Lal Bahadur, Bhagwandin, Gokul and Tika Ram. All of these people are the appellants before us. The first four persons in group A are represented by Mr. Desanges. Jangi Lal was not represented but at our request Mr. Desanges was good enough to bear his interest in mind and has at the end discussed the case of Jangi Lal separately with a view to assist him. Group B are represented by Mr. Jamini Mohan Banerji.

There is no doubt that for a long time there has been extremely bad blood between these two parties represented by Ajudhia Prasad as the ring leader on the one side and Hardwari on the other and their relatives and friends. There had been previous litigations and criminal proceedings, but on the 8th of April last there was an encounter which we are told is still the subject of a judicial enquiry, with the result that a man named Jagannath belonging to faction A was so injured that he died four days later. In our opinion that circumstance, the injury of Jagannath on the 8th, has an important bearing on what took place on the 10th of April. We may pause for a moment to say that we are satisfied that both sides have told falsehoods about this matter, that group A have deliberately concocted a story as to Ajudhia Prasad being dragged from the neighbourhood of Dwarka's sitting room towards the threshing floor of Hardwari whilst on Hardwari's side there has been a deliberate fabrication of evidence putting the wounding of Jangi Lal as the act of a man named Puhup Ram. There are three or four witnesses who are independent in the sense that they are not relatives of any of the accused nor do they appear to be members of group A or group B, but with the solitary

exception of a man named Tilok it is obvious on reading the evidence of the so-called independent witnsses that their sympathies can be plainly marked out as leaning either towards group A or group B. Tilok, however, holds the balance very evenly and we attach very considerable weight to his evidence and from his evidence and the evidence of the other witnesses in the case we are able to construct with sufficient certainty and safety what in fact in our belief took place. It should be understood that group A and group B in this village undoubtedly consisted of more persons than are before us to-day. We have no doubt that group A were vengeful and resentful because of the injuries to Jagannath which had been received by him two days before and that a number of persons adherent to group A did gather at Dwarka's sitting room either about midday or in the early afternoon. News of this gathering, we believe, was communicated to Hardwari and it may be that Hardwari on learning that a considerable number of men, certainly more than 10 and probably less then 20, had gathered at Dwarka's sitting room, felt it prudent in the circumstances to get his brothers and friends also to come to his threshing floor. But however that may be we have no doubt whatever that this fight arose from an advance made by group A party towards the threshing floor of Hardwari. It is common ground and agreed and we have been most precise and careful about this that the fight took place on a piece of waste ground belonging to Hardwari and at a distance of about 40 paces from the sitting room of Dwarka and about 30 paces or less from that of Hardwari. In other words the fight took place at a distance of 2/3 from the sitting room of Dwarka and 1/3 from the threshing floor of Hardwari. There is one point on which the evidence is perfectly clear and that it is that there was some preliminary abuse and a reference by Ajudhia Prasad to what had been done to Jagannath on the 8th and then before any *lathi* blow was struck, Jangi Lal fired a pistol. There is no doubt that the bullet from that pistol hit Shamacharan. On the evidence we accept what Tilok says, that thereupon Hardwari, who had come down from his threshing floor, turned back, grasped a pistol and fired it in the direction of and in fact hit Jangi. Thereupon a *lathi* fight became general. No more pistol shots were fired on either side and in the result Pimmi Singh, an adherent of the A group, was so seriously injured in this fight that he died on the same day, the 10th of April. Shamacharan of B group, the man who was wounded by Jangi was trampled upon in the fight and received other severe injuries and died of pneumonia on the 19th of April.

There are two principal questions which we must settle at the outset. The first is who were the participants in this fight who are proved by the evidence beyond any reasonable doubt to have been engaged in it; secondly are there any circumstances to exonerate any body either in group A or group B individually or collectively?

Turning now to group A, as we have said, there is no doubt that this encounter was started by Jangi firing the shot and we have no doubt whatever that Ajudhia Prased was the ring leader or at all events a very important person in this fight. Jangi and Ajudhia Prasad also received injuries which cannot be counted for except on the ground that they were present.

It has been pressed upon us that Misri Lal was not present in the capacity of a combatant and indeed he asserted that he received the slight injury that he did when he was engaged in helping his injured brother Ajudhia Prasad. We have a great deal of doubt about that story but Misri Lal has had the advantage of evidence given in his favour by Binda who states that Misri Lal got hurt when helping his brother, and Jhabu who says also that Misri Lal was not in the fight. With some hesitation we have decided to give Misri Lal the benefit of the doubt.

As regards Chetram and Jwala Singh, they stand on quite a different footing. It is agreed that they are not relatives of any of the members of group A. They in fact live in a different village. They admit that they were present on the 10th of April in Kundri. They explain their presence by saying that they were indebted to Ajudhia Prasad and they came to the village on business without any knowledge of any impending *mar pit* and that they did nothing whatever in the matter at all. We have gone through the evidence very carefully with regard to these men and there does seem to be evidence in their favour, as for instance of Komal, who says that Chetram did not use a *lathi*,

Binda said that Chetram and Jwala Singh took no part in the *mar-pit* and generally there seems to be very little evidence against them. In these circumstances we are acquitting them also.

The result, therefore, as far as it concerns group A, is that we uphold the conviction as regards Ajudhia Prasad and we do not interfere with the sentence of 10 years' rigorous imprisonment passed upon him.

Jangi has been sentenced to 10 years' rigorous imprisonment. In our opinion that is not sufficient punishment. He commenced the affray by the firing of a pistol and we regard the importation of a firearm into a village faction fight of this character as a most serious matter. Although the wound inflicted by him on Shama Charan was not in a vital spot, it brought Shamacharan to the ground and may have been the indirect cause of his death as it led to his receiving injuries from which he might otherwise have escaped. Organised fights with each side armed with *lathis* are grave infractions of the law and frequently result in the death of one or more combatants. In this case the introduction of the pistol was an added aggravation and we are of opinion that transportation for life is the only appropriate sentence in Jangi's case.

We now come to group B. The position has been taken as regards group B, quite boldly that the whole of these men are entitled to acquittal on the ground that they acted in self defence only. In the lower Court they gave no hint of any such defence but they are entitled to have it examined and if it is proved to us that that was the attitude of Hardwari and his adherents they are entitled to claim their right to act in the way they did. We must summarise what we have previously said. We have already expressed our relief that the origin of this *mar pit* on the 10th of April was due to the beating which group B had given to Jagannath on the 8th. With the rights and wrongs of that beating we are not in any way concerned here at all. But in our belief that brought about in the minds of the A group a determination for revenge and that when they gathered together at Dwarka's sitting room about mid-day or a little after that on the 10th they meant to take that revenge and meant to beat Hardwari and his brothers. We accept the evidence of the boy Bhudar who says that he went and told Hardwari what had been happening as regards the gathering of men at Dwarka's sitting room and we have very little doubt that Hardwari on receiving this information collected his forces. The Judge also seems to have thought that Hardwari did this but that Hardwari was doing what was wrong. That in our view is not entirely a correct view. If Hardwari knew that he could have escaped from these people and if his brothers and adherents were aware that they could escape also there would have been a duty on them to get out of the way until the anger and resentment had lessened. But if they had a reasonable belief that if they separated they would be pursued and individually beaten they had every right to keep together and that seems to be the view that they took, and in the circumstances of the feeling as between these two factions they seemed to have felt it safer for them not to be separated. We have already said that we believe that the attack proceeded from group A and we are confirmed in that view by the undoubted circumstance that the fight took place very much nearer to the threshing floor of Hardwari than the sitting room of Dwarka. In other words group A advanced upon group B. We have no doubt that Jangi fired the first shot and we believe that Hardwari had not then at that moment a pistol in his hand, but he went back and took one from the threshing floor. We think that it is a very unfortunate circumstance that fire-arms were used in this village fight, but we are of opinion that when Jangi had fired at some one in group A and in fact did wound Shamcharan, Hardwari had a right in law to fire back and did fire back and did wound the right man, Jangi. Having decided that important point it follows that if Hardwari had a right to repel the attack of Jangi by pistol the rest of his party had a right to repel by *lathis* the attacks made upon them by *lathis*. That being so, although the defence of self-protection was not raised at all in the lower Court, we believe on a very careful perusal of the evidence that we have come to what is the right and the proper conclusion in this matter. This case has occupied a full day's hearing and we have endeavoured to dissect the evidence and to arrive at what we think to be the just and proper conclusion. We have already dealt with group A. As regards group B the order is that the sentences passed on

Hardwari, Lal Bhadur, Bhagwan Din, Gokul and Tika Ram must be set aside and those five persons released unless it should happen that they are being detained in connection with any other criminal charge. Turning now to group A as regards Misri Lal, Chet Ram and Jwala Singh the convictions against them are also set aside and they must be released subject to their being detained in respect of any other charge. The appeal of Ajudhya Prasad is dismissed and his sentence confirmed and the sentence passed upon Jangi Lal is enhanced to transportation for life.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 307 OF 1924.

July 25, 1924.

Present:—Mr. Justice Marten and Mr. Justice Kincaid.

RANCHHOD SURSANG AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 34, 114, 307—S. 34, application of—Charge of substantive offence—Abetment, conviction for, whether legal.

Where several persons conspire to kill another and one of them shoots him down, all the conspirators are guilty under s. 34, Penal Code. [p. 603, col. 1.]

Obiter:—A man charged with the substantive offence can be rightly convicted of that offence read with s. 114 of the Penal Code, although not charged with it. [p. 601, col. 1.]

Emperor v. *Barendra Kumar Ghose*, 81 Ind. Cas. 353; 38 C. L. J. 411; 28 C. W. N. 170; (1924) A. I. R. (C.) 257; 25 Cr. L. J. 817, followed.

Emperor v. *Nirmal Kanta Roy*, 24 Ind. Cas. 340; 41 C. 1072; 15 Cr. L. J. 460; 18 C. W. N. 723 and *Emperor* v. *Profulla Kumar Mazumdar*, 74 Ind. Cas. 267; 50 C. 41; (1923) A. I. R. (C.) 453; 24 Cr. L. J. 763, dissented from.

Criminal appeal from conviction and sentence passed by the Sessions Judge, Broach.

FACTS.—There were two factions in the village V, one headed by the accused No. 1, *R*, and the other by one *N*, the friend of the complainant. As a result of a dispute between *N* and *R* about certain property feelings ran high, and when an open house site near the house of *S*, accused No. 2, was put up to public auction by Government on October 22, 1923, *N* outbid *S* and secured it for himself. This gave a fresh umbrage to the party led by *R*. Two days later both parties were regaling themselves at the houses of *N* and *S* respectively on account of the Manekthari Punem festivities, and when the party at *N's* house broke up, the complainant accompanied by *N*. happened to pass by the house of *S*. On seeing them *R* came out armed along with *S* and another (accused No. 6) and when they came near *R* fired full in the face of the complainant who screened his face with the *tapeli* he happened to be carrying in his hand at the time. One of the shots, however, got into his right eye and put it out while others hit him in his face, chest and arms. He fled for his life and on being pursued by accused Nos. 1, 2 and 6 took shelter in the house of *N*. On being removed to the hospital his condition grew worse and his dying declaration was recorded. Ultimately, however, he recovered, and the accused were put on their trial for offences under ss. 148, 149 and 307 of the Penal Code. The Sessions Judge found *R*. guilty of an offence under the second part of s. 307 and sentenced him to transportation for life. Accused Nos. 2 and 6 were convicted under s. 307 read with s. 34 or s. 114 of the Penal Code, and were sentenced the first to rigorous imprisonment for five years and a fine of Rs. 500, and the second to rigorous imprisonment for two years and a fine of Rs. 200.

The accused thereupon appealed to the High Court.

Mr. *Jinnah*, (with him Mr. *M. K. Thakore*), for Accused No. 1.

Mr. *G. N. Thakor*, (with him Mr. *M. K. Thakore*), for Accused Nos. 2 and 3.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Kincaid, J.—[After dealing with the facts of the case, his Lordship agreed with the Sessions Judge as to the findings of fact and held that the appellants Nos. 2 and 3 conspired with appellant No. 1 to shoot the complainant. He then proceeded :—]

I now turn to the legal points in the case, which are of considerable importance. The first point raised by the learned Advocate was that his clients, appellants Nos. 2 and 3, had been charged under ss. 148, 149 and 307, but had been convicted under

s. 114 read with s. 307. The learned Counsel next argued that to charge a person with a substantive offence and to convict him on a charge of abetting that offence was illegal and afforded a good ground for re-trial.

In support of his contention the learned Advocate quoted the cases of *Reg.* v. *Chand Nur* (1) and *Emperor* v. *Raghya Nagya* (2). I cannot find any such dictum in the two cases. As regards the first of these two cases, there is not the slightest doubt but that the accused had in the lower Court been convicted not under s. 114 read with s. 302 but under s. 109 read with s. 302. The sections are not given, I admit, in the report; but from the judgment itself it is clear that the accused was charged with murder, but was afterwards held not to have been present at the commission of the offence. The accused was convicted of abetment of murder. It is clear that such a conviction could only have taken place under s. 109 read with s. 302.

The facts in *Emperor* v. *Raghya Nagya* (2) are not so clear, but as the learned Chief Justice in his judgment held that he was bound by the decision in *Reg.* v. *Chand Nur* (1), I must come to the conclusion that there, too, the Judge of the lower Court convicted the accused not under s 114 read with s. 302, but under s. 109 read with s. 302.

We are, therefore, not bound, in my judgment, by any previous decision of this Court. Speaking for myself, I can see no reason why a person who is charged under s. 302 cannot be tried and convicted, although he is not charged with it, under s. 114 read with s. 302. A man so charged and so convicted would not in any way be misled in his defence; for he is punishable under s. 114 not as a mere abettor but as a principal. I, therefore, hold that a man charged with the substantive offence can be rightly convicted of that offence read with s. 114, although not charged with it.

In this case, however, the circumstances are different. The appellants were not charged merely with the substantive offence and convicted under s. 307 read with s. 114, but they were charged under ss. 148 and 149 and s. 307. In other words, the accused were charged in that they were members of an unlawful assembly, that the unlawful assembly had a common object, and that in pursuance of the common object Ranchhod committed an offence under s. 307. The lower Court has held that there was no unlawful assembly, because there were not five persons present. It has held that there were three men who had a common object, and that in pursuance of that common object, Ranchhod committed an offence under s. 307. Now when five persons are not present, there can be no unlawful assembly: so there can be no conviction under s. 148 or 149. But under s. 238 of the Cr. P. C. it is laid down:

"When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it."

Now is there any offence which the particulars in the charge minus the presence of five persons went to make up? The lower Court found the accused guilty under ss. 114 and 307.

The learned Counsel has contended that a man may be a member of an unlawful assembly without being guilty of abetment. In other words, he may have joined the unlawful assembly innocently, and by continuing in it although aware of the facts which render it unlawful, may become liable under s. 142, Indian Penal Code. Now that is an exceptional case, and the aid of s. 142 has not been invoked here. The definition of an unlawful assembly is given in s. 141. If we turn to cl. 3 we find the words "An assembly of five or more persons is designated an 'unlawful assembly,' if the common object of the persons composing that assembly is to commit any mischief or criminal trespas, or other offence." Now if five persons assemble with the common object of committing an offence, they clearly engage in a conspiracy to commit that offence; in other words, they come not only within the four corners of s. 141 but of s. 107. When three persons assemble with the common object of committing an offence, they are not an unlawful assembly but they do engage in a conspiracy to commit that offence. In other words, there are not present all the particulars which go to make an offence under s. 148 or 149, but there are present the particulars

(1) 11 B. H. C. R. 240.
(2) 81 Ind. Cas. 959; (1924) A. I. R. (B.) 432; 26 Bom. L. R. 323; 25 Cr. L. J. 1135.

which go to make an offence under s. 114 read with the substantive section.

The learned Counsel, however, has argued that this reasoning does not advance the matter, for s. 238, Cr. P. C., only refers to minor offences, and that the offence under s. 307 read with s. 114 is not a minor offence as compared with one under s. 307 and s. 149. This argument is not without weight, although, as it seems to me, a conspiracy of six persons to murder is more grave than one of three persons and an abetment is a minor offence as compared with the substantive offence. It must also be remembered that our power to set aside the charge is limited by s. 232 and s. 537, Cr. P. C. Section 232 runs as follows:—

"If any Appellate Court, or the High Court in the exercise of its powers of revision or of its powers under Ch. XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit."

Section 537 runs as follows:—

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Ch. XXVII or on appeal or revision on account—(*a*) of any error, omission or irregularity in the complaint, summons, warrant, charge,...judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code.....unless such error, omission, irregularity, want or misdirection has. ....occasioned a failure of justice."

Now where an accused person has been charged with one offence consisting of several particulars, a combination of some of which only constitutes a complete offence, and such combination is proved, but the remaining particulars are not proved, and he is convicted of such offence although not charged with it, can he be said to have been misled in his defence by an error in the charge or can it be said that such an error in the charge occasioned a failure of justice? I think not; for every particular of the offence of which he was convicted was present in the offence with which he was charged.

In any case, however, the accused, as it seems to me, could have been and indeed were convicted under s. 307 read with s. 34. The learned Advocate for the appellants Nos. 2 and 3 has relied upon the case of *Emperor* v. *Nirmal Kanta Roy* (3) and the case of *Emperor* v. *Profulla Kumar Mazumdar* (4). In the former case the learned Judge (Stephen, J.) held that where of two men one fired and killed a third person and the other fired and missed him the latter could not be found guilty under s. 302 read with s. 34. To quote the Judge's words (page 1088*):—

"In this case the killing of Nripendra was, according to the evidence, done by one person who was not the accused. It was, therefore, not done by several persons and I do not see how the section can apply. The only act he can be liable for under the section is one done by several persons of whom he was one, that is by the man who escaped and himself."

This view was followed in *Emperor* v. *Profulla Kumar Mazumdar* (4). The learned Judges, however, seem to have overlooked s. 9 of the Indian Penal Code which in my opinion would have removed the difficulty felt by Stephen, J. Section 9 runs as follows:—

"Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number."

If we turn then to s. 34 and read it in the light of s. 9, we can interpret it as follows:—When a criminal act is done by one or more persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

The question was recently exhaustively considered in *Emperor* v. *Barendra Kumar Ghose* (5) and Stephen, J.'s view was overruled as unduly narrow. Richardson, J., put the case in the following words (page 576†):—

"Prove the common intention of the persons present at the commission of the offence and all would be equally guilty of nothing less than that offence. If death were the result of the act or series of acts of one out of several confederates, the act would be done by them all within the

(3) 21 Ind. Cas. 310; 41 C. 1072; 15 Cr. L. J. 460; 18 C. W. N. 723.

(4) 71 Ind. Cas. 267; 50 C. 41; (1923) A. I. R. (C.) 453; 24 Cr. L. J. 763.

(5) 81 Ind. Cas. 353; 38 C. L. J. 411; 28 C. W. N. 170; (1924) A. I. R. (C.) 257; 25 Cr. L. J. 817.

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†Page of 38 C. L. J. -[*Ed.*]

meaning of s. 34. If death followed the different acts of different confederates at the same time and place, then again s. 34 would probably suffice. Every confederate would be regarded as having done every criminal act and would, therefore, be liable as if he had done them all alone."

For the above reasons I hold that there was no legal defect in the conviction by the learned Judge of the lower Court. I have already stated that I entirely agree with the learned Judge's very careful finding on the facts of the case.

Coming to the question of sentence, the learned Advocate has urged that at any rate the appellant No. 2's sentence of five years should be reduced to the two years inflicted on appellant No. 3. At the same time he begged us to consider whether the sentence passed on appellant No. 3 should not also be reduced. For my part I cannot say that the sentence errs in any way on the side of undue severity. Had the shots of appellant No. 1 taken effect, both the appellants Nos. 2 and 3 would have been in grave danger of their lives. The reason why the learned Judge inflicted a higher sentence on appellant No. 2 is obvious. It was in his house that the conspiracy was hatched: it was his house which afforded a hiding place from which the would-be murderer set forth to shoot Nathuram.

I have no hesitation, therefore, in confirming the convictions and sentences on all the three appellants, and I dismiss their appeal.

Marten, J.—[After discussing the facts of the case, his Lordship proceeded as follows:—]

I now turn to the important point of law involved as regards accused Nos. 2 and 6. It is argued that an accused charged under s. 307 with an attempt to murder cannot, as here, be convicted under that section as read with s. 34 or s. 114, unless ss. 34 and 114 or one of them are expressly mentioned in the charge. Now it is important to remember here what the charge was, and also the finding by the Court. I have already stated what that finding was. As regards the charge, it was not only under s. 307 but was also under ss. 148 and 149. But to avoid any misconception, I wish to make it perfectly clear that in my opinion there were separate and alternative charges under ss. 148 and 307. In other words, it was quite permissible to convict under s. 307, as happened in the case of accused No. 1, although the charge failed under s. 148. In effect then the charge was that these three accused, Nos. 1, 2 and 6 assembled with a common object or intention of murdering Nathuram, and that this was to be effected by accused No. 1 shooting at Nathuram, which accused No. 1 in fact did and thereby caused grevious hurt, and that accordingly all the accused were guilty of an attempt to murder. So the charge alleged a common presence: a common object: the actual slaughter to be effected by one: and the consequence in law, the criminal offence of an attempt to murder.

Accordingly accused Nos. 2 to 6 knew that they were charged with attempt to murder, although the actual shots were admitted by the Crown to be fired by accused No. 1 alone. They also knew that as they were charged with a common object or intention along with accused No. 1, this, if proved, might make them criminally liable under s. 34 subject to the question of construction which I will mention later. Or else that their acts would amount to a conspiracy and hence to abetment under s. 107 (2) in which case they might be liable to be convicted as if they were principals under s. 114. As to this, I wish to make it perfectly clear that if I thought here that this was a case of an accused being charged with one offence and convicted of another, or if I thought there was the slightest reason to suppose that the accused were actually misled in their defence, I would unhesitatingly join in setting aside the conviction, and if necessary in ordering a re-trial. I in no way depart from the ordinary view of the criminal law in this respect, which recently found expression in *Emperor* v. *Appay Baslingappa* (6). There Mr. Justice Covaji and myself set aside a conviction where a man who had been charged with abetment of murder was acquitted of that charge but was then convicted by the learned Judge of causing disappearance of the evidence of offence under s. 201, when in point of fact there was nothing in the charge on the point, nor was the opinion of the assessors even asked upon it.

But here, as I have already endeavoured to point out, the charge told the accused plainly what the case was against them. And that they were not in fact misled

(6) 81 Ind. Cas. 938; 25 Bom. L. R. 1318; (1924) A. I. R. (B.) 246; 26 Cr. L. J. 394.

appears also from the arguments advanced by Mr. Manilal K. Desai, the Pleader for accused Nos. 1 and 2, in his summing up, *viz.*, "Accused Nos. 3, 4 and 5 in any case cannot be held responsible for any conspiracy or abetment. Tapeli is a concoction. Nor has accused No. 2 abetted the firing of the gun by accused No. 1," and the Public Prosecutor urged in reply. "All the accused conspired with accused No. 1 and so all are guilty of the offences charged." If then there was nothing more in the case, it might be said that even if it was an error that no specific mention was made in the charge of s. 34 or s. 114 still it was a defect which could be cured under either s. 232 or s. 537 of the Cr. P. C., as no miscarriage of justice had resulted, nor had the accused been misled in their defence, nor had the point been raised at the trial.

But was it an error not to mention s. 34 or s. 114 specifically? In the first place, s. 34 is a rule of law and not an offence in itself. It appears in a Chapter headed "General Explanations" which contains (*inter alia*) various definitions. Section 34 itself runs:—

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

It is said, however, that in the present case the act was the firing of the gun, that it was done by one man alone, and that accordingly it was not done by several persons within the meaning of s. 34, and that accordingly that section does not apply. The learned Advocate for accused Nos. 2 and 6 pressed this point of law strongly on us, and cited some authorities in Calcutta to establish his views. But the Court pointed out that there was a recent case in Calcutta which reviewed all the previous authorties and, which being a decision of the Full Bench of Calcutta, would be binding on that Court: *Emperor* v. *Barendra Kumar Ghose* (5). Counsel were good enough to get this authority for the Court. I regret I cannot give a reference to the authorised reports, because apparently there is as much delay in Calcutta in issuing the authorised reports as we have in our own Presidency. It is regrettable that although that case was decided as long ago as September 26, 1923, we are unable to get the authorized report by the end of July 1924.

In that case there was a reference under the Letters Patent against a charge to the Jury by Mr. Justice Page at the High Court Sessions. I should state that it was a case where some armed men entered a post office, and one or more of them shot the Post Master. The accused alleged that he was on watch outside the post office at the time. The prosecution case was that he went inside, but it appears to have been uncertain who actually fired the fatal shot. The accused was charged under s. 302 and 394. There was no charge under s. 34 or 114. The charge to the Jury was this (p. 173*):—

"Therefore in this case if these three persons went to that place with a common intention to rob the Post Master and if necessary to kill him and if death resulted, each of them is liable whichever of the three fired the fatal shot.

"If you come to the conclusion that these three or four persons came into the Post Office with that intention to rob and if necessary to kill and death resulted from their act, if that be so, you are bound to find a verdict of guilty.

"I say if you doubt that it was the pistol of the accused which fired the fatal shot, that does not matter. If you are satisfied on the other hand that the shot was fired by one of those persons in furtherance of this common intention, if that be so then it is your duty to find a verdict of guilty."

The Full Bench reference was heard by five Judges including Mr. Justice Page. The unanimous finding was that there was no misdirection and that the balance of authority and reason was against the limited interpretation placed on s. 34 of the Indian Penal Code in *Emperor* v. *Nirmal Kanta Roy* (3).

Now I do not propose to discuss the authorities which the learned Judges in the Full Bench case exhaustively considered. They number altogether over 200. Nor is it necessary for me to read extracts from their judgments. I am content to say that with great respect I entirely concur in the result which they have arrived at. It may, however, be observed that apparently they have arrived at that result quite irrespective of s. 9 of the Indian Penal Code which section

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we mentioned to Counsel for consideration. In reply it was urged that to apply s. 9 of the Indian Penal Code to s. 34, would be adopting a most violent construction or application of s. 9. But to do so is only to give an interpretation to s. 34 which the Full Bench of the Calcutta High Court has arrived at quite irrespective of s. 9. After all what does s. 9 say? "Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number." If then in s. 34 the words "by several persons," which in fact import the plural are also to be deemed to include the singular, unless the context is to the contrary, then surely it is permissible to read the section as being in effect as follows, *viz.* "When a criminal act is done by one or more of several persons in furtherance of the common of intention all, each of such several persons is liable for that act in the same manner as if it were done by him alone."

In this connection one must always remember that in a Code you have first of all to turn to the definitions which are used. If one forgets to do so, one may be trapped into a mistake and after all it is only fair to the draftsman to try and understand his mind and the intentions, with which he has drafted any particular documents, so that one may appreciate his expressions, and none the less so when for brevity he uses one particular expression to include one or more, what I may call, sub-expressions.

It follows, therefore, that in my judgment the conviction by the learned Judge, *viz.*, under s. 307 read with s. 34 or s. 114, can at any rate be sustained as being under s. 307 read with s. 34. The mere fact that the judgment was in the alternative is immaterial under s. 367 (2) of the Cr. P. C.

But in deference to the arguments which have been addressed to us, I think I should deal shortly with s. 114. My learned brother has pointed out that this case is entirely diffent from *Emperor* v. *Raghya Nagya* (2) and *Reg.* v. *Chand Nur* (1). In the latter case the party accused of abetment was not present, and the real ground on which the conviction was set aside was that the Court thought that the defence was not given fair notice of the charge actually brought against them. What the learned Judges said there is (p. 241*):

"When a man is accused of murder, he may not be conscious that he will have to meet an imputation of collateral circumstances constituting abetment of it, which may be quite distinct from the circumstances constituting the murder itself."

So, too, in the case before Sir Norman Macleod and Mr. Justice Shah, there was a doubt whether the woman was present at the offence as well as the man who actually did the deed. I have no doubt that is why the Appellate Court thought that the proper charges should be in the alternative *viz.*, under s. 302 read with s. 109 or s. 114. But I am not prepared to extend that case to a case like the present where the accused were in fact present, and were charged with being present and were also charged under ss. 148 and 149, *viz.*, with a common object and a common intention of an attempt to murder in a particular manner.

I should have mentioned that the Calcutta Full Bench will in due course come under review by their Lordships of the Privy Council, as a certificate of appeal has been granted by the Calcutta High Court, as appears from *Barendra Kumar Ghose* v. *King-Emperor* (7). It may be, therefore, when we have the advantage of the decision of the Privy Council in that particular case, that it may become a question whether these two ealier Bombay cases should be reviewed by a Full Bench.

But I repeat that the real test in my opinion is whether the accused fairly knew the charge they had to meet. In the present case I think they did, and that the actual conviction was justified under the procedure in force in this country.

I accordingly agree with my learned brother in thinking that this appeal should be dismissed. I have nothing to add to what he has already said on the question of sentence.

K. S. D. & N. H. *Appeal dismissed.*

(7) 83 Ind. Cas. 580; 28 C. W. N. 377; 39 C. L. J. 1; (1924) A. I. R. (C.) 545; 26 Cr. L. J. 52.

*Page of 11 B. H. C. R.—[*Ed.*]

CALCUTTA HIGH COURT.

UNDEFENDED CRIMINAL APPEAL No. 34 OF 1925[1]

March 16, 1925.

Present:—Mr. Justice Mukerji and Mr. Justice Duval.

SARODA CHARAN MISTRI AND ANOTHER —ACCUSED

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 307, 439—Trial by Jury—Disagreement between Judge and Jury—Reference to High Court, when to be made—Failure to make reference—Power of High Court to direct that reference should be made.

It is ordinarily a matter entirely within the discretion of the Sessions Judge as to whether he should or should not make a reference to the High Court under s. 307 of the Cr. P. C. This discretion, however, should always be exercised when the Judge thinks that the verdict is not supported by the evidence; it is the only way in which a miscarriage of justice by a perverse verdict of a Jury can be remedied by the High Court. It is not necessary that before making a reference the Sessions Judge should be satisfied that the verdict is perverse, it is sufficient that he should be clearly of opinion that a reference is necessary for the ends of justice If in a case in which for the ends of justice a reference is necessary the Sessions Judge fails to make the reference and thus deprives the High Court of an opportunity to deal with the case on its merits, he does something more than merely acting in the erroneous exercise of his discretion. He fails to exercise his jurisdiction and this failure operates to the prejudice either of the Crown or of the accused, and it is well within the power of the High Court under s. 439 of the Cr. P. C. to direct the Sessions Judge in such a case to submit the case to the High Court for its consideration under s. 307 of the Cr. P. C. [p. 607, cols. 1 & 2.]

Appeal against an order of the Sessions Judge, Backarganj, dated the 23rd December 1924.

JUDGMENT.

Mukerji, J.—It is difficult to comprehend the exact import of the order which the learned Sessions Judge has passed in this case. His summing up was a perfectly fair one, and as far as one can say from a perusal of the heads of charge recorded by him, he seems to have summed up for an acquittal of the two appellants.

The Jury brought in a unanimous verdict of guilty under s. 302, Indian Penal Code, in respect of Madhumala and under s. 328, Indian Penal Code in respect of Saroda Charan Mistri.

The learned Judge states in his order that had he been trying the case alone he should have been inclined to give the appellants the benefit of the doubt on the question as to whether the appellants knew that the drug they administered was poison but as the jury seemed to have unhesitatingly rejected the case for the defence on this point, he thought that he was not justified in pressing "the slight doubts" that remained in his mind, to the extent of referring the case to this Court under s. 307, Cr. P. C. This observation of the learned Judge may be taken to indicate that his disagreement with the Jury was not such a complete dissent as to lead him to consider it necessary for the ends of justice to submit the case to this Court under the provisions of the said section. To this extent, perhaps, and if there was nothing else, his refusal to refer the case may be justified.

The learned Judge, however, goes on to observe in his order that the differentiation of the cases of the two accused by the Jury did not appear to him to be justified and he states further thus. "If the accused are at all guilty, then they are both certainly guilty of murder." In his charge too he had given his ruling that if the two accused knew they were administering aconite they were guilty of murder and the charge under s. 328 was unnecessary. After this clear and definite expression of opinion on his part both to the Jury and in his judgment his duty under the law was to make a reference. The duties of a Judge in this respect are clearly laid down in the section itself. That section lays down that on certain conditions existing, *viz.*, there being a disagreement between the Judge and the Jury, and the Judge being clearly of opinion that it is necessary for the ends of justice to submit the case, he *shall* submit the case accordingly. No doubt it is ordinarily a matter entirely within the discretion of the Judge as to whether he should make a reference or not. This discretion however, as observed in the case of *Empress* v. *Guruvadu* (1) "should always be exercised when the Judge thinks that the verdict is not supported by the evidence; it is the only way in which a miscarriage of justice by a perverse verdict of a Jury, which is of frequent occurrence, can be remedied by the High Court." It is no longer the law that before making a reference the Judge must be satisfied that the verdict is perverse, it is sufficient that he should be clearly of opinion that a reference is necessary for the ends of justice: *Ismail Sarkar* v. *Emperor* (2).

(1) 13 M. 343; 2 Weir 389; 4 Ind. Dec. (N. S.) 951.

(2) 46 Ind. Cas. 846; 23 C. W. N. 747; 19 Cr. L. J. 830.

The doubts entertained by the learned Judge on the question of knowledge coupled with his definite conviction that the case was one of murder, if of any offence at all, made it obligatory for him to make a reference; his dissent from the verdict as to the character of the offence, of which the accused were guilty, was a clear, full and complete dissent, nor can it be doubted for a moment that the ends of justice demanded a reference, which would have enabled this Court to deal with the facts and determine whether the appellants were really guilty and if so, of what offence.

The learned Judge has refrained from making a reference for reasons to which I shall presently refer. Although the offence, if any, of Saroda Charan Mistry is in the opinion of the Judge nothing less than murder, he thought that the said appellant could be adequately punished under s. 328, Indian Penal Code, and he sentenced him to undergo rigorous imprisonment for 5 years. This is somewhat incomprehensible. As regards Madhumala the learned Judge passed upon her, as he says, with the greatest reluctance, the only alternative sentence which the law permits and he recommends that the District Magistrate should move the authorities for reduction of her sentence. He says that he is confident that this is a case in which the prerogative of mercy will be exercised. He states that he feels that there was certainly no case for punishing the girl more severely than her brother.

It is clear then that the learned Judge felt that the verdict of the Jury was wrong, and that if he accepted the verdict in its entirety he was unable to do justice to the accused. It follows, therefore, that the ends of justice demanded a reference to this Court. The conditions necessary for the application of s. 307, Cr. P. C., being clearly present, the duty of the learned Judge was to make such a reference, and once the conditions are present that course is obligatory and is no longer a matter of discretion at all; it should be remembered that the word used is "shall". If under circumstances such as those that are in this case the learned Judge fails to do what the law requires him to do and thus deprives this Court of an opportunity to deal with the case on its merits, he does something more than merely act in the erroneous exercise of his discretion. He fails to exercise his jurisdiction and this failure operates to the prejudice either of the Crown or of the accused, and, speaking for myself, I am of opinion that it is well within our powers under s. 439, Cr. P. C., to direct him to submit the case to us for our consideration under s. 307, Cr. P. C.

It is, however, not necessary in the present case to exercise those powers. The verdict of the Jury is illogical, absurd and incomprehencible and I entirely agree with the learned Judge that no differentiation can possibly be made between the cases as against the two accused and that the offence committed by them is either murder or nothing at all. The verdict brought in by the Jury is only explicable on the supposition that there was a misunderstanding on the part of the Jury of the law as laid down by the learned Judge. As I have already stated there is no misdirection in the learned Judge's charge to the Jury to which this erroneous verdict can be attributed.

I have perused the record with some degree of care and I have no hesitation in saying that I share in the doubts which the learned Judge entertained as to the guilt of the appellants. It will not serve any useful purpose to recapitulate the points upon which my doubts are founded, for they are set out in the learned Judge's charge with sufficient particularity and precision. I agree with him in holding that it has not been proved to my satisfaction that the appellants are guilty of any offence. I accordingly allow the appeal and order that the appellants be acquitted and discharged.

Duval, J.—I agree that the appeal by these two prisoners must be allowed and that the Judge should have made a reference for two reasons—(*i*) that the Jury refused to accept his ruling that the evidence revealed a case under s. 302 or nothing, and so the findings against the male accused under s. 328 only were not justified by the evidence, and (*ii*) that though there were circumstances which shew that the two accused knew they were administering a drug surreptitiously in the deceased's food and there is evidence that they were in bad terms with him, there is practically no evidence that they knew that the drug given to them to use would cause hurt, much less death.

Z. K. *Appeal decreed.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 906 OF 1924.

December 11, 1924.

Present:—Mr. Justice Mukerji.

Hafiz NEHAL AHMAD—APPELLANT

versus

RAMJI DAS—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 476, 476B: Application for order directing prosecution—Appeal—Death of applicant pending appeal, effect of—Right, whether survives.

Where a private person moves a Court to take action under s. 476 of the Cr. P. C., but the Court refuses to take such action, and the applicant files an appeal but dies during the pendency of the appeal, the right to carry on the appeal does not survive to his legal representatives or to anybody else.

Criminal appeal against an order of the Second Additional Sessions Judge, Saharanpur, dated the 16th August 1924.

Mr. *M. A. Aziz*, for the Appellant.

Mr. *Nihal Chand*, for the Respondent.

JUDGMENT.—These Appeals Nos. 906—920 are appeals under s. 476B of the Cr. P. C. filed by one Nehal Ahmad who has since died.

It appears that several people were prosecuted on a charge of dacoity at Saharanpur, the case being one of the now notorious Saharanpur riot cases. The learned Sessions Judge acquitted some of the accused persons and convicted others. Nehal Ahmad was one of the persons who were prosecuted and acquitted. On his acquittal Nehal Ahmad presented sixteen petitions before the learned Sessions Judge asking the Court to take action under s. 476 of the Cr. P. C. and to file a complaint for the prosecution of the witnesses for the prosecution. The learned Sessions Judge took action against only one, *viz.*, Badri Das who has filed an appeal No. 695 of 1924. He dismissed the application against the rest. Nehal Ahmad came up to this Court in appeal.

Nehal Ahmad is dead and with his death the power which he gave to Mr. A. Aziz, Vakil, to prosecute the case on his behalf came to an end. Mr. Aziz, yesterday, mentioned these cases and stated that it was possible that he would be able to show that without a *vakalatnama* he was entitled to argue the appeals. His argument seemed to be that it was after all the duty of the Court to take up the prosecution and any member of the public could represent matters before an Appellate Court. Mr. Aziz told the Court that he was going away and asked for a postponement. Mr. Nehal Chand, the learned Counsel appearing for the opposite parties, objected to a postponement on the ground that his clients were already here and waiting for the disposal of the appeals. Mr. Aziz was, therefore, told that if he was going away he should hand over his brief (if indeed any brief is left) with a brother practitioner to argue the point if he was so advised. Evidently Mr. Aziz left no instructions, for nobody is appearing to-day on behalf of his client.

The learned Government Advocate appeared and stated that as a Government Counsel he had examined the cases and he was not prepared to take up the appeals preferred by Nehal Ahmad and to prosecute them before this Court.

I do not quite see how the learned Government Advocate could come in and express his opinion on the merits. Section 476B gives a right of appeal to a private person and it has nothing to do with the Government. Indeed, it is a Government Officer, who has refused to order a prosecution and unless there is an instruction to the contrary from the Government, the learned Government Advocate is not likely to make an application to upset the judgment of a Government Officer. However, the matter is not of any importance. The fact remains that the private party who was entitled to move in the matter did move, but has died and there is no question of any survival of the right of appeal. Section 476B says that any person on whose application a Civil, Revenue and Criminal Court has refused to make a complaint may appeal etc. etc. The language does not indicate that any legal representative of the deceased appellant may file an appeal, or support it on the death of the appellant.

Mr. Nihal Chand, the learned Counsel representing the other side has argued that under ss. 404 and 431 of the Cr. P. C. the appeal abates on the death of the appellant. But so far as I can see, the appeal referred to in s. 431 is an appeal either against an acquittal or by a convicted person. This is not a case like that. Section 404 has apparently no application for *this is an appeal* under the Code.

Although ss. 404 and 431 have no application, in my opinion, the right of appeal does not survive.

I declare that the appeals have all abated.

Z. K. *Appeals abated.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1319 OF 1924.

December 15, 1924.

Present:—Mr. Justice Harrison.

Pandit BASANT LAL—SURETY—APPELLANT

versus

JOWAHIR SINGH AND ANOTHER—DECREE-HOLDER AND JUDGMENT-DEBTOR—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17 (1) (b), 49—Surety—Hypothecation deed, unregistered, whether admissible to prove personal liability.

Appellant stood surety for a judgment-debtor and executed a deed hypothecating his house as security for the performance of the decree. The deed was not registered. In a statement made before the Court the appellant made himself personally liable for the decretal amount:

Held, (1) that the surety having made himself personally liable for the decretal amount, the unregistered hypothecation deed may be ignored and by virtue of the personal liability of the surety the very house which he had hypothecated by the unregistered deed could be attached and sold in satisfaction of the personal liability;

(2) that the hypothecation deed, though inadmissible in evidence in order to affect the house, for want of registration, was admissible in evidence in proof of the personal obligation which the surety had thereby undertaken.

Pulaka Veetil Muthalakulangara Kunhu Moidu v. *Thiruthipalli Madhava Menon*, 1 Ind. Cas. 1; 32 M. 410; 19 M. L. J. 584, *Khuddu Mal* v. *Kunji Lall*, 80 P. R. 1881 and *Prem Singh* v. *Mula Mal*, 10 P. R. 1883, relied on.

Second appeal against an order of the District Judge, Amritsar, dated the 18th February 1924, reversing that of the Sub-Judge, Fourth Class, Amritsar, dated the 16th May 1923.

Mr. *Nanak Chand Chopra*, for the Appellant.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—One Basant Lal stood surety for a judgment-debtor named Narain Das. He executed a deed hypothecating his house which should have been registered and was not. It has been held by the learned District Judge that in spite of this want of registration, the fact that Basant Lal in a statement before a Court made himself personally liable for the disputed amount, justifies the decree-holder in proceeding against him. Counsel urges that this statement can only be treated as a repetition of a fact which cannot be proved. In my opinion the unregistered deed may be ignored and as held by the District Judge the surety is personally liable and in virtue of his personal liability the very house which he hypothecated in the unregistered deed can be attached.

Not only is this so but the deed itself recites that he is standing surety and will pay personally the amount due from his principal in case of default. It goes on to say that in lieu of this liability he hypothecates this house. This puts the case, in my opinion, on all fours with *Pulaka Veetil Muthalakulangara Kunhu Moidu* v. *Thiruthipalli Madhava Menon* (1), where a mortgage-deed though inadmissible for want of registration was still allowed to be tendered as evidence in proof of the debt. This view is also in accordance with that expressed in *Khuddu Mal* v. *Kunji Lal* (2) and *Prem Singh* v. *Mulla Mal* (3). I, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 1 Ind. Cas. 1; 32 M. 410; 19 M. L. J. 684.
(2) 80 P. R. 1881.
(3) 10 P. R. 1883.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1555 OF 1922.

December 15, 1924.

Present:—Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

SAGILI PEDDA RAMI REDDI AND OTHERS—DEFENDANTS—APPELLANTS

versus

NARREDDI GANGIREDDI—PLAINTIFF—RESPONDENT.

Hindu Law—Succession—Bandhus—*Maternal uncle's son and maternal aunt's son, priority between.*

The rules to be applied for determining priority among the *atma bandhus* are

(1) that propinquity should be the governing factor; [p. 614, col. 1.]

(2) that if both are equal in degree the spiritual benefit conferred may be used as a test for preference. [*ibid.*]

A maternal uncle's son and a maternal aunt's son are *bandhus* in the same degree, but the former must be preferred to the latter on account of superior spiritual efficacy. [p. 620, col. 1.]

Rules relating to succession among *bandhus* explained.

Case-law and texts discussed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Guddapah, in A. S. No. 40 of 1922, preferred against that of the Court of the District Munsif, Proddatur, in Original Suit No. 601 of 1920.

Mr. *B. Somayya*, for the Appellants.

Mr. *N. Chandrasekhara Iyer*, for the Respondent.

JUDGMENT.

Ramesam, J.—The only question to be decided in this second appeal is one of succession to the properties of one C. Subbayya who died in 1906 or 1907 leaving a widow Narakka who died in October 1918. The plaintiff is a vendee (under a sale-deed, dated 14th October 1919) from A. Venkatareddi and Balireddi who are the mother's sister's sons of Subbayya. The District Munsif found that Subbayya has also left his mother's brother's sons but held relying on *Appandai Vathiyar* v. *Ragubali Mudaliar* (1), that the plaintiff was entitled to succeed. The Subordinate Judge confirmed his judgment. The defendants file this second appeal and contend that the mother's brother's son is entitled to priority over the mother's sister's son under the Hindu Law. They point out that the decision in *Appandai Vathiyar* v. *Ragubali Mudaliar* (1) has been dissented from in *Ramcharan Lal* v. *Rahim Bakhsh* (2) and it must be regarded as shaken if not overruled by the decision in *Vedachela Mudaliar* v. *Subramania Mudaliar* (3).

The question is one relating to the succession of *bandhus*. It is desirable to clear the ground by stating the principles of succession among *bandhus* at least such of them as may help to solve the question.

There is no doubt as to the meaning of the term '*bandhu*' for purposes of succession. Though only some *bandhus* are enumerated in the well-known ancient Smriti text (attributed variously to Vridha Statapa and Baudhayana), it has been laid down that the enumeration is not exhaustive and that it includes all *bhinnagotra sapindas*: see *Gridhari Lal Roy* v. *Bengal Government* (4) and *Martand Waikar* v. *Vinayak Venkatesh Kothekar* (5).

(1) 5 Ind. Cas. 280; 33 M. 439; 7 M. L. T. 203; 20 M. L. J. 275; (1910) M. W. N. 44.

(2) 34 Ind. Cas. 108; 38 A. 416; 14 A. L. J. 538.

(3) 64 Ind. Cas. 402; 44 M. 753; 14 L. W. 402; (1921) M. W. N. 669; 2 P. L. T. 707; 26 C. W. N. 159; 41 M. L. J. 676; 30 M. L. T. 198; 4 U. P. L. R. (P. C.) 13; 24 Bom. L. R. 649; (1922) A. I. R. (P. C.) 33; 48 I. A. 349 (P. C.).

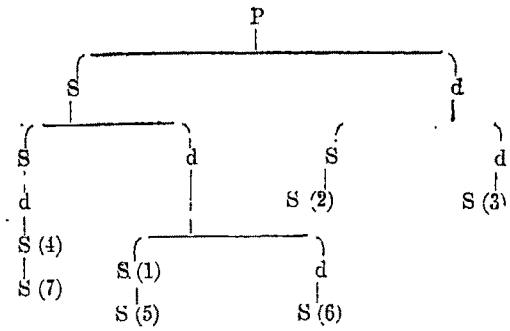
(4) 12 M. I. A. 448; 10 W. R. P. C. 31; 1 B. L. R. P. C. 44; 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 20 E. R. 408; 3 Mad. Jur. 386; 1 Ind. Dec. (N. S.) 28.

(5) 25 Ind. Cas. 290; 42 C. 384; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L. J. 573; 41 I. A. 290 (P. C.).

Relying on this definition, Saravadhikari (Tagore Law Lectures 1882) attempted to construct exhaustive tables of *bandhus*. He restricted the *bandhus* to four famalies: (1) the family of the agnates of the propositus; (2) the family of the agnates of his mother's father; (3) the family of the agnates of his father's mother's father; and (4) the family of agnates of his mother's mother's father. Whether the *bandhus* ought to be limited to these four families though they otherwise satisfy the definition of *bhinnagotra sapindas* has not arisen for judicial decision and does not arise in this case. With the said limitation and also excluding, the so-called *sapindas* by 'frog's leap (see Sarvadhikari, 2nd Edition, pages 592, 597 and 600) and remembering that *sapindaship* is mutual, he tabulated the possible *bandhus* in four tables (facing pages 606, 607). Some of his views as to priority of succession (as expounded in the 1st Edition) based on the separation into four families were not accepted by the Privy Council in *Muthusami Mudaliyar* v. *Simambedu Muthukumaraswami Mudaliyar* (6). All these *bandhus* can be grouped in one table. Such a table is shown in the 9th Edition of Mayne's Hindu Law facing page 852. The table is exhaustive and accurate subject to the limitation mentioned above. The order of succession among the persons in the table has to be determined.

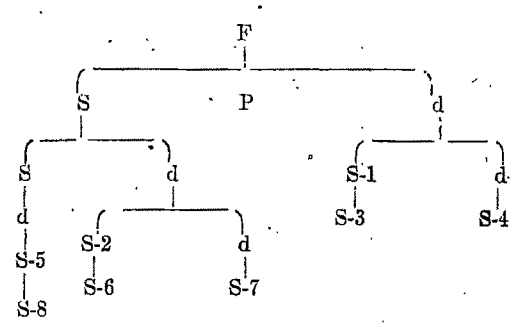
Now, apart from any texts of Hindu Law, the *bandhus* so enumerated will *naturally* fall into the following groups depending on the nearness of the ancestor.

(1) Descendants of the propositus whom I indicate hereafter by the letter P. They are numbers 1 to 7 in the table in Mayne's Hindu Law and in the annexed table.

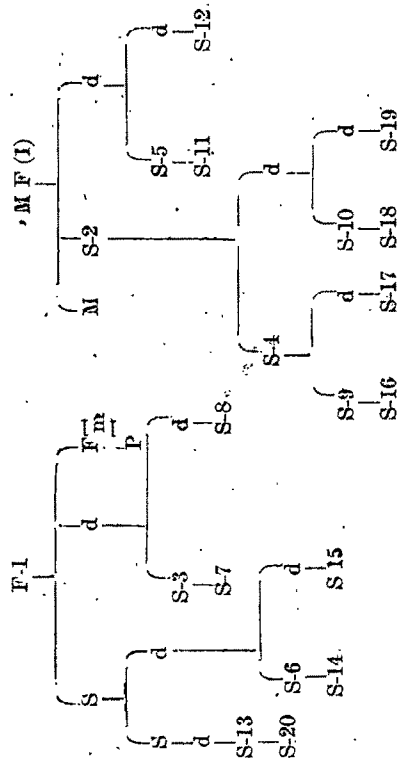


(6) 19 M. 405; 23 I. A. 83; 6 M. L. J. 113; 7 Sar. P. C. J. 45; 6 Ind. Dec. (N. S.) 987 (P. C.).

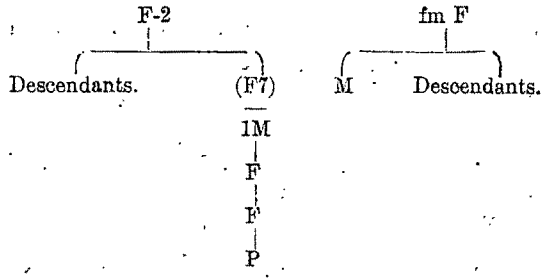
(2) Descendants of P's father, collateral to P, *i. e.*, excluding group 1. They are Nos. 1 to 8 in the annexed table and Nos. 8 to 15 in the table in Mayne.



(3) Descendants of P's grandfathers (paternal and maternal) collateral to P's father, *i. e.*, excluding groups 1 and 2. They correspond to Nos. 1 to 20 in the table annexed and are Nos. 16 to 35 in the table in Mayne.

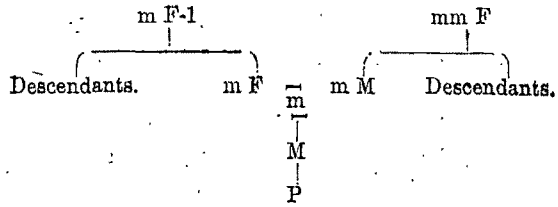


(4) Descendants of P's father's grandfathers (paternal and maternal) collateral to P's grandfather (F-1) (*i. e.*,) excluding groups 1 and 2 and left half of group 3. They are Nos. 36 to 55 in the table in Mayne.



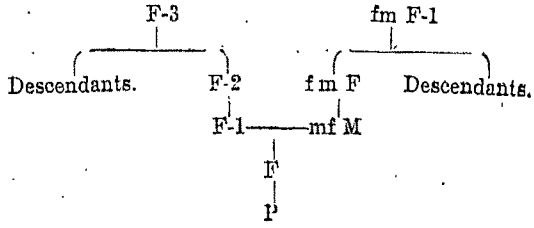
The descendants are formed exactly as in the table for group 3.

(5) Descendants of P's mother's grandfathers (paternal and maternal) collateral to P's mother's father (*i. e.*, excluding groups 1 and 2 and right half of group 3). They are Nos. 56 to 75 in the table in Mayne.



The descendants are formed exactly as in table for groups 3 and 4.

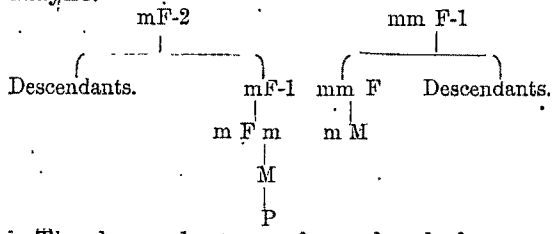
(6*a*) Descendants of P's paternal grandfather's (F-1) paternal grandfather (collateral to P's paternal great grandfather (F-2) *i. e.*, excluding groups 1 and 2 left half of group 3, and left half of group 4; and descendants of P's paternal grandfather's (fM) paternal grandfather, collateral to her father (fmF) *i. e.*, excluding groups 1, 2 and right half of group 4. These are Nos. 56 to 75 in the table in Mayne.



The descendants are formed as before.

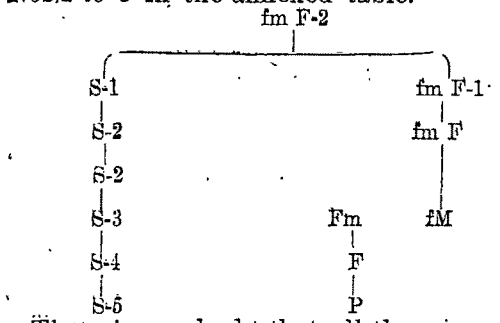
(6*b*) Descendants of P's mother's father's (mF) paternal grandfather collateral to mother's father's father (mF-I) *i. e.*, excluding groups 1, 2, right half of group 3, and left half of group 5; and descendants of P's mother's mother's (mM) paternal grand-

father, collateral to mother's mother's father (mmf) *i. e.*, excluding groups 1, 2, right half of group 3 and right half of group 5 They are Nos. 105 to 125 in Mayne.



The descendants are formed as before.

(7) Descendants of P's paternal grandmother's (fm) great grandfather collateral to her grandfather (fM f-1). These are Nos. 76 to 80 in the table in Mayne and are Nos.1 to 5 in the annexed table.



There is no doubt that all the persons in the above seven groups are *bandhus*. groups 1, 2 left halves of groups 3, 4 (6*a*) constitute Sarvadhikari's Table 1 (*a*). Right half of group 3, left half of group 5, and left half of group (6-*b*) constitute his Table 1 (*b*). Right half of group 4, right half of group (6*a*) a and group 7, constitute his Table II. The right half of group 5, and right half of group (6*b*) constitute his Table III.

I now come to the expressions '*atma bandhns*' '*pitrubandhus*' and '*matru bandhus*' used in the ancient Sanskrit Text. It is, evident that the word '*bandhu*' in these expressions has a narrower significance than *bhinnagotra sapinda*'. The question that naturally arises is—Are *bandhus* other than those enumerated, included in each of these three expressions and if so, who? The three persons enumerated as *atma bandhus* are in group 3 being Nos. 18, 19 and 20 in Mayne's Table. The Privy Council held No. 17 to be *atma bandhu* in *Muthuami Mudaliyar* v. *Simambedu Muthukumaraswami Mudaliyar* (6) and *Vedachela Mudaliar* v. *Subramania Mudaliar* (3), No 22 to be an *atma bandhu* in *Vedachela Mudaliar* v. *Subramania Mudaliar* (3) and No. 26 to be an *atma bandhu* in *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (7). Therefore it follows that Nos. 21, 23 to 25 and 27 who are in the same degree as Nos. 22 and 26 should be regarded as *atma bandhus*. Similarly not only Nos. 38, 39 and 40 who are enumerated as *pitru bandhus* but also Nos. 41 to 47 (on the analogy of *Vedachela Mudaliyar* v. *Subramaia Mudaliyar* (3) and *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (7) should be regarded as *pitru bandhus*. Similarly not only Nos. 86, 87, and 88 who are expressly enumerated but also 85 who is in the same line and (on the analogy of *Muthusami Mudaliyar* v. *Simambedu Muthukumaraswami Mudaliyar* (6) and *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (7), Nos. 89 to 96 should be regarded as *matru bandhus*. But, beyond these, it is not clear to me how the *bandhus* should be classified. For instance, it is not clear to me how Nos. 36, 81 and 82 who are the ancestors should be classified. I doubt, if the expressions '*atma bandhus*' etc., were ever intended to be the basis for a scientific classification and share in the doubts of Mullick and Jwala Prasad, JJ., in *Uma Shankar Prasad Parasari* v. *Nageswari Koeri* (8). If we assume that the expression '*atma bandhu*' includes all the persons in my third group, the expression '*pitru bandhu*' includes all the persons in my fourth group and the expression *matru bandhus* includes all the persons in my fifth group, even then the question arises in what class should groups 1, 2, 6 and 7 be placed. That is the first question is whether there are only these classes or more? If groups 1 and 2 are to be classified under the named classes, they should obviously be classed as *atma bandhus*. For if it is said that the expression '*atma bandhu*' is not quite appropriate for these, the other expressions are still less appropriate. This is the view taken in *Balusami Panditha*r v. *Narayana Rau* (9) and *Sham Devi* v. *Birbhadra Prasad* (10) (where persons in group 2 were held to be *atma bandhus*) and by Dawson Miller, C. J., and

(7) 60 Ind. Cas. 251; 48 I. A 86; 6 P. L. J. 140; 40 M. L. J. 270; (1921) M. W. N. 153; 19 A. L. J. 208; 2 P. L. T. 97; 33 C. L. J. 263; 29 M. L. T. 240; 23 Bom. L. R. 692; 25 C. W. N. 842; 14 L. W. 20 (P. C.).

(8) 48 Ind. Cas. 625; 3 P. L. J. 663; 7 P. L. W. 1; (1919) Pat. 162.

(9) 20 M. 342; 7 M. L. J. 207; 7 Ind. Dec. (N. S.) 243.

(10) 62 Ind. Cas. 432; 43 A. 463; 19 A. L. J. 312.

Imam, J., in *Uma Shankar Prasad Prasari* v. *Nageswari Koeri* (8) (as to a person in group 2). But Mullick and Jwala Prasad, JJ., doubted the propriety of attempting to class the unnamed *bandhus* under the expressions '*atma bandhus*' etc.,—a view which has much to commend itself. In *Ajudhia* v. *Ram Sumer Misir* (11) and *Ramphal Thakur* v. *Panmati* (12) person in group 1 was regarded as an *atma bandhu* though, no question of priority and hence no question of classification arose in the case. If the connotation of the term '*atma bandhu*' is extended as in *Balusami Pandithar* v. *Narayana Rau* (9) and *Sham Devi* v. *Birbhadra Prasad* (10) so as to include group 2 for satisfying the requirement that all *bandhus* should be divided into three classes, we are landed in anomalies as to the similar connotation of the expressions *pitru bandhus*, and '*atma bandhus*.' Again how should groups 6 and 7, be classified? if they are classed as *pitru bandhus*, groups (6*a*) and (7) take priority over group (5) and group (7) takes priority over group (6*b*) a result as to the equity of which I have considerable doubt. The doubts indicated by me above do not arise in this case and have not got to be solved by us. Such as relate to groups (6)and (7) have never arisen and may never arise.

Confining myself to the enumerated persons, among whom are ten claimants, the first rule to be applied is that *atma bandhus* should take precedence over the rest. *Muthusami Mudaliyar* v. *Simambedu Muthukumaraswami Mudaliyar* (6).

Confining to myself to groups (3), (4) and (5) as to the division of which into three classes, there is no difficulty, the first rule to be applied is that *atma bandhus* take precedence over the rest: *Muthusami Mudaliyar* v. *Simambeda Muthukumaraswami Mudaliyar* (6). This rule does not help us in this case as both the claimants are in group (3) and are *atma bandhus* on any view of the expression. We have to find the rules regulating priority among *atma bandhus*.

The only decision of the Privy Council dealing with a case of rival claimants who are both *atma bandhus* is *Vedachela Mudaliar* v. *Subramania Mudaliar* (3). The passage from the Mitakshara (II 6-1) was quoted at page 758 and again referred to at page 764. At page 765 the Smriti Chandrika (XI-5, 13 to 15) and Sarasvati Vilasa 595—S were cited. At page 766*, the conclusion is thus stated: "A very small consideration would show that that passage has nothing to do with the members of the same class *inter se*." After this conclusion of the Privy Council, I think it is unnecessary for me to deal in detail with the arguments of Mr. Chandrasekhara Iyer based on (1) the sentence, *bhandhava asannathara krameniya smrithyantharam darsithah)* in the Smriti Chandrika and in Sarasvati Vilasa.

(2) Jaimini Mimamsa sutras Adhikaram V and Parthasaradhi Misra's Sastra Dipika—a commentary on Nyayamala of Madhwacharya. I may add as to the passage from Smriti Chandrika, there are two versions—one containing the word (*Vachanika*) and the other not containing it, and version relied on by Mr. Chandrasekhara Iyer, (*i. e.*, containing the word (*vachanika*) is the one referred to by their Lordships at page 765. I will only add that Dayavibhaga of Madhwacharya (Dr. Bernall's translation), another Madras authority, supplemental to Mitakshara says that the enumerated *bandhus* take according to nearness. In my opinion the basis of the decision in *Appandai Vathiyar* v. *Ragubali Mudaliar* (1) has been destroyed by the reasoning of their Lordships in *Vedachela Mudaliar* v. *Subramania Mudaliar* (3). It still remains for us to determine the rules that have to be applied to *atma bandhus*.

At page 762, His Lordship Right Honourable Amir Ali after referring to the proposition that: 'each class should be divided into sub-classes according to the side of relationship and that in any case preference should be given to the father's side' observes: "Their Lordships do not think it necessary to express an opinion how far this proposition is in conformity with the *express rule* that in each class *propinquity should be the governing factor*." At page 763* the principles laid down by Mathuswami, Aiyar, J., in *Muthusami* v. *Muthukumarasami* (13) were quoted. The second principle refers to the decision into three classes and the third runs thus:

"(3) That the examples given therein are intended to show the mode in which nearness of affinity is to be ascertained." The fourth relates to spiritual benefit. At page 766*,

(11) 2 Ind. Cas. 376; 31 A. 454; 6 A. L. J. 557.
(12) 7 Ind. Cas. 292; 32 A. 640; 7 A. L. J. 776.
(13) 16 M. 23 at p. 30; 2 M. L. J. 296; 5 Ind. Dec. (N. S.) 524.

*Pages of 44 M.—[*Ed.*]

His Lordship says: "Among modern writers both Golap Chandar Shastri (page 296) and Raj Coomar Sarvadhikari (page 726) affirm that nearness of blood is the governing principle in the succession of *bandhus*." The Shastri lays down the rule in the following words: "(1) The nearer in degree on whichever side is to be preferred to one more remote.'" His Lordship then says that the rules quoted from *Muthusami* v. *Muthukumarsami* (13) furnish a safer guide (page 767*.) The conclusion is thus stated: "The appellant is undoubtedly nearer in degree to the deceased than Subramania. He also offers oblations to his father and grandfather to whom the deceased was also bound to offer *pinda*."

Accordingly I infer from *Vedachela Mudaliar* v. *Subramania Mudaliar* (3) that the rules to be applied to the *atma bandhus* for determining priority are: (1) propinquity should be the governing factor; (2) if both are equal in degrees, the spiritual benefit conferred may be used as a test for preference.

The first of these rules does not help us in the present case, as both the claimants are of the same degree. I am unable to agree with the statement in *Ram Charan Lal* v. *Rahim Bakhsh* (2) stated at page 425*: "As we hold that the matenal uncle's son is of nearer consanguinity than the maternal aunt's son, the question of funeral oblations need not be considered." It is not clear whether the expression "nearer consanguinity" is used in a different sense from "nearness in degree." If the expressions mean the same, I am not able to see how the maternal uncle's son is nearer in degree than maternal aunt's son. To this extent, *viz.*, that both are equal in degree, I agree with the decision in *Rajeppa Ranappa Kundagol* v. *Gangappa Jotappa Mandwe* (14).

Mr. Chandrasekhara Iyer adduced an ingenious argument based on the rules relating to marriage. In Southern India, a man may marry his maternal uncle's daughter but not his mother's sister's daughter. Therefore, he argues, that a maternal aunt's daughter is nearer than maternal uncle's daughter, and, therefore, a maternal aunt's son is nearer than a maternal uncle's son for purposes of succession. According to the ancient Sanskrit texts, both maternal uncle's daughter and maternal aunt's daughter are *sapindas* and are ineligible for marriage. I believe the rule is strictly observed in Bengal and probably in other parts of Northern India. But a custom has grown up in Southern India, (probably a Dravidian custom) by which a mother's sister's daughter is regarded equivalent to a sister and is ineligible for marriage, while a mother's brother's daughter, or a father's sister's daughter is regarded equivalent to a wife or wife's sister, and, therefore, eligible for marriage. This notion has nothing to do with nearness. Even the South Indian ancient Sanskrit texts (*e.g.*, Vyavahara Madhaviya a commentary on Parasara Smriti, of Madhawacharyya of which Dayavibhaga translated by Dr. Burnell is a portion) that recognise the marriageability of a maternal uncle's daughter base the recognition on local custom.

We have, therefore, to resort to the second test enumerated by their Lordships in *Vedachela Mudaliar* v. *Subramania Mudaliar* (3), *viz.*, spiritual benefit. We have to see which of the two claimants confers higher spiritual benefits on the propositus. There is no doubt that both confer some spiritual benefit.

In discussing the question of spiritual benefit, we have to remember (1) that a claimant offers oblations to his ancestors in which the propositus participates through his ancestors (2): the offering to a paternal ancestor is superior to the offering to a maternal ancestor; and (3) it follows by the principle of mutuality that the participation through a paternal ancestor is superior to the participation through a maternal ancestor. Thus, as between two persons (propositus) and C (claimant) there are four possible cases.

(1) *C* offers to his paternal ancester and *P* participates through paternal ancestors.

(2) *C* offers to maternal ancestors and *P* participates through paternal ancestors.

(3) *C* offers to paternal ancestors and *P* participates through maternal ancestors.

(4) *C* offers to maternal ancestors and *P* participates through maternal ancestors.

The first case is a case where *C* and *P* are *sagotra sapindas* and does not come under the discussion relating to succession by *bandhus*. In the other three cases *C* is a *bandhu* of *P*. Mr. Chandrasekhara Iyer concedes that *C* in the second case is superior to C in (3) and (4), *e. g.*, a father's

(14) 77 Ind. Cas. 219; 47 B. 48; 24 Bom. L. R. 789; (1922) A. I. R. (B.) 420.

*Page of 38 A.—[*Ed.*]

sister's son is superior to mother's sister's son or mother's brother's son, *i. e.*, he concedes that the participation through paternal ancestor is superior to participation through maternal ancestors. (Mayne, pages 736, 508, r. 4). But he does not concede that offering to maternal ancestors is inferior to offering to paternal ancestors. If we remember that all *sapindaship* and all *bandhuship* is mutual, it seems to me that the same inferiority attaches to offering to maternal ancestors, in comparison with offering to paternal ancestors. as in the case of participation. That offering to maternal ancestors is inferior to offering to paternal ancestors is an *a fortiori* case can be inferred from the following facts:—In all schools of Hindu Law, *bandhus* descended from agnate ancestors are certainly postponed to agnates (subject to certain exceptions in Bengal which it is unnecessary to note here). For instance, in the four simple cases, mentioned above, a father's brother's son is superior to a father's sister's son. In this case, the participation in each case is through paternal ancestors. So far is the rule recognised that agnates, even if remote, are preferred to cognates, even if near (except in Bengal in the case of daughter's sons of agnate ancestors and in Mitakshara Law in the case of daughter's sons). In fact, the principle is the very foundation of the whole system of Hindu Law, by which agnates are preferred to cognates. If so, among cognates, one degree of cognateness is certainly superior to two degrees of cognateness.

Divested of the religious, spiritual or ceremonial veil, the same principle of religious effieacy or spiritual superiority may be stated as (1): claimants through father of propositus are superior to claimants through mother of propositus, other circumstances being equal (2) a claimant through his father is superior to a claimant through his mother. The caution is necessary that these rules should not be applied as they were applied in *Sundrammal* v. *Rengasami Mudaliar* (15) so as to defeat the rule as to nearness in degree. The case in *Sundrammal* v. *Rangasami Mudaliyar* (15) has been overruled by *Vadachela Mudaliar* v. *Subramania Mudaliar* (3). They should be applied subject to the rule of nearness in degree: [see *Vedachela Mudaliar* v. *Subramania Mudaliar* (3).]

(15) 18 M. 193; 4 M L. J. 275; 6 Ind. Dec. (N. S.) 484.

In the above discussion I have attempted to establish the superior spiritual efficacy of the mother's brother's son by mother's sister's son from general principles. As a particular case, the fact has been recognised in Dharma Sindhu, *tadhabave gotrajah tadhabave matamaha matula Tatputradhayah matrusapindah anukramena; matru sapindaabhava svapitrushvasru matru shvasru putrah*,—a book which, though mentioned by West and Buhler as an authority in Western India, is of high authority, along with Niranya Sindhu, in the Telugu country (the parties in this case are Telugus) being constantly referred to by Pandits and Purohits (See translation in Sarvadhikari, pages 86-89) *anukrama ena matruspinda*.

It is true that the text shows a mother's brother's son should have priority in the performance of *shraddah* over even father's sister's son. I do not wish to concede that the order of succession is the same among them. The point does not arise here.

If every step in cognateness, compared to agnateness denotes a mark of inferiority, it follows that two steps in cognateness are inferior to only one step in cognateness and one in agnateness. The principle has been recognised in this Court in *Tirumalachariar* v. *Andal Ammal* (16). The decision in *Appandai Vathiyar* v. *Ragubali Mudaliar* (1), itself recognises the superior spiritual efficacy of a maternal uncle's son to mother's sister's son. Finally the Bengal School of Law which depends on spiritual efficacy gives preference to mother's brother's son: (see Daya Krama Sangraha Ch. I-X 14 to 26. Mayne, 584, page 859). A text somewhat in conflict with the passage in Dayakrama Sangraha, *viz.*, the commentary of its author (Sri Krishna Tarkalankara)—on Jimutawahana's Dayabhaga has been cited in Ghose's Hindu Law, Vol. II, page 928 but its authenticity is doubtful and it is inconsistent with the main work of the author. This is also the view of Sarvadhikari.

For all the reasons, I would agree with the conclusion in *Ram Charan Lal* v. *Rahim Bakhsh* (2) and regard *Appandai Vathiyar* v. *Raghubali Mudaliar* (1) as overruled by *Vedachela Mudaliar* v. *Subramania Mudaliar* (3) and allow the appeal and dismiss the suit with costs only in the First Court. Each party will bear his costs in this and in the lower Appellate Court.

(16) 30 M. 406; 2 M. L. T. 357; 17 M. L. J. 285.

Venkatasubba Rao, J.—I agree.

The question to be decided in this case has reference to the priority in regard to succession to a deceased Hindu, the competing claimants being his maternal uncle's son and his maternal aunt's son. The rules respecting succession of *bandhus* are involved in considerable obscurity, and the specific point with which we have to deal has been the subject of great controversy. The case has been fully and ably argued by Mr. Somayya whose contention has been that the maternal uncle's son is to be preferred and by Mr. N. Chandrasekhara Iyer who has maintained that the maternal aunt's son has the preferential right.

I have come to the conclusion that the maternal uncle's son must be preferred. A Bench of this Court held in *Appandai Vathiyar* v. *Ragubali Mudaliar* (1) that a mother's sister's son is to be preferred to a maternal uncle's son. But, in my opinion, the reasons given for the decision cannot now be accepted as sound, in view of the recent judgment of the Judicial Committee in *Vedachela Mudaliar* v. *Subramania Mudaliar* (3).

I shall first examine the texts of Hindu Law on this subject and shall then discuss the case referred to above, namely, *Appandai Vathiyar* v. *Ragubali Mudaliar* (1).

I may preface my remarks on the original texts, with the observation that the ancient writers, after stating that on failure of agnates, cognates succeed invariably, quote a text that is variously attributed to Vriddha Satatapa and Baudhayana. That text merely enumerates the *bandhus* and has no bearing on the question of succession. Though it has been repeatedly quoted by the exponents of the law, there is nothing to show that the text, whatever may be its origin, had any connection with any discussion of legal questions, and it is more than probable that the author intended to do no more than merely enumerate the *bandhus*. The text itself is this:

"The sons of a man's own paternal aunt, the sons of his own maternal aunt, and the sons of his own maternal uncle, are recognised as a man's own *bandhavas* (*atma bandhus*). The sons of his father's paternal aunt, the sons of his father's maternal aunt and the sons of his father's maternal uncle are recognised as his father's *bandhavas*. (*pitri bandhus*.) The sons of his mother's paternal aunt, the sons of his mother's maternal aunt and the sons of his mother's maternal uncle are recognised as his mother's *bandhavas* (*matri bandhus*)."

I shall now proceed to examine the texts,

(1) Vignaneswara in his Mitakshara says thus:—

(1) On failure of agnates, the cognates are heirs. Congates are of three kinds, related to the person himself (*atma bandhus*), to his father (*pitru bandhus*) or to his mother (*matru bandhus*) as is declared by the following text." Here is quoted the famous text attributed to Vriddha Sataapa. Then the Mitakshara continues.

(2) "Here by reason of near affinity, the cognate kindred of the deceased himself (*atma bandhus*) are his successors in the first instance. On failure of them, his father's cognate kindred (*pitru bandhus*) or if there be none, his mother's cognate kindred (*matru bandhus*). This must be understood to be the order of succession here intended." See Ch. II, s. 6, Setlur's Hindu Law Books on Inheritance.

The Mitakshara thus prescribes that the *atma bandhus* are to be preferred to the *pitru bandhus* and the *pitru* to the *matru*. As regards the order of succession among the *bandhus* of each class, it says nothing. The Mitakshara, therefore, is not an authority for the proposition that the maternal aunt's son is to be preferred to the maternal uncle's son.

ii. Saraswati Vilasa thus deals with the succession of the *bandhus*:

"595. The *bandhus* are exhibited in another law Code, in the order of their greater propinquity." The text of Vriddha Satatapa is then quoted.

"596. If there are no *gotrajas*, the connection through property belongs to these."

"597. There also the order to be recognised is that a man's own *bandhavas* first take the property on account of their nearer relationship; if there are none, the father's *bandhavas* take the property; if there are none, the mother's *bandhavas*." (See Translation of Saraswati Vilasa by Rev. Thomas Foulkes, page 119).

A reference to the original Sanskrit texts will show that the passage in Saraswati Vilasa, stanza 597, is identical with para. 2 of the above quotation from the Mitakshara.

Now turning to the opening words of *sloka* 595

"The *bhandus* are mentioned in another Smriti in the order of their propinquity." I

cannot agree with the contention that the learned author intended in this passage to lay down the order of succession in regard to *bandhus* mentioned in each of the three categories. *Sloka* 597 puts the matter beyond doubt, because there, it is expressly stated that the order prescribed is only as regards the three classes of the *bandhus*.

(iii) Smriti Chandrika after stating that after *sapindas, samanodakas* take the wealth of a deceased kinsman, says that *bandhavas* come in next in order. Then s. 5, *sloka* 13 continues:

"The *bandhavas* are exhibited in another Law Code, in the order of their greater propinquity." Then follows the text of Vriddha Satatapa, which is numbered *sloka* 14. So far it will be seen that Smriti Chandrika is in complete agreement with Saraswati Vilasa. In the original Sanskrit the same words are used in both the treatises to express the idea conveyed by the words "are exhibited in another Law Code in the order of their propinquity." Then comes *sloka* 15 which according to one reading is as follows:—

"Of the kinsmen (*gnatiyah* or *sapindas*) distant kinsman (Sakulyah or *samanodakas*), and cognate kindred (*bandhavas*), in default of one that stands nearest in the order expressly given, he that may be somehow viewed to stand on a par with him may be selected; it being generally declared by Gautama, "Let those take the inheritance who give the funeral cake (*pinda*), who are the descendants from the same *gotra* or who are sprung from the same Rishi." See Setlur page 297.

The other reading is that which is adopted by Ghose and is as follows:

"Of the agnates, *sakulyas* and *bandhus*, on failure of near heirs, those that may be some how considered near, may be considered as heirs, from what Gautama says generally, thus: "*sapindas, sagotras* or those connected by descent from the same Rishi take the estate." See principles of Hindu Law, Vol. II, page 471 for the Sanskrit text and page 403 for the English rendering.

In the first place, whichever reading is adopted, *sloka* 15, is somewhat obscure and in any event, it contains no indication that a different rule was intended to be laid down from what was prescribed in the Mitakshara.

iv. Parasara Madhavya is even less explicit on the point. It does not set out the priority, even in regard to the main three classes. This is how the law is stated:—

"In default of *gotrajas, bandhavas* take the property and they are of three kinds, as has been shown by Budhayana." Here the writer gives as usual the well-known text and then proceeds to say "But he who is nearest among the *bandhavas* takes first. So Brihaspati says: "Where there are many kinsmen *sakulayas* and *bandhavas*, he who is nearest to them should take the property of a man who leaves no issue." (See *sloka* 41 in the translation by Mr. A. C. Burnell page41). As I have observed, on the point at issue, this passage throws little light.

(v) Varadaraja's Vyavahara Nirnaya merely states that *bandhavas* succeed in default of *sagotras* and then cites the text of Vriddha Satatapa. See Burnell's translation of Vyavahara Nirnaya, page 37.

(vi) Vyavahara Mayukha enunciates the law thus:—

"If no distant kinsman exists then come the cognate kindred (*bandhu*) who are thus specified in another Smriti." The Smriti of Vriddha Satatapa is then as usual quoted. Then the author continues: "Here also the order of succession follows the order of the text." (See s. 8, verse 22, p. 101 of Burnell's translation.)

A careful examination of these texts reveals, that so far as the Mitakshara is concerned it settles priority only in regard to the three main categories of the *bandhus* and that excepting a doubtful and obscure passage of the Smriti Chandrika, there is nothing in these authorities which indicates that the order in which the *bandhus* of each class are enumerated, is intended to determine their respective priority.

I shall next deal with *Appandai Vathiyar* v. *Ragubali Mudaliar* (1), the case to which I have referred. The reasons for holding that a mother's sister's son is to be preferred to a maternal uncle's son are, according to the judgment in that case, the following:—

(1) "The express authority of the Smriti Chandrika, the Sarasvati Vilasa and the Vyavahara Mayukha must be given effect to" page 445*).

With all respect, in my opinion, as I have shown, this reason is not sound. The translator of the Smriti Chandrika who is referred to in the judgment (Mr. Krishnaswamier) no doubt gives the 24th place to the son of the mother's sister and the 25th to the son of the maternal uncle. This

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is merely the opinion of the translator and it is not correct to say that the Smriti Chandrika itself supports the view. Again Mr. Mandlik in his translation of the Vyavahara Mayukha adds in a foot-note that the order applies to the three classes as well as to the several members of those three classes. Whatever may be Mr. Mandlik's opinion, it does not receive any support from the original which he has translated. I have sufficiently shown that the texts of the Hindu Law do not support the view which the learned Judges have taken in this case.

(2) The second reason given in support of their judgment may also be stated in the words of the learned Judges: "There is a rule of Mimamsa that effects should be given to the order in which persons and things are named unless the sense requires a different order. In the absence of any decisive principle dictating a different order, the duty of the interpretor of the law is to accept the order in which they are named as based upon some rule which they may be unable to discover or upon the mere *ipse dixit* of the law-giver." Jaimini in his Mimamsa Sutras refers to what are called Krama.

The three chief Kramas are thus defined.

(*i*) The order of succession is sometimes declared by express Srutis. This is called Sruti-Kramas.

(*ii*) In the absence of express Sruti, it is in some cases to be determined by the sense of the passage. This is called Artha-Krama (determination of order by sense).

(*iii*) It is sometimes indicated by the order in which the texts appear. This is called Patha-Krama, (succession by reading). See Sircar, Tagore Law Lectures on Mimamsa Rules of interpretation, page 196.

It is the third rule that is referred to in the passage quoted above from the judgment. The first two Kramas are based on reason. The third Krama is purely arbitrary and cannot be relied on, excepting possibly, in the last resort. This artificial rule was treated by the learned Judges as the chief canon of construction. The mere accident of enumeration in a certain order was taken as decisive of the point at issue.

Moreover, in the light of decided cases, can any importance be attached to the order of enumeration? In *Sundrammal* v. *Rangasami Mudaliyar* (15), the sons of the daughter of the deceased's paternal uncle were preferred to the deceased's mother's sister's son. Both belonged to the class of *atma bandhus*, but a cognate not specified in the enumeration was preferred to a cognate specified. In *Balusami Pandithar* v. *Narayana Rau* (9), the son of the sister's son was preferred to the maternal uncle's son. Here again, the contest was between two *atma bandhus*, and a *bandhu* not mentioned was preferred to a *bandhu* mentioned. In *Gunesh Chunder Roy* v. *Nil Komul Roy* (17), a sister's son was given priority over a mother's sister's son and in *Mohandas* v. *Krishnabai* (18), the maternal uncle was preferred to the mother's sister's son. In each of these two cases again, a *bandhu* specified among the *atma bandhus* was rejected in favour of one not specified. In *Vedachela Mudaliar* v. *Subramania Mudaliar* (3), the Judicial Committee preferred a maternal uncle (an *atma bandhu ex parte maternal* to a son of the paternal aunt's son (an *atma bandhu ex parte paterna*).

It has been held that the enumeration in the text of Vriddha Satatapa is only illustrative and not exhaustive; and if cognates not included in the enumeration of *atma bandhus* are to be preferred to the first named *pitru bandhu* and if similarly *pitru bandhus* not in the list are to be preferred to the first mentioned *matru bandhu*, where then can priority come, by virtue of mere enumeration? I am, therefore, decidedly of the opinion that Pâdakrama rule ought not to be applied.

(3) I shall next deal with the third ground on which the judgment in *Appandai Vathiyar* v. *Ragubali Mudaliar* (1) is based. Referring to Bhattacharya and Sarvadhikari, who give precedence to the maternal uncle's son over the mother's sister's son, the learned Judges observe that the view of those writers is not entitled to weight as it is based on the theory of religious efficacy of oblations which has no place in the Mitakshara scheme of succession. The learned Judges say: "It is difficult to decide the question under consideration on any theory of superior efficacy." (page 444*). Similarly they dispose of the observation of Mr. Justice Muthuswami Iyer in *Muttusami* v. *Muttukumarasami* (13), that the spiritual benefit conferred on a propositus is a ground of preference. A good portion of the judgment is devoted

(17) 22 W. R. 264.

(18) 5 B. 597; 3 Ind. Dec. (N. S.) 393.

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to showing that the Mitakshara "repudiates the notion of connection by spiritual offerings." There can be little doubt that the learned Judges were disposed to take the view that if the question had to be decided with reference to the theory of religious efficacy, the maternal uncle's son ought to be preferred to the maternal aunt's son. A very different view on the question of spiritual benefit has now been taken by the Judicial Committee in *Vedachela Mudaliar* v. *Subramania Mudaliar* (3), and the value of *Appandai Vathiyar* v. *Ragubali Mudaliar* (1), as an authority is thus lost.

In *Vedachela Mudaliar* v. *Subramania Mudaliar* (3), the contest was between the mother's brother and the father's sister's son's son. The Madras High Court (Miller and Sadasiva Iyer, JJ.), held that the latter was the preferential heir. In doing so, one of the learned Judges (Sadasiva Iyer, J.) refused to recognise the fourth rule laid down by Sir T. Muthuswami Iyer, J., in *Muthusami* v. *Muttukumarasami* (13), namely: "that as between the *bandhus* of the same class, the spiritual benefit they confer upon the propositus is as stated in Viramitrodaya a ground of preference."

Their Lordships of the Judicial Committee point out that the Viramitrodaya is regarded as a high authority, wherever the Law of the Mitakshara is in force and state their conclusion thus:—"Their Lordships think that in the absence of any express authority varying the rule, the propositions enunciated in *Muttusami* v. *Muttukumarasami* (13) which on appeal was affirmed by the Judicial Committee, furnish a safe guide." The competing claimants, the maternal uncle and the father's sister's son's son, both belong to the class of *atma bandhus*. The maternal uncle was preferred on the grounds: (1) that he is undoubtedly nearer in degree to the deceased than the rival claimant; (2) that he effers oblations to his father and grandfather to whom the deceased was also bound to offer *pinda*, whereas the father's sister's son's son offers no *pinda* to the deceased ancestors. In the course of their judgment, their Lordships observe that it is not necessary to express any opinion, how far the proposition that preference should be given to cognates *ex parte paterna* over cognates *ex parte materna*, is in conformity with the express rule that in each class propinquity should be the governing factor, but it is noteworthy that the maternal uncle who was preferred by their Lordships is a cognate *ex parte materna* and that the sister's son who was rejected in favour of the maternal uncle, is a cognate *ex parte paterna*.

In *Appandai Vathiyar* v. *Ragubali Mudaliar* (1), the learned Judges, (White, C. J., and Krishnaswami Iyer, J.), expressed disapproval, as Mr. Justice Sadasiva Iyer did in the case that went up to the Privy Council of the fourth principle enuuciated by Sir T. Muthuswami Iyer, J., in *Muttusami* v. *Muttukumarasami* (13). It, therefore, follows that *Appandai Vathiyar* v. *Ragubali Mudaliar* (1) cannot now be regarded as an authority for the proposition that the maternal aunt's son is to be preferred to the maternal uncle's son.

I have so far examined the grounds of the decision in *Appandai Vathiyar* v. *Ragubali Mudaliar* (1) with a view to show that it cannot be followed. That is the only Madras case that deals with the question of preference between the maternal aunt's son and the maternal uncle's son. The same question arose in two other cases, one of the Allahabad High Court and the other of the Bombay High Court. In *Ram Charan Lal* v. *Rahim Bakhsh* (2), Banerji and Piggott, JJ., held, dissenting from the Madras view, that the maternal uncle's son was the preferential heir. The ground of decision was that precedence was to be determined by propinquity. They quote with approval the passage in *Tirumalachariar* v. *Audal Ammal* (16) which is to the effect that all other considerations being equal that claimant between whom and the stem there intervenes only one female link is to be preferred to the claimant who is separated from the stem by two such links. In *Rajeppa Ranappa Kundagol* v. *Gangappa Jotappa Mandwe* (14). Macleod, C. J., and Shah, J., held that the only test that ought to be applied is propinquity to the deceased, that the argument of relative religious efficacy was not well-founded and that the affinity of the maternal uncle's son and the maternal aunt's son is equal and that they being equally near to the propositus, they ought to take equally. The peculiar doctrine that prevails in Bombay enabled the learned Judges to treat a female's and a male's descendant as standing on a par and, therefore, being equally entitled.

We are bound by the decision of the

Judicial Committee and giving effect to the view adopted in *Vedachela Mudaliar* v. *Subramania Mudaliar*, (3), we must hold that the maternal uncle's son is the preferential heir, on the ground of superior efficacy of oblations. The mother's sister's son as well as the mother's brother's son are both *atma bandhus* and are both expressly mentioned in the Mitakshara. They are both related on the mother's side and they are both equally removed from the propositus. The Allahabad High Court held that the maternal uncle's son is nearer to the deceased than the maternal aunt's son; but the Bombay High Court was of the opinion that both were equally near to the propositus. In my opinion, it is unnecessary to enquire whether the Allahabad view or the Bombay view is correct. I would prefer to base my judgment on the surer ground referred to by the Privy Council that of superior religious efficacy.

How then does the question of superior religious efficacy stand?

Sarvadhikari in classifying the heirs according to the Dayabhaga gives the thirty-fifth place to the maternal uncle's son and the thirty-seventh place to the maternal aunt's son. The doctrine of spiritual benefit, which is the foundation of the order given in the Dayabhaga, is discussed by Sarvadhikari at pages 700 to 710: (see Hindu Law of Inheritance by Sarvadhikari, 2nd Edition). Daya Krama Sangraha by Sri Krishna Tarkálankara similarly prefers maternal uncle's son to maternal aunt's son and superior spiritual efficacy is given as the ground: See Ch. I, s. 10, Pl. 14, 15 and 16. Ghose in his Hindu Law observes that in some copies of Sri Krishna's commentary on the Dayabhaga the maternal aunt's son is given a place higher than that accorded to the maternal uncle's son and the learned author points out that this order of succession is not only opposed to the authority of Daya Krama Sangraha, but on principle cannot be accepted.

I do not propose to discuss the theory of the relative superiority of the *pindas*. It is sufficient to say that Jurists of the Bengal School whose system of the Law of Inheritance is permeated by considerations of religious efficacy, recognise that the maternal uncle's son has precedence over the maternal aunt's son. It is also worthy of note that the learned Judges in *Appandai Vathiyar* v. *Ragubali Mudaliar* (1), as also in *Ram Charan Lal* v. *Rahim Bakhsh* (2), were disposed to take the view that if the question was to be decided with reference to the ground of superior spiritual efficacy, the maternal uncle's son would be the preferential heir.

I, therefore, agree in the order proposed by my learned brother.

V. N. V. *Appeal allowed.*

Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 418 OF 1923.

February 4, 1925.

Present:—Justice Sir Theodore Caro Piggott, KT., and Mr. Justice Mukerji.

Sheikh MUHAMMAD HASHIM AND ANOTHER —DECREE-HOLDERS—APPELLANTS

versus

RADHA KRISHUN—JUDGMENT-DEBTOR —RESPONDENT.

Procedure—Decree conditional on payment of money within prescribed period—Court closed on last day for payment—Payment, whether can be made on re-opening.

Where a decree is passed conditional on the payment of money and a period is specified within which the payment must be made, it is open to the decree-holder, if the Court is closed on the last date on which the money could be deposited under the terms of the decree, to make the deposit on the day on which the Court re-opens.

Muhammad Jan v. *Shiam Lal*, 78 Ind. Cas. 1014; 22 A. L. J. 110; (1924) A. I. R. (A.) 218; 46 A. 328; L. R. 5 A. 104 Civ., followed.

Second appeal from a decree of the District Judge, Mainpuri, dated the 19th December 1922.

Mr. *Iqbal Ahmad*, for the Appellants.

Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.—This appeal arises under the following circumstances. A decree was passed by this Court in second appeal on the 4th of April 1922 in favour of the appellants *Sheikh* Muhammad Hashim and Baldeo Singh against the respondent Radha Kishan, conditional on payment of the sum of Rs. 1,940 within two months. The amount thus ordered to be paid was not paid into Court until the 21st of June 1922. The Courts below were closed for the vacation between the 20th of May 1922 and the 20th of June 1922. On the re-opening of the Court the deposit was made. The question between the parties arose whether in the circum-

stances the decree in favour of the appellants stood or vacated itself. The Courts below came to the conclusion, following two cases decided by this Court, that the appellants were bound to deposit the money in terms of the decree, and the fact that the Courts were closed was of no help to them.

It has since been held by a Full Bench of three learned Judges of this Court that where a conditional decree is passed on payment of money it is open to the decree-holder to deposit the money after the re-opening of the Court, if the Court was closed on the last date on which the money could be deposited: see *Muhammad Jan* v. *Shiam Lal* (1).

In view of the authoritative pronouncement the decision of the Court must be in favour of the appellants, and it must be held that the deposit was within time.

That being so, the present appeal is allowed with costs in all the three Courts including fees in this Court on the higher scale.

The result is that the application of the respondent to be restored into possession will stand dismissed. If under that application the respondent has been put into possession, the appellant will recover possession under the present order.

Z. K. *Appeal allowed.*

(1) 78 Ind. Cas. 1014; 22 A. L. J. 110; (1924) A. I. R. (A.) 218; 46 A. 328; L. R. 5 A. 104 Civ.

MADRAS HIGH COURT.

CIVIL SUITS NOS. 755 OF 1920, 557 OF 1921 AND 290 OF 1923.

October 29, 1924.

Present:—Justice Sir Kumaraswami Sastriar, KT.

IN C. S. No. 755 OF 1920

GANSHAMDOSS NARAYANDOSS—PLAINTIFF

versus

SARASVATHI BAI—DEFENDANT.

IN C. S. No. 557 OF 1921

JAMNADOSS, MINOR BY HIS NEXT FRIEND DEVICHAND—PLAINTIFF

versus

SARASVATHI BAI AND OTHERS—DEFENDANTS.

IN C. S. No. 290 OF 1923

JAMNADOSS DEVICHAND—PLAINTIFF

versus

Syed IMAM SAHIB AND ANOTHER—DEFENDANTS.

Will, construction of—Bequest to daughters followed by clause creating right of pre-emption—Estate taken—Succession Act (X of 1865), ss. 50, 187—Hindu Wills Act (XXI of 1870)—Attestation—Witnesses, whether must attest in each other's presence—Unprobated Will, whether can be set up in defence—Caste Disabilities Removal Act (XXI of 1850)—Hindu widow, conversion of, to Islam—Claim to succeed to property under Will, whether affected—Probate, application for—Dismissal for default, effect of—Subsequent application, whether maintainable—Civil Procedure Code (Act V of 1908), s. 11, O. IX, rr. 8, 9.

A testator directed his executors to alter a certain house belonging to him so as to convert it into four houses and to give one house to each of his four daughters after getting grants issued in their names. This was followed by a clause that in case any of the four daughters should be in need of money and should wish to sell her share, she should sell to the other daughters and not to strangers:

Held, that the Will conferred an absolute estate on the daughters and that the subsequent clause which only amounted to a direction in the nature of pre-emption did not operate to cut down the right of each of the daughters in the property given to her to a life-estate. [p. 625, col. 2; p. 626, col. 1.]

Where a person asks another to attest a document it may be legitimately inferred that he admits that the document has been executed by him and the person whom he wants to attest is required to attest the document in token of the executant's admission of execution. [p. 627, cols. 1 & 2.]

Section 50 of the Succession Act, which is made applicable to Hindu Wills by the Hindu Wills Act, does not require the witnesses to a Will to attest the Will in the presence of each other. [p. 627, col. 2.]

Where a Will is disputed several years after its alleged execution, one important test is to see what was the conduct of the parties; and where the conduct of the parties can only be rationally explained by the fact of the existence of a Will, it will have a considerable bearing in appreciating the evidence of the witnesses as to its genuineness. [*ibid.*]

Section 187 of the Succession Act does not say that an unprobated Will should not be looked into for any purpose whatever. It only says that title cannot be proved to establish a claim as a legatee without taking out Probate of the Will. Where a plaintiff comes into Court claiming as on an intestate succession, his claim can be displaced by proving that the deceased did not die intestate but left a Will. In such a case the plaintiff who claims adversely to the Will is out of Court irrespective of any proof of claim or title by the defendant. In cases where the plaintiff necessarily fails on the ground that there is a Will left by a deceased person and that by reason of the Will his claim to succeed to the estate of the deceased on the ground of intestacy under the ordinary law is not sustainable, there is nothing to prevent the defendant from pleading and proving the existence of the Will. It is unnecessary in such cases for the defendant to prove any independent title of his own. [p. 628, cols. 1 & 2.]

The dismissal for default of an application for Probate would not debar an application by another person claiming an interest under the Will or by the executor himself. An executor presenting an application for Probate of a Will cannot be regarded as a plaintiff who brings a suit in respect of a cause of action. [p. 629, col. 1.]

Where a suit is dismissed for default it does not extinguish the right of the party whose suit is dismissed. All it involves at best is that he cannot file

fresh suit in respect of the same cause of action. Where he is in the position of a defendant in another action it is open to him as defendant to set up his title as a bar to the plaintiff's suit. [p. 629, col. 2.]

A dismissal for non-prosecution or for the absence of the plaintiff does not operate as *res judicata*. [*ibid.*]

Where a Hindu widow becomes a convert to Islam her conversion does not affect her right to property to which she is entitled under the Will of her father. [p. 630, col. 1.]

Mr. *K. Bhashyam Iyengar*, for the Plaintiff in C. S. No. 755 of 1920.

Mr. *C. Venkatasubbaramiah*, for the Defendant in C. S. No. 755 of 1920.

Mr. *K. Doraswami Iyengar*, for the Plaintiff in C. S. No. 557 of 1921.

Messrs. *C. Venkatasubbaramiah* and *K. Bhashyam Iyengar*, for the Defendants in C. S. No. 557 of 1921.

Mr. *K. Doraiswami Iyengar*, for the Plaintiff in C. S. No. 290 of 1923.

Mr. *K. Bhashyam Iyengar*, for the Defendants in C. S. No. 290 of 1923.

JUDGMENT.—These suits relate to house and ground No. 2/100 Perumal Mudali Street, Madras, described in the schedules to the plaint.

The following facts are not in dispute. One Govindoss Ghanshamdoss had two wives. The first wife was Krishna Bai, and the second wife was Ganga Bai. By Krishna Bai, he had a son Narayandoss and a daughter Kaveri Bai. Narayanadoss had a son Ghanshamdoss, who is the plaintiff in C. S. No. 755 of 1920, Kaveri Bai died issueless, in October, 1908, and it is alleged that she left a Will, dated 5th of April 1908. By the socond wife, Ganga Bai, Govindoss Ghanshamdoss had three daughters, Saraswathi Bai, who died in 1923, Bhagirathi Bai who died in October 1909, leaving a son Jamnadoss who is the plaintiff, in C. S. Nos. 557 of 1921 and 290 of 1923 and Gula Bai who is a defendant in C. S. Nos. 755 of 1920 and 557 of 1921. Saraswathi Bai, who was left a widow, when she was quite young, subsequently became a convert to Muhammadanism and married a Muhammadan and died professing the Muhammadan religion in 1923. Gula Bai who also became a widow when she was young married a Muhammadan and is now professing the Muhammadan faith. Govindoss Ghanshamdoss died on the 18th December 1891, having left a Will, of which Probate was granted by the High Court. The Will is filed as Ex. A. He appoints as executors his son Narayandoss and one Goverdhandoss. The material portions of the Will run as follows:—

"3. My second wife Ganga Boyee's *pulla* (or dowry) jewels worth about six thousand rupees are with me. The documents of the house door No. 3 in Narayana Mudaly Street, which my wife purchased from Mundapathi Ramakrishniah are with Goverdhan Doss Jumna Doss. Krishna Doss Vittal Doss shall take those documents from Ghoverdhan Doss Jumna Doss. I delivered the above mentioned jewels to the aforesaid Krishna Doss Vittal Doss. My son Narayana Doss and Goverdhan Doss Jumna Doss together shall within six months get proper prices for and sell the aforesaid jewels. Should these two persons fail to sell the same within the aforesaid six months, the aforasaid Krishna Doss Vittal Doss shall get good prices, according to the market rates and sell the same and shall with that money itself construct four separate houses, out of the house door No. 3 in Narayana Mudali Street and give them to my four daughters, after getting grants issued in their names. In case any of these four persons may, through want of money, wish to sell her share, any of the remaining daughters may then purchase the same. In case they may not consent to do so, she herself shall enjoy the same and shall not in the least sell it to others.

4. My deceased second wife Ganga Boyee has left four per cent, interest bonds for Rs. 8,500, with Goverdhan Doss Jamnadoss. Out of this, my son Narayana Doss shall receive Rs. 1,750 for expenses at the time of the marriage of my second wife's daughter Bhagirathi Bai. My son Narayana Doss shall receive Rs. 1,750 for expenses at the time of the marriage of my third daughter Goolab Bai. Out of the balance of Rs. 5,000 one share shall be given to Sow. Saraswathi Boyee, out of the three daughters of my second wife, as soon as the 20th year of her age begins. The two other shares shall be given to the others, when the 20th year of their age begins, respectively by Goverdhan Doss Jumnadoss or his heirs; in case any of these may die by act of King or by act of God, a division shall be made between the survivors; out of the three girls, when occasions may arise for expenses for the aforesaid children, money shall be drawn for proper expenses from the interest on the bonds."

It is not disputed that according to the terms of this Will, houses were built and given to each of the daughters Kaveri Bai, Saraswathi Bai, Bhagirthi Bai and Gula Bai,; Kaveri Bai with whom we are concerned, got the house in 1893, and she was in possession and enjoyment of the same, till her death in 1908. It is alleged that she left a Will dated the 5th of April 1908; which is marked as Ex. II in this case. I shall refer to the terms of this Will and the evidence about it later on; but it is sufficient at this stage for me to state that I am of opinion that it has been proved that she executed the Will Ex. II and that it is valid.

C. S. No. 755 of 1920 is filed by Gansham Doss Narayana Doss, who is the son of Narayana Doss and nephew of Kaveri Bai, for a declaration that house No. 2,100 Perumal Mudali Street, belongs to him and, for possession from Sarasvathi Bai, who it is alleged, got into possession of the property without any title and has no right to the property. His case is that the property belonged absolutely to Kaveri Bai, that Kaveri Bai died intestate in 1908, that he was a minor at the date of her death, that his father also died in 1912, that on the death of Kaveri Bai, Saraswathi Bai took unlawful possession of the property and that he is entitled to the relief claimed. He says that he was born in October 1896, and that as Kaveri Bai died in October 1908 and as the suit was filed, within 12 years of her death, the suit is not barred by limitation.

As I said before, the suit was against Saraswathi Bai, who was then alive and she filed a written statement, putting the plaintiff to the proof of the various allegations in the plaint, denying his title and pleading that Kaveri Bai died leaving a Will, by which she bequeathed the property to her (Saraswathi Bai) and her two sisters, and that under the Will the house belongs to her. She says that the plaintiff is not entitled to any mesne profits and that the mesne profits claimed are excessive. She also says that the suit is barred by limitation, as she has been in adverse possession for over 12 years. She further states that under the terms of Gansham Doss's Will, the properties which were given were properties, which belonged to her mother and that the plaintiff has no right to the property.

The following issues were settled:—

(1) Did Kaveri Bai die intestate, as alleged in para. 5 of the plaint, or after making a last Will and testament, as alleged in para. 3 of the written statement?

(2) If there was such a Will, can the defendant set up a right, as legatee thereunder, without producing Probate of the said Will?

(3) What was the date of the death of Kaveri Bai?

(4) Has the defendant acquired an absolute right to the suit property by adverse possession, for over 12 years, after the death of Kaveri Bai and previous to the institution of the suit, as alleged in para. 7 of the written statement?

(5) Was the plaintiff's father the heir to Keveri Bai, as alleged in para. 6 of the plaint?

(5) (*a*) When did plaintiff attain majority?

(6) Is the plaintiff's claim barred by the Law of Limitation?

(7) To what mesne profits, if any, is the plaintiff entitled? and

(8) To what relief isthe plaintiff entitled?

C. S. No. 557 of 1921 is filed by Jamnadoss, who is the son of Bhagirathi Bai against Saraswathi Bai and Gansham Doss Narayan Doss, plaintiff in C. S. No. 755 of 1920 to recover possession of house No 2,100 Perumal Mudali Street; Saraswathi Bai died pending suit and her sister Gula Bai was brought on record and she is described in the plaint as legal representative of Saraswathi Bai. After setting out the relationship between the parties and the Will of Goverdhan Doss Ghansham Doss and after stating that Kaveri Bai obtained possession of the property described in the schedule to the plaint and was in possession and enjoyment of the same, till her death in 1908, when she died issueless and intestate, the plaintiff states that Govindoss Ghansham Doss had no power to dispose of any of his wife's properties, including the suit property, that he had no power to give to Kaveri Bai any property built out of the monies belonging to Ganga Bai, her step-mother, that Kaveri Bai could not acquire any title to the suit house as the legatee under the Will, that even if she purported to claim any title thereunder, it could not prevail against the title of Saraswathi Bai, Bagirathi Bai and Gula Bai, that Kaveri Bai died intestate and issuless in October 1908, and on her death, Saraswathi

Bai took possession of the property claiming that she obtained the same under a Will, alleged to have been left by Kaveri Bai, that the plaintiff's mother Bagirathi Bai died at Madras, on or about the 24th October, 1909, leaving the plaintiff her only son, a minor, as her heir and legal representative that as the three daughters of Ganga Bai were minors, at the time of the death of their father and mother, Kaveri Bai could not claim any title to the suit property, even as a trespasser as against them that even if Kaveri Bai could claim any title to the property under the Will of her father, she could claim no more than the life-estate of a daughter under her father's Will and that she having died before she acquired any title to a daughter's estate by prescription, she could not transmit any property to her heirs. The plaintiff also says that Kaveri Bai had no power to dispose of the property by Will and that he became entitled to the share of his mother on her death. He stated that the 2nd defendant, who is the plaintiff in C. S. No. 755 of 1920, has no right to the property, as he could not under any circumstances succeed to the property, belonging to Ganga Bai. He says that Saraswathi Bai and Gula Bai, the 1st and 3rd defendants, became out castes, having married Muhammadans and that they could acquire no title to the properties of their mother. In the alternative, he states that in any event, he is entitled to one-third of the property and mesne profits.

The 1st defendant Saraswathi Bai filed a written statement in the same terms as the written statement in Civil Suit No. 755 of 1920. She states that Kaveri Bai acquired full and absolute title to the suit property that she left a Will of which she (the 1st defendant) is going to obtain Probate. She denies that she is an outcaste, or that she is not entitled to the property and states that in any event, Kaveri Bai acquired complete title by adverse possession.

The 2nd defendant, Ghansham Doss Narayan Doss, filed a written statement, which sets out the contentions contained in his plaint in C. S. No. 755 of 1920. He says that even if Govindoss Ghansham Doss has no power to dispose of the property by Will, Kaveri Bai acquired an absolute title to the property.

The following issues were settled:—

(1) Was the suit house the property of Ganga Bai, as alleged in the plaint, or had it been purchased in her name only *benami* by Govindoss Gansham Doss?

(2) If it was the absolute property of Ganga Bai, is the plaintiff estopped from setting up the same by reason of Kaveri Bai and the plaintiff's mother, or either of them having taken under the Will of Govindoss Gansham Doss?

(4) If it be found that Kaveri Bai took under the Will, what, on the true construction of the Will, was the estate given to her? Whether it was an absolute estate or only a life-estate and if the latter, in whom did the remainder become vested?

(5) Did Kaveri Bai leave a Will, as alleged by the 1st defendant and can the 1st defendant set up any right thereunder, until and unless she obtains Probate of the same?

(3) If issues Nos. 1 and 2 should be found for the plaintiff, had Kaveri Bai acquired a right to the suit property by adverse possession, as alleged in paras. 5 and 6 of the 2nd defendant's written statement?

(6) Have the 1st and 3rd defendants lost their rights, if any, to the suit property, by reason of their conversion to Muhammadanism and marriage?

(7) What are the rights, if any, in the suit property, of any of the parties to the suit?

(8) To what mesne profits, if any, is the plaintiff entitled?

(9) Is the suit barred by limitation? and

(10) To what relief is the plaintiff entitled?

Civil Suit No. 290 of 1923 was filed by Jamnadoss, who is the plaintiff in C. S. No. 557 of 1921, after the death of Saraswathi Bai against her husband Syed Imam Sahib and Ghansham Doss Narayan Doss the plaintiff in C. S. No. 755 of 1920. The plaint contains the same allegations, as the plaint in C. S. No. 557 of 1921, the parties only being different and his case is that Saraswathi Bai is only entitled to a qualified estate, inherited from her mother Ganga Bai, that on her death the heirs of Ganga Bai are entitled to succeed and that the plaintiff is the nearest reversioner of Ganga Bai.

The 1st defendant is *ex parte*.

The 2nd defendant filed a written statement, in which he sets up the same title, as he sets up in his plaint in C. S. No. 755 of 1920.

No issues were settled separately in this suit; but the issues in the other two suits will cover all the contentions raised in this suit.

These three suits were tried together, by consent of parties and the evidence in one was treated as evidence in the other suits.

Before dealing with the material issues I may dispose of certain issues, which raise no difficulty.

The first point is as regards the date of the death of Kaveri Bai. It is proved by the death certificate Ex. B that Kaveri Bai died on the 16th of October 1908. This date is not disputed by any of the parties. It is also proved that Ghansham Doss Narayan Doss, the plaintiff in C. S. No. 755 of 1920, was born on the 19th of October 1896. As C. S. No. 755 of 1920 was filed on the 14th of October 1920, that is, within 12 years after the death of Kaveri Bai, the suit cannot be barred by limitation.

As regards the property in dispute, in these suits, it is not disputed that houses were built, in accordance with the directions contained in the Will, Ex. A, and Kaveri Bai was put in possession of one of the houses, which is the house now in dispute. Paragraph 5 of the plaint, in C. S. No. 755 of 1920, distinctly alleges that from 1892, Kaveri Bai was in possession and enjoyment of the suit property, as her absolute property till her death which took place in 1908. It is clear from the plaint and it is the case of all the other parties, that Kaveri Bai was in possession of the house from 1892 or 1893, she having been put in possession of the property by the executors under the Will of her father. As Kaveri Bai died only in 1908, it is clear that she was in possession of the property for over 12 years and unless there is anything shown to the contrary, she would have acquired a right to the property by adverse possession. As regards the possession of Saraswathi Bai, though the plaintiff in C. S. No. 755 of 1920, wanted to throw some doubt as to when she got possession, the plaintiff in para. 8 of his plaint admits that on the death of Kaveri Bai, the defendant Saraswathi Bai, taking advantage of her having been with Kaveri Bai till her death, took possession of the house and has continued to be in possession and management of the same. This is also the case of the other defendants that Saraswathi Bai took possession of the property on the death of Kaveri Bai. It is, therefore, clear that Saraswathi Bai was in possession of the property from the year 1908, up to her death in 1923.

The next question for determination is as to the interest that Kaveri Bai took under the Will of her father Govindoss, Ghansham Doss. I already referred to para. 3 of Will, Ex. A, which deals with this house. The contention of the plaintiff in C. S. No. 755 of 1920, is that under the term of this Will Kaveri Bai acquired an absolute estate, whereas the contention of Jamna Doss, the plaintiff in the other two suits, is that Kaveri Bai acquired only a life-estate. I do not think, on a proper construction of this Will, Kaveri Bai can be said to have acquired only a life-estate. The Will says that, house No. 3 Narayana Mudali Street will be altered in such a way that four houses ought to be built and that the executors should give them to his four daughters, after getting grants issued in their names. So far, there is nothing to qualify the gift. It is a gift without any reservation. I do not think, that the next sentence, which, in my opinion only amounts to a direction for pre-emption would cut down the absolute nature of the gift. What the testator says is that in case any of the four daughters should be in need of money and wish to sell her share, she should sell to the other daughters and not to strangers. The evident intention of the testator was that the houses should not pass out of the hands of the members of the family; but that would not cut down the right of each of the donees to a life-estate. One test would be to see whether, if one daughter was willing to buy her sister's house the money would not be money which the sister would take absolutely and do what she pleased with. The mere contingency of sale, which under the Will would only arise, in case any of the daughters wanted money, shows that the testator did not want to give them only a life-estate in the money. Reference has been made to a recent decision of the Privy Council in *Ashrafi Singh* v. *Bidya Prasad Narayan Singh* (1), but I do not think it was intended that all the previous decisions of their Lordships, where the word "*malik*" was treated as absolute owner, were over-

(1) 80 Ind. Cas. 826; 20 L. W. 425; (1924) A. I. R. (P. C.) 191; 26 Bom. L. R. 776; 47 M. L. J. 585; (1924) M. W. N. 819; L. R. 5 A. (P. C.) 136; 6 P. L. T. 77 (P. C.).

ruled. There is this additional fact, in the present case, that the testator does not anywhere indicate an intention that his daughters should have only a woman's estate. I am not prepared to hold that the clause, as to pre-emption, coupled with the direction that they should not sell the houses to strangers cut down the estate to a mere life-estate. I am of opinion that Kaveri Bai took an absolute estate in the suit property. In the view I take of the case, the fact that the property bequeathed by the testator in paras. 3 and 4 of the Will, Ex. A, was the property of his wife Ganga Bai to which Kaveri Bai would not, in the ordinary course, under Hindu Law get any right and the fact that Govindoss Ghansham Doss had no power to dispose of the *stridhanam* property of his wife Ganga Bai, do not assume much importance. There can be little doubt that Govindoss Ghansham Doss had no power to dispose of his wife's dowry properties which are her *stridhanam* and which would, in the ordinary course, under Hindu Law have descended to her three daughters, but it is clear from the facts, which I have referred to above, that Kaveri Bai was in possession of the property as legatee with an absolute estate, without any objection, by Saraswathi Bai, Bhagirathi Bai, or Gula Bai, for over 12 years; and it seems to me to be clear that Kaveri Bai, at the date of her death, acquired an absolute title, to the property, whatever may have been the infirmity of her claim, under the Will of Govindoss Ghansham Doss, owing to his want of disposing power over the properties.

The next question to be decided is as to who in law would be the heirs of Kaveri Bai. There can be little doubt that, in the absence of any testamentary disposition by Kaveri Bai, the plaintiff Ghansham Doss Narayan Doss would be entitled to succeed to her absolute properties, in preference to Saraswathi Bai, Bhagirathi Bai, Gula Bai and Jamna Doss. I need only refer to *Kanakammal* v. *Ananthamathi Ammal* (2) and *Ganpat Rama Joshi* v. *Secretary of State for India* (3). This would be equally so, whether the parties are governed by Mayukha or Mitakshara. But the question is whether the plaintiff could have any right, in view of the fact that Kaveri Bai left a Will, and this takes me to the two chief questions, raised in these suits; first, as to whether Kaveri Bai left a Will, and secondly, whether in the absence of Probate, the Will can be pleaded as a bar to the plaintiff's claim.

The evidence as to the Will, left by Kaveri Bai, consists of the evidence of two of the attesting witnesses Rangal Doss and Poolji Vyas. One of the attesting witnesses Mr. Seshacharlu a Vakil of this Court, who evidently was the legal professional gentleman consulted in the matter, died in 1909 or 1910 and the evidence of Sripati Rao, who was his *gumastah* proves that the Will, Ex. II, bears the attestation of Mr. Seshacharlu. The witness also says that he used to accompany Mr. Seshacharlu, when he went to prepare Wills to the houses of his clients; but he is not sure, as to what was done in this particular case. He is, however, perfectly sure that the attestation in the Will, Ex. II, is that of Mr. Seshacharlu's.

Before dealing with the evidence, I may remark that there is considerable force in the argument of Mr. Venkatasubbaramayya that the conversion of his client, Gula Bai, to Muhammadanism and her living with a Muhammadan husband, has estranged the members of the community from her, that although he took out subpœnas to the available attesting witnesses, there was considerable difficulty in getting them to state what actually happened and that the sympathies of the attesting witnesses are naturally against his client. This I found, in the way in which both Rangal Doss, and Poolji Vyas gave their evidence.

Rangal Doss, who was examined as defendant's first witness, says that he saw Kaveri Bai put her mark to the Will Ex. II, that he attested the Will and that there are three other attestations, before his attestation in the Will. He had to admit this because he had committed himself in the testamentary proceedings, to the statement that Kaveri Bai made her mark in the Will. In cross-examination, he states that the executor under the Will Ranchordoss took him to Kaveri Bai's house, that she was then ill and that the Will was not read over to her, in his presence. He, however, had to admit that he saw her put her mark to the Will, Ranchordoss having given her the pen to do so. He wants to make out that when she put her mark, nobody but Ranchordoss, Kaveri Bai and

(2) 25 Ind. Cas. 901; 37 M. 293.
(3) 62 Ind. Cas. 109; 45 B. 1106; 23 Bom. L. R. 462.

himself were present and that the other attesting witnesses were not present when he attested the Will. He wants to get over the fact, that his attestation comes last, by saying that Ranchordoss asked him to sign his name below, so as to leave space for the other attesting witnesses. Why it is not explained. He says that Kaveri Bai was very ill, and that she died; soon after the execution of the Will, that he does not know whether she was in such a condition, as to execute a Will or not, and that although Ranchordoss told her that the witness had come to attest the Will, she did not give any answer, by word or sign. It appears, however, from the evidence that Kaveri Bai died on the 16th of October 1908, while the Will was executed on the 5th of April 1908, so that she lived about six months, after the execution of the Will. Poolji Vyas, who was examined as defendants' second witness, is also an attesting witness. He denies some more facts, as he has not committed himself till now to any statement as to the Will. He admits that he attested the Will but says that he did not see her put her mark to the Will. He says that he was called by Ranchordoss, that the lady was sitting there, that Ranchordoss told him that it was the Will of Kaveri Bai and wanted him to attest it, that she was lying on the bed and that she told the witness that he should attest the Will. The words which he says she used, were "put your signature in this." He says that he does not remember whether her mark was there, when he attested the Will. When asked, whether he thought she was in a condition to execute the Will, he says that he does not think she was in a condition to understand the Will. I have little doubt from the way in which this witness gave his evidence, that he is evidently trying to help the other side, as much as possible. His evidence, however, is clear on one point, that Kaveri Bai asked him to attest the Will and that he did so, at her request. Although he wants to make out that does not remember, whether she had put her mark on the Will or not, when he attested it, it seems to be fairly clear, that where a person asks another to attest a document it can be quite legitimately inferred that she admitted that the document was executed by her and that the person whom she wanted to attest, had to attest the document, in token of her admission of execution.

So far as Vakil Seshacharlu is concerned, he died several years ago. Nobody suggests that this signature in the Will is not his signature; and one thing is quite clear that the Will could not have been brought into existence, after 1909 or 1910, when he died and long before there were any disputes between the parties.

Section 50 of the Succession Act, which is made applicable to Hindu Wills by the Hindu Wills Act, does not require the witnesses to attest, in the presence of each other. Clause (3) is clear and I think the Will has been validly executed and attested.

There is one circumstance, which, in my view, strongly corroborates the case for the defendants, that Kaveri Bai left a Will and which probablises the genuineness of the Will. It is admitted that Saraswathi Bai, who was under the Will, Ex. II, the legatee of this house, continued to be in possession of the same, ever since the death of Kaveri Bai even though she had no legal title and even though Narayana Doss, the plaintiff's father, would have been the next heir and he lived for about four years, after the death of Kaveri Bai. It is also significant that the plaintiff who was born in 1896, and who attained majority in 1914, took no steps to recover the property, till he filed the suit in 1920, even though Saraswathi Bai had no title to the property and was in possession and enjoyment of the same, till her death in 1923. No explanation has been offered, why if Kaveri Bai left no Will bequeathing the property to Saraswathi Bai and Saraswathi Bai had no title to the property, except under the Will, both the plaintiff's father and the plaintiff allowed Saraswathi Bai to be in possession of the property, till her death in 1923. It is hardly likely that they would have done so, unless they were aware that Kaveri Bai had left a Will, disposing of the property and that the legatee Saraswathi Bai was in the rightful possession of the same. One important test, in cases where Wills are disputed and disputes arise several years later, is to see what was the conduct of the parties; and where the conduct of the parties can only be rationally explained, by the fact of the existence of a Will, I think this fact will have considerable bearing, in appreciating the evidence of the witnesses as to its genuineness.

It was argued by the plaintiff's Vakil, on the strength of the power-of-attorney, Ex. C, dated the 14th of February, 1885, executed by Kaveri Bai, in favour of the plaintiff's father, that Kaveri Bai put her mark in that document, differently from the mark in Ex. II, executed by her in 1908. The mark in Ex. C is like a Swasthika mark: whereas the mark in Ex. II is a cross-mark. There is nothing to show that Kaveri Bai's usual way of marking was the Swasthika mark. Exhibit C is the only document put in which contains such a mark. I do not think it can be said that because an illiterate woman put a particular kind of mark in 1885, the mark put in 1908, *i. e.* 23 years afterwards, which differs slightly from the mark of 1885, could not be genuine.

Giving the oral evidence on this point, my best consideration, I have little hesitation in coming to the conclusion that the Will, Ex. II is genuine.

The next question is as to whether the Will not having been probated, it can be used to defeat the plaintiff's claim. On this part of the case, there is some conflict of authority. *Janki* v. *Dhanu Lall* (4) *Carlapatti Chinna Cunniah* v. *Cota Wammalivariah* (5), *Parthasrathy Aiyar* v. *Subbaroya Gramony* (6) and *Shadagopa Naidu* v. *Thirumalaswami Naidu* (7) are authorities for the view that a defendant can rely upon a unprobated Will, as defence to an action. The contrary view is suggested in *Lakshammma* v. *Ratnamma* (8) and C. S. No. 521 1919. I have in *Shadagopa Naidu* v. *Thirumalaswami Naidu* (7) considered the authorities and I see no reason to change my view, as there is no clear authority against the view I have taken and which is supported by the cases I have already referred to. Section 187 of the Succession Act does not say that an unprobated Will should not be looked into, for any purpose whatever. It only says that title cannot be proved to establish a claim as legatee. In the present case, the plaintiff comes to Court, saying that Kaveri Bai died intestate and that he is the heir under the Hindu Law, claiming by intestate succession. There is no authority which says that where a plaintiff comes to Court, claiming as on intestate succession, his claim can only be displaced, by one who has obtained Probate of the Will. Where it is, shown that the person did not die intestate, but left a Will, the plaintiff, who claims adversely to the Will, is out of Court, irrespective of any proof of claim or title, by the defendant. In cases where the plaintiff necessarily fails, merely on the ground that there is a Will left by a person and that by reason of the Will, his claim to succeed to the estate of the deceased, on the ground of intestacy, under the ordinary law, is not sustainable, there is nothing to prevent the defendant from pleading and proving the existence of the Will. It is unnecessary, in such cases, for the defendant to prove any independent title of his own. Just as he could plead *jus tertii*, he could also plead facts, that would bar the plaintiff's title. Even assuming, therefore, that the authority in *Lakshmamma* v. *Ratnamma* (8) and C. S. No. 521 of 1919 correctly, state the law, which I doubt very much, it seems to me that the plaintiff would still be out of Court, if the defendant proves that there can be no question of heirship or intestate succession, because of the existence of the Will. I may refer to the observations of the learned Chief Justice, in *Parthasarathy Aiyar* v. *Subbaroya Gramony* (6).

"Now the law as stated in s. 187, in my judgment, is the same, as the Law of England on the subject. And I think that it is that a person who in Court has to prove title and has to deduce that title from a Will, whether that person is plaintiff or defendant, cannot do so without producing Probate, and I do not agree with the cases which have suggested to the contrary, such as *Carlapatti Chinna Cunniah* v. *Cota Wammalivariah* (5) which seems to have decided that a defendant can claim, as a legatee under an unproved Will. This would not prevent a defendant resisting a claim, by an heir-at-law, by producing and proving a Will, of which Probate had not been granted."

It is not necessary in this case, for the defendant to prove his title, claiming as legatee under the Will of Kaveri Bai. It is sufficient for him to show that the plaintiff could not succeed, by reason of the existence of the Will. Even assuming, therefore, that the defendant cannot seek to prove his title, on an unprobated Will, he

(4) 14 M. 454; 5 Ind. Dec. (N. S.) 317.
(5) 3 Ind. Cas. 475; 33 M. 91.
(6) 72 Ind. Cas. 559; 17 L. W. 763; (1923) M. W. N. 763; 45 M. L. J. 175; (1924) A. I. R. (M.) 67.
(7) 30 Ind. Cas. 272; 18 M. L. T. 129.
(8) 21 Ind. Cas. 698; 38 M. 474; 25 M. L. J. 556

could use it for a collateral purpose, namely, to defeat the plaintiff's title to succeed on the basis of intestacy.

I am, therefore, of opinion that it is open to the defendant to prove the Will of Kaveri Bai, although it has not been probated, for the purpose of showing, that the plaintiff would not be entitled to succeed as heir.

The next question raised is as to the effect of T. O. S. Nos. 6 of 1921 and 8 of 1921. Saraswathi Bai applied for Probate of the Will of Kaveri Bai. A caveat was entered by the present plaintiff. The application was numbered as T. O. S. No. 6 of 1921 and it was dismissed for default. When the case was taken up it was alleged that the plaintiff was ill and he could not attend; but it was dismissed for non-prosecution. Saraswathi Bai applied again for Probate. It was also contested and it was numbered as T. O. S. No. 8 of 1921; but Saraswathi Bai died and matters dropped.

The contention of the plaintiff is that these proceedings are a bar to setting up a title under the Will, by the defendant, who claims under Saraswathi Bai. It is urged that the provisions of the C. P. C. apply, that, therefore, the second application by Saraswathi Bai would have been a bar and that consequently, it must be taken that the Will could not be proved for any purpose. Reference has been made to ss. 55 and 83 of the Probate and Administration Act; but these sections do not say that all the provisions of the Code apply. Section 55 says that the provisions of the Code will apply, as far as the circumstances of the case will admit, and s. 83 states that the provisions of the Code will apply, as nearly as may be. It has been held in *Ramani Debi* v. *Kumud Bandhu Mukherjee* (9) by Mookerjee and Carnduff, JJ., in an elaborate judgment reviewing the authorities, that the dismissal, for default of an application for Probate, would not debar an application by another person, claiming an interest under the Will and, therefore, necessarily also by the executor himself, and that an executor, presenting an application for Probate of a Will, cannot be regarded as a plaintiff who brings a suit, in respect of a cause of action. With this judgment I respectfully agree. It would lead to many anomalies if the dismissal of an application for Probate of a Will for default would preclude legatees or persons claiming under them, from filing a fresh application for Probate. In this case, there is the further fact that under Kaveri Bai's Will, legacies have been given to Gula Bai a defendant, in two of those suits; and it is open to Gula Bai to apply for Probate, as legatee, in her own right, and Probate once granted would cover all the properties and it cannot be said that because Saraswathi Bai applied for Probate and the application was dismissed for default, Letters of Administration cannot be issued to Gula Bai, who is also a legatee under the Will. I am also of opinion that where a suit is dismissed for default, it does not extinguish the right of the party, whose suit is dismissed. All it means at best is that he connot file a fresh suit, in respect of the same cause of action. Where, therefore, he is in the position of a defendant in another action, and his title is not extinguished, it is open to him, as defendant, to set up his title as a bar to the plaintiff's suit. That a dismissal for non-prosecution, or for the absence of the plaintiff, would not be *res judicata*, is clear from the decision of the Privy Council in *Chand Kour* v. *Partab Singh* (10), where it was held that s. 102 of the old C. P. C., which corresponds to O. IX, r. 8 of the present Code cannot operate as *res judicata* between the parties. Even assuming that Saraswathi Bai could not have filed a fresh application, the title acquired under the Will not being extinguished, Saraswathi Bai's heirs can always plead, as defendants, the existence of the Will, as to which there has been no adjudication, that it is not genuine.

A question has been raised as to estoppel; but it was not pressed or argued. It is difficult to see how there can be an estoppel in this case.

As to the law, governing the parties, there is no evidence that the parties, who migrated from Bombay, gave up Mayukha and adopted Mitakshara. But in any view of the case, it seems to me that Jamna Doss, the plaintiff in C S. No. 557 of 1921, and C. S. No. 290 of 1923, would not be entitled to the possession of the suit property, till Gula Bai's death. It is unnecessary to determine in this suit, what his rights would be, on the happening of that

(9) 7 Ind. Cas. 126; 14 C. W. N. 924; 12 C. L. J. 185.

(10) 16 C. 98; 15 I. A. 156; 5 Sar. P. C. J. 243; 12 Ind. Jur. 331; 8 Ind. Dec. (N. S.) 65 (P. C.).

contingency; and I make no declaration as to his rights, as the daughter's son of Ganga Bai, the original owner of the property and wife of the testator, Govindoss Ghansham Doss.

The conversion of Saraswathi Bai and Gula Bai to Muhammadanism, after they became widows, will not affect their rights to the property. No right they got from their deceased Hindu husbands is in question. Section 2 of the Hindu Widows Re-marriage Act will not apply and the Castes Disabilities Removal Act of 1850, prevents any forfeiture, by reason of conversion.

It follows from my findings that the three suits must be dismissed. As regards costs in C. S. Nos. 755 of 1920, and 557 of 1921, the plaintiff will pay the costs of Gula Bai and in C. S. No. 290 of 1923 the plaintiff will pay the costs of Ghansham Doss Narayan Doss, the 2nd defendant.

The Receiver will hand over possession of the property to Gula Bai.

V. N. V. *Suits dismissed.*

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1251 OF 1922.

November 26, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

INDU BHUSAN BOSE—PLAINTIFF —APPELLANT

versus

ATUL CHANDRA BISWAS AND OTHERS —DEFENDANTS—RESPONDENTS.

Landlord and tenant—Encroachment by tenant—Determination of tenancy—Tenant, whether bound to give up encroached land.

At the determination of his tenancy a tenant is bound to give up to his landlord the land encroached upon by him and made part of his tenancy. [p. 631, col. 2; p. 632, col. 1.]

Appeal against a decree of the District Judge, Jessore, dated the 16th of February 1922, modifying that of the Munsif, First Court, Magura, dated the 5th of January 1921.

Dr. *Kunjilal* and Babu *Surendra Chandra Sen* (not present), for the Appellant.

Dr. *D. N. Mitter* and Babu *Surendranath Bose* (*Sr.*), for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the plaintiff and arises out of a suit brought by the plaintiff against a number of defendsnts for possession of 90 plots of land on the allegation that they appertain to his *towji* of which he is an *ijaradar* under the *patnidar* of *Towji* No. 203. The defendants are numerous. Defendants Nos. 1 to 3 are said to be the legal representatives of one Sarola Sundari who held a tenancy under the owners of the plaintiff's *towji* at a *jama* of Rs. 50 which was subsequently reduced to Rs. 30. Defendant No. 4 is said to be a *patnidar* of a neighbouring *Towji* No. 2498. Defendant No. 5 is alleged to be one of the co-*patnidars* with defendant No. 4 who, we are told, has disclaimed his right as a *patnidar*. Defendants Nos. 6 to 9 are *zamindars* of *Towji* No. 2498. I should have stated that defendants Nos. 1 to 3 also claim to be tenants under the proprietors of *Towji* No. 2498. The other defendants are either tenants of defendants Nos. 1 to 3 defendant No. 4 or defendants Nos. 6 to 9. It is not necessary for the purpose of this appeal to go into details of the cases of the various defendants. It appears that the main defence in the case was that the lands in suit did not appertain to the tenancy of Sarola Sundari the predecessor of defendants Nos. 1 to 3. The plaintiff's case further was that *Towji* No. 203 was let out in a *patni* so far back as 1891, that the *patni* was purchased by the plaintiff in 1902 and that the *patni* having been transferred to the Jessore Loan Company, the plaintiff took an *ijara* for 99 years from the said Company. The plaintiff further alleged that the tenancy which I have mentioned before held by Sarola fell into arrears of rent and a decree was obtained by the plaintiff and the tenancy was sold on the 15th of July 1907. The plaintiff took symbolical possession on the basis of his purchase and he was dispossessed from the land by the defendants in February 1908. The present suit was brought in 1919 well within 12 years of the date on which the plaintiff took symbolical possession as against defendants Nos. 1 to 3. As I have already stated, the main defence was whether the land appertained to *Towji* No. 203 or to the neighbouring *towji* of defendants and also whether the lands were covered by the lease of Sarola. It appears that the Munsif directed a local investigation for the pur-

pose of ascertaining whether the lands did appertain to the plaintiff's *towji* or outside it, and also for the purpose of ascertaining the boundaries of the *jote* held by Sarola. The Commissioner reported that in the absence of a correct *thak* map and in the absence of field books of the *thak*, it was not possible to ascertain definitely whether the lands appertained to *Towji* No. 203 or not. It seems to have been admitted in the Court of first instance that three plots of land really appertained to the tenancy of Sarola. Numerous plots were given up by the plaintiff in the course of the trial and so far as I can gether, the number of the plots was ultimately reduced to about 55. The decree of the First Court was confined to the three plots in favour of the plaintiff and the rest of his claim was dismissed. On appeal to the District Judge by the plaintiff, the learned Judge agrees with the Munsif as regards the plots which had been decreed in favour of the plaintiff. As regards the other plots the learned Judge says that it was argued before him on behalf of the plaintiff that the plaintiff's claim really was based upon his claim to *Towji* No. 203. So far as the tenancy of Sarola was concerned that having been sold was wiped out and, therefore, whether the lands appertained to the *jote* of Sarola or not, so far as they appertained to *Towji* No. 203, they could be her property as owner of *Towji* No. 203. The learned District Judge in discussing that view of the case says that the plaintiff claimed all lands which appertained to *Towji* No. 203 beyond those which were covered by the lands of Sarola on the ground that defendants Nos. 1 to 3 must have been in possession of those of *Towji* No. 203 by their encroachment as tenants under the plaintiff of the waste lands or unoccupied lands of the plaintiff within *Towji* No. 203; and, therefore, if the plaintiff could establish that the lands did apperation to *Towji* No 203 the defendants were bound to give the lands back which they held by encroachment after the determination of the tenancy held by their predecessor. The learned District Judge after discussing the authorities came to the conclusion that if the plaintiff had established that those lands were held by defendants Nos. 1 to 3 and those who claimed under them on the ground that they had encroached upon those lands, then all that the plaintiff would be entitled to would be merely a decree for rent for the encroached lands because the tenants when the tenancy continued had acquired a title by adverse possession of a limited interest as tenants. In that view the learned District Judge refused to direct a local investigation which, it appears, he was inclined to grant, if any useful purpose would have been served by a further investigation, because in one part of his judgment the learned District Judge thought that the report of the Commissioner would be no safe guide for the determination of the question as to whether the lands were within the *Towji* No. 203 or *Towji* No. 2498, because the *thak* map was not supported by field books; but it appears that at the trial before the District Judge the field books were produced by the defendants themselves and partly by the plaintiff and, therefore, there were materials upon which a proper investigation was possible. But as we have already stated the learned District Judge appears to have refused to direct a further investigation because he thought that the plaintiff would not be entitled to a decree for *khas* possession. In that view the learned District Judge dismissed the plaintiff's appeal who has now preferred this second appeal to this Court.

In support of this appeal it was contended by the learned Vakil for the appellant that the view taken by the learned District Judge as to the rights of the plaintiff as regards the encroachment made by the tenant upon the waste land of the landlord the tenants' rights to resist *khas* possession on the determination of the tenancy was wrong and for the ends of justice the case should be sent back for investigation by a Commissioner as to whether the lands did appertain to one *towji* or the other. Dr. Mitter, who appeared for the defendants, pointed out to us that there was difference as to the defence raised by the various defendants; but we cannot at this stage go into that question. The learned District Judge disposed of the case on the view that the case related so far as the lands of *Towji* No. 203 were concerned only between the plaintiff and the defendants who claimed through Sarola. We think that the view expressed by the learned District Judge as to the right of the plaintiff as to the encroached lands after the determination of the tenancy is not correct. In fact Dr. Mitter frankly admitted that the general law is that after the determination of a tenancy if a tenant had encroached upon any land and made it

a part of his tenancy he is bound to give up those lands to his landlord at the determination of his tenancy. We think upon this ground that the decision of the learned District Judge should be set aside and that he should be directed to order a local investigation by a competent Commissioner to determine the question upon the materials on the record or upon fresh materials to be supplied, to determine how far the lands in suit appertained to *Towji* No. 203. So far as the lands which fell within *Towji* No. 203 and are in the possession of defendants Nos. 1 to 3 or in the possession of anyone claiming through defendants Nos. 1 to 3, the plaintiff would be entitled to a decree for possession of those lands. We do not here discuss or determine any question or issue which any of the defendants might raise in the Court below on a title apart from the title of a tenancy held by Sarola. After the local investigation and after the determination of what lands fell within *Towji* No. 203, the learned District Judge will dispose of all the issues which may be raised before him in view of the observations which I have made above.

I need hardly add that this remand only affects the plots which the plaintiff did not abandon.

Costs will abide the result.

Greaves, J.—I agree.

The appeal has abated against defendants Nos. 10, 20, 40, 44, 48, 55 and 58 named in the affidavit filed in Court on 26th November 1924 and stands dismissed as against their heirs. *Appeal allowed. case remanded.*

S. D.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1382 OF 1921.

February 26, 1925.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Harrison.

CHARAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM DAYAL AND OTHERS—DEFENDANTS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 9—Limitation Act (IX of 1908), s. 5, Sch. I, Arts. 171, 177—Appeal—Death of respondent—Application for substitution made after expiry of limitation—Order permitting substitution, effect of.

One of several respondents died during the pendency of a suit and an application was made after the expiry of the period of limitation for substitution of his legal representatives on the record. The application was allowed *ex parte* and the substitution was made. On the day fixed for the hearing of the appeal the Judge, in ignorance of the order for substitution, decided that the appeal had abated. On second appeal:

Held, that an order having actually been passed permitting substitution and the substitution having been made and the order not having been objected to at the hearing by the other respondents, it must be held that time had been extended and that the legal representatives of the deceased respondent had properly been brought upon the record.

Second appeal from a decree of the District Judge, Karnal, dated the 3rd March 1921, affirming that of the Munsif, First Class, Sonepat, District Rohtak, dated the 28th of November 1919.

Sayed *Mohsin Shah*, for the Appellants.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—In two connected appeals against a large number of respondents one of the respondents, Shadi, died and an application to bring his representatives on the record was made nearly eight months after his death. By an order in vernacular this application was granted on the 7th January 1921 and notice was issued to the other side. Before the hearing of these appeals the memorandum were corrected and the names of the legal representatives were substituted for that of Shadi. On the day fixed for hearing neither Counsel appears to have appreciated the fact that this order had been passed and this action had been taken, and the fact was not noticed by the District Judge, who proceeded to decide that the appeals having abated against Shadi and no representatives having been brought on the record the whole appeals must abate on the view taken in *Hadu* v. *Lala* (1). On second appeal it has been pointed out by Counsel that orders had actually been passed substituting the legal representatives for the deceased Shadi. These were no doubt *ex parte* orders and it was open to the other side to take exception to them at the hearing of the appeals. They took no such exception and under the circumstances we are of opinion that we must hold that time had been extended and that the legal representatives had properly been brought upon the record.

We, therefore, accept the appeal on this preliminary point and set aside the decree

(1) 21 Ind. Cas. 951; 41 P. R. 1915; 15 P. L. R. 1915; 16 P. W. R. 1914.

and return the appeals for disposal on the merits under O. XLI, r. 23, C. P. C. Costs will follow the event, and stamp on appeal will be refunded.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 313 OF 1923.

December 15, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

T. WANG—DECREE-HOLDER—APPELLANT

versus

SONA WANGDI—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, Sch. II, paras. 1, 15, 16—Dispute, what amounts to—Execution of decree—Reference to arbitration, validity of—Award, whether can be enforced—Appeal, whether lies—Jurisdiction, whether can be conferred by consent.

Any question on which the parties join issue, whether or not the Court can legally enquire into it, is a dispute within the meaning of para. 1 of Sch. II to the C. P. C. [p. 634, col. 1.]

The Second Schedule to the C. P. C. does not apply to execution proceedings and, therefore, a reference to arbitration made by an Executing Court is without jurisdiction and an award made thereon is illegal and unenforceable [*ibid.*]

Paragraphas 15 and 16 of the Second Sch. to the C. P. C. depend for their operation on a valid reference under para. 1 of the Schedule. Where, therefore, a reference is made to arbitration by an Executing Court and an award is passed thereon, the entire proceedings must be regarded as without jurisdiction and must be totally ignored and the only question which is left for consideration, namely, whether the award should or should not be enforced is one relating to the satisfaction and discharge of the decree under s. 47 of the C. P. C., and on this question an appeal and second appeal are competent.. [p. 634, col. 2.]

Parties cannot by consent confer jurisdiction where it does not exist. [*ibid.*]

Girija Nath Roy Choudhury v. *Kanai Lal Mitra*, 43 Ind. Cas. 169; 27 C. L. J. 339 and *Seth Dooly Chand* v. *Mamuji Musagir*, 41 Ind. Cas. 295; 25 C. L. J. 339; 21 C. W. N. 383, referred to.

Appeal against an order of the District Judge, Darjeeling, dated the 13th of June 1923, affirming that of the Subordinate Judge, Darjeeling, dated the 30th November 1922.

Babu *Jitendra Kumar Sen Gupta*, for the Appellant.

Babus *Sarat Chandra Roy Choudhury* and *Santi Kumar Roy Choudhury*, for the Respondent.

JUDGMENT.—This appeal raises an interesting question of law, which, so far as we are aware, is not covered by authority. In execution of a money-decree obtained by the appellant against the respondent, the respondent contended that the decree had been fully satisfied out of Court and that the appellant practising fraud on the respondent did not certify payment in Court. The appellant contended that the uncertified payment could not be enquired into under O. XXI, r. 2, C. P. C., but the learned Subordinate Judge in the Execution Court decided to investigate the allegation of fraud. After he had examined several witnesses, the parties filed an application referring the dispute about payment to two arbitrators and an Umpire. The case was thereupon referred to the arbitrators who by their award found a much lesser amount due to the appellant than he was claiming in execution. Various objections to the legality of the award were raised by the appellant which were overruled by the Subordinate Judge. The concluding portion of the learned Subordinate Judge's judgment is in these words:—"The application of the decree-holder to set aside the award is, therefore, rejected, the suit is consequently decreed in terms of the award with proportionate costs". The meaning of the last clause is not sufficiently clear but it appears that the learned Subordinate Judge was of opinion that a proceeding under s. 47, C. P. C., followed as it is by a judgment is a suit which was decided in accordance with the award. Against this decision the appellant decree-holder appealed to the District Judge of Darjeeling who held that no appeal lay to him under s. 16, Sch. II, C. P. C.

The decree-holder has preferred this second appeal on the ground, among others, that the learned District Judge is wrong in holding that no appeal lay to him. A preliminary objection is raised to the competency of this appeal on the ground that as no appeal lay to the Court of Appeal below no second appeal lies to this Court. The preliminary objection really begs the question in this case which is the determination of the nature of the proceedings in the Execution Court.

It is contended by the appellant that the reference to arbitration was invalid in law in as much as there was no dispute between the parties within s. 1, Sch. II, C. P. C., because the Court could not take notice of uncertified payment alleged by the judgment-

debtor. There is no force in this argument. Whether or not the Court can legally enquire into it, any question on which the parties join issue is a dispute within the meaning of that section.

The next point urged is one of substance and deserves careful consideration. It is argued that the Second Sch. of the C. P. C. does not apply to execution proceedings and, therefore, the reference to arbitration was without jurisdiction and *ultra vires* of the Executing Court; the award is accordingly illegal and unenforceable. In our judgment this contention is right and ought to prevail. Section 1 of the Second Sch. empowers reference to arbitration of a dispute between parties to a *suit*. Section 16 provides that a decree should follow the award. The decree must be a decree as is passed in a suit and capable of execution and not merely a judgment as the learned Subordinate Judge seems to think, for by that section the decree is made appealable as a decree where it is not in conformity with the award. It is admitted that all the provisions of the C. P. C. relating to suits are not applicable in execution proceedings. Order IX, [*Hari Charan Ghose* v. *Manmatha Nath Sen* (1), *Bipin Behari Shaha* v. *Abdul Barik* (2)]. Order XVII, [*Tirthsami* v. *Annappayya* (3).] Order XXII, (r. 12), O. XXIII (r. 4) and of course such other Orders that deal with parties to suits or pleadings do not apply to execution of decree. Nothing has been shown to us to persuade us to hold that there is any speciality in the Second Schedule which makes it applicable to questions arising in the execution of decrees. Section 141, C. P. C., is more an authority for the view we take and does not lend countenance to the contention of the respondent. As has been explained in *Hari Charan Ghose* v. *Manmatha Nath Sen* (1), the law is the same as it was under s. 647 of the Code of 1882 which expressly excluded execution proceedings from those to which provisions relating to suits were extended. The view that the special procedures in suits do not apply to execution of decrees is based on the supposition that O. XXI relating to executions is self-contained and exhaustive as to the special subject with which it deals.

(1) 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343.
(2) 35 Ind. Cas. 613; 44 C. 950; 21 C. W. N. 30; 24 C. L. J. 446.
(3) 18 M. 131; 6 Ind. Dec. (N. S.) 441.

But the learned Vakil for the respondent maintains that an order passed under s. 47, C. P. C., is a decree under s. 2 and, therefore, a proceeding under s. 47 is a suit. The contention is untenable as a proceeding under s. 47 comes into being after the termination of the suit and in course of execution of the decree which concludes the suit. The second clause of s. 47 clearly indicates that the proceeding under that section is distinct from a suit.

It is next argued for the respondent that Execution Court having jurisdiction over the proceeding under s. 47, the reference to arbitration was not without jurisdiction. We have not been able to follow the reasoning for the appellant's objection is directed against the jurisdiction of the Execution Court in following a procedure not warranted by law.

It is further argued that the objection with regard to the illegality of the award must be taken to have been made under s. 15 cl. (c) of the Second Sch. as an award "being otherwise invalid" and even if the reference was without jurisdiction the appellants' objection having been overruled and the award confirmed, no appeal lay to the lower Appellate Court from the order of the First Court. The answer to this contention is simple. Section 15 and s. 16 of the Second Sch. depend for their operation on a valid reference under s. 1 of the Schedule. The reference to arbitration by the Executing Court being without jurisdiction must be totally ignored and the question that is left for consideration is one relating to the satisfaction and discharge of the decree under s. 47, C. P. C. The appeal to the lower Appellate Court and a second appeal to this Court are, therefore, competent.

It is faintly suggested that the appellant being a party to the submission to arbitration he should not in equity be allowed to question the validity of the proceedings initiated at his instance. It is also submitted that the Court having jurisdiction over the subject of the litigation, parties can by consent invest it with power to do something not strictly within its jurisdiction. It is an elementary principle of law that parties by consent cannot confer jurisdiction where it does not exist. In *Girija Nath Roy Choudhury* v. *Kanai Lal Mitra*, (4) and *Seth. Dooly Chand* v,

(4) 43 Ind. Cas. 169; 27 C. L. J. 339.

Mamuji Musagir (5), one of the parties to the submission was permitted to successfully question the validity of an award on the ground that all the parties to the suit had not joined in the reference. These decisions afford complete answer to the other contentions raised by the respondent.

We are not called upon in this case to consider the question of the validity of an award on a reference to arbitration without the intervention of Court by way of adjustment of the decree under O. XXI, r. 2.

Though we look upon the conduct of the appellant with disapproval we are constrained in the view we take of the law to uphold his contention that the Execution Court had no jurisdiction to refer the dispute between the parties to arbitration under the Second Sch. of the C. P. C. In this view we are of opinion that an appeal lay to the lower Appellate Court from the order of the First Court giving effect to the award but it is not necessary to remit the case to the Court of Appeal below for a re-hearing of the appeal as we have by our judgment decided the sole question raised in that Court.

In the result the appeal is allowed and the order of the Execution Court upholding the award set aside. The case will be sent back to that Court with a direction to proceed with the execution according to law. We make no order as to costs of this appeal; the order relating to costs passed by the Courts below will stand.

Appeal allowed;
Case remanded.

Z. K.

(5) 41 Ind. Cas. 295; 25 C. L. J. 339; 21 C. W. N. 383.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST APPEAL No. 2087 OF 1924.
March 19, 1925.
Present:—Mr. Justice Harrison.

MULCHAND AND ANOTHER—DEFENDANTS—APPELLANTS
versus
Musammat CHAMPA FOR HERSELF AND FOR HER MINOR SONS, LAL CHAND AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Execution of decree—Adjustment pleaded after expiry of period prescribed for certification—Court, whether can go into question of adjustment.

Where in execution of a decree an adjustment is pleaded after the expiry of the period of limitation prescribed for the certification of the adjustment, the Executing Court cannot go into the question whether there has or has not been any adjustment.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Gurgaon, dated the 23rd June 1924.

Mr. *Shamair Chand*, for the Appellants.

Lala *Nanwan Mal*, for the Respondents.

JUDGMENT.—In execution of a decree of this Court, the decree-holder sought to attach and sell certain property of the representatives of a judgment-debtor Kishori Lal. They were met with a plea put forward on the 1st of April 1924, that there had been an adjustment on the 27th of December 1923, by relinquishment, the story told being that on the death of Kishori Lal the decree-holder, who is a near relation, waived his claim for costs against the widow and children. The Trial Court has given a finding that there was such a relinquishment and on appeal it is urged by Mr. Shamair Chand that the period of limitation had expired for the certification of such an adjustment before it was pleaded. This is true and, although taken at this late stage, the plea is good, and the Executing Court acted *ultra vires* in going into the question of whether there had been an adjustment or not. I, therefore, accept the appeal but inasmuch as this legal plea was not taken as soon as it could have been, I leave the parties to bear their own costs.

Z. K. *Appeal accepted.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 247 OF 1922.
December 8, 1924.
Present:—Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

KUMARA GOUNDAN—DEFENDANT No. 3—APPELLANT
versus
THEVARAYA REDDI AND OTHERS—SUPLEMENTAL PLAINTIFFS NOS. 2 TO 4 AND DEFENDANTS NOS. 1, 2 AND 4 TO 6—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 57, 58, 63—Execution of decree—Attachment—Claim petition, dismissal of—Subsequent dismissal of execution petition, effect of—Claimant, whether bound to sue under r. 63.

An order on a claim petition is final against the

claimant only in so far as the rights worked out in pursuance of the particular attachment are concerned. [p. 641, col. 1.]

Ponaka Balarami Reddi v. *Hazi Mahomed Abdul Aziz*, 26 Ind. Cas. 532; 26 M. L. J. 499, *Gollampalli Subbayya* v. *Sankara Venkataratnam*, 42 Ind. Cas. 683; (1917) M. W. N. 851; 22 M. L. T. 496, and *Sadaya Pillai* v. *Amurthachari*, 8 Ind. Cas. 157; 34 M. 533; 8 M. L. T. 417; (1910) M. W. N. 741, relied on.

A claim petition against an attachment of certain properties was disallowed, and subsequently the execution petition itself was dismissed as the decree-holder was unwilling to proceed with it:

Held, (1) that the original attachment ceased to exist under O. XXI, r. 57 of the C. P. C.; [p. 637, col. 1.]

(2) that the claimant was not bound to set aside the order on the original claim petition. [p. 637, col. 2.]

Case-law reviewed.

Second appeal against a decree of the Court of the Subordinate Judge, Salem, in A. S. No. 5 of 1921, preferred against that of the Court of the District Munsif, Namakkal, in Original Suit No. 254 of 1918.

Mr. *T. M. Krishnaswami Iyer*, for the Appellant.

Mr. *C. Krishnamachariar*, for the Respondents.

JUDGMENT.

Ramesam, J.—The facts of this case are as follows:—In this case one Ramanadan Chetty had obtained a decree against defendants Nos. 1 and 2 in S. C. S. No. 296 of 1915. In execution of that decree (E. P. No. 959 of 1915), the decree-holder attached the suit property. The order to attach was made on 11th August 1915, and the attachment was actually made on 6th September 1915. The sale was posted to 8th January 1916. On 6th January 1916, the present 3rd defendant filed a claim petition. On 8th January 1916, the sale was adjourned to 15th January 1916 in order to enable the Court to enquire into the claim. But the claim petition was actually disallowed only on 17th January 1916. The order disallowing the claim petition runs as follows:—"In these two cases rival claimants have preferred claims to the property in dispute. The judgment-dobtors are minors and two persons purporting to be their guardians have sold in one case the whole property and in another half the property to the two purchasers respectively who are adjacent land owners. The contest is practically between the two claimants and a suit is inevitable. On the grounds that the claims have been preferred too late and the delay is not satisfactorily explained, I disallowed the claim." Seeing that the attachment was made on the 6th of September 1915 and the claim petition was filed on 6th January 1916, it is difficult to believe that there was such a serious delay in the case as to justify a dismissal without enquiry. It is doubtful that the District Munsif really meant to dismiss the claim petition on the ground of delay in view of his remark. "The contest is practically between two rival claimants and a suit is inevitable." He seemed to think that whatever his order was, a regular suit was so certain that to enquire into the merits at that stage would be a waste of time and it was desirable to avoid waste of time at that stage. It is, therefore, difficult to construe the District Munsif's judgment as one dismissing the petition on the ground of delay in spite of the express statement to that effect. If the judgment of the District Munsif cannot be regarded as one disposing of the claim petition on the ground of delay, then the Full Bench decision in *Machi Raju Venkataratnam* v. *Vadrevu Ranganayakamma* (1) does not apply; and the issue which raises the question of title will have to be gone into. But I do not wish to rest my judgment in this case solely on this ground, in view of the ambiguous nature of the District Munsif's order. Mr. Krishnaswami Iyer has contended that E. P. No. 959 of 1915 was dismissed and with its dismissal the attachment has ceased to exist under r. 57 of O. XXI, C. P. C. The E. P. No. 959 of 1915 with all orders thereon up to 1st February has now been exhibited in second appeal as Ex. A. E. P. No. 196 of 1919 is exhibited as Ex. B. What happened was that on 17th January 1916 after the claim petition was disallowed, the decree-holder requested the Court to stop the sale. At any rate that is the note made on the execution petition. Mr. Krishnamachari who appears for the respondent now suggests that that was not the result of the unwillingness on the part of the decree-holder to proceed with the sale but it was at the suggestion of the District Munsif that he stated he would file another petition and was willing to withdraw the same. He relies on E. P. No. 196 of 1916 which was filed on the 31st January 1916 and on which an order was made directing notice for fresh proclamation. This was ordered on 21st February 1916. In that petition, the petitioner stated

(1) 48 Ind. Cas. 270; 41 M. 935; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292; 35 M. L. J. 335.

that the Court suggested that another petition may be filed on 1st February. No doubt the facts are somewhat suspicious and support Mr. Krishnamachari's suggestion. But the first petition was not very old at the time and there does not seem to be any particular reason why the District Munsif should be anxious to have it taken out of the file for statistical purposes being only five months old and suggest to the party to file another petition. If the District Munsif did so for such purposes no doubt it is improper. The decree-holder seemed to be willing to oblige the District Munsif. Anyhow he was willing that the fact should appear as if he was not prepared to proceed with the E. P. No. 959 of 1915 on 17th January 1916. The final order in E. P. No. 959 of 1915 on the 1st February was that the petition was dismissed. Whatever the effect of that order was between the decree-holder and the judgment-debtor, persons who are not parties to the execution proceedings and who do not know all that passed between the Court and the decree-holder are entitled to rely on the fact that the petition was dismissed on account of the unwillingness of the decree-holder to proceed with E. P. No. 959 of 1915. The result of this was that the attachment ceased to exist under O. XXI, r. 57. Though a fresh order on E. P. No. 196 of 1916 was taken without a fresh attachment and is final and binding between the decree-holder and the judgment-debtor and cannot be questioned on account of want of attachment, the present 3rd defendant is entitled to rely on the result of the dismissal of the earlier petition and say that the attachment has ceased to exist, so far as he is concerned.

If the attachment has ceased to exist, the next question that arises is whether the order on the claim petition dated 17th January compels the 3rd defendant to set it aside within one year and precludes him from raising his title in the absence of his suit within one year. On this question, it is convenient if I make an extract from my judgment in A. S. No. 36 of 1920, referring this identical point to the Full Bench:

"The appellant next contends that the order of 8th August 1916 has not got to be set aside because the attachment to get rid of which, the claim petition was filed, had ceased to exist."

I will first observe that the effect of an order on a claim petition may be different according as the judgment-debtor is or is not a party to the inquiry. It was pointed out in *Moidin Kutti* v. *Kunhi Kutti* (2) that the judgment-debtor may not be a party to the inquiry on the claim petition and in such a case the order though in favour of the claimant and opposed to the judgment-debtor's rights need not be conclusive against the judgment-debtor if no suit is filed by him within one year to set it aside. Conversely, if adverse to the claimant and in favour of the judgment-debtor it need not be set aside by the claimant to the full extent it may sound in favour of the judgment-debtor and has to be set aside only in so far as the order is in favour of the decree-holder concerned. If the judgment-debtor is a party, then the order on the claim petition decides not only questions between the claimant and the decree-holder, but also questions between the claimant and the judgment-debtor the latter being in general much broader in scope than the former. To put it in other words: as soon as a claim petition in filed, there are three possible parties to the enquiry the claimant, the decree-holder and the judgment-debtor and we may have two classes of cases.

1. Cases in which all three are parties. In such a case an order against the claimant will be wider in scope and has effects reaching much farther than in the 2nd class.

2. Cases in which the claimant and the decree-holder are the only parties. In this case the order is narrower in scope and its consequences are not so far-reaching as in class 1.

An example will make my meaning clear. *A* obtains a decree against *B* for Rs. 200 and attaches a house worth Rs. 3,500. *C* claims ownership of the house and objects to the attachment. If *A*, *B* and *C* are parties to the inquiry and the claim petition is dismissed, it is obvious that the effect of the order is to hold that *C* is not the owner of the house and *B* is the owner, the order in favour of *B* operating to help *A* and other creditors of *B*. A regular suit by *C* in such a case to set aside the order to the fullest extent, has to be valued at Rs. 3,500 and has to be filed in a Court competent to try that suit.

But if only *A* and *C* are parties to the

(2) 25 M. 721; 12 M. L. J. 411.

enquiry, the effect of the dismissal of *C's* petition is simply to hold that *A* has got a right to pursue the attachment and *C* has not got a right to object to the attachment. It is not to decide that *C* is not the owner of the property and that *B* is. A regular suit to set aside the order should be valued at Rs. 200 and not at Rs. 3,500 and may be filed in the District Munsif's Court. It may be that the *reason* of the order is that *C* is not the owner and it may be that, in the regular suit that follows, the issue that may be framed relates to the title of *C* (especially so if *B* is a party to the suit). These remarks follow from *Krishnasami Naidu* v. *Somasundaram Chettiar* (3), *Sadaya Pillai* v. *Amurthachari* (4) and *Vedalingam Pillai* v. *Veerathal* (5). I will refer to these cases later on again but at present I have made these general remarks as it is useful to remember the distinction in the discussion of cases.

The earliest case on the point raised before us is *Umesh Chunder Roy* v. *Raj Bullubh Sen* (6). At page 281, Tottenham, J., says: "the finding of the Court in the Execution Department that the sale was invalid, only meant that the sale was invalid as against the judgment-creditor, and as against any purchaser who might *purchase at a sale held* in execution following *that attachment.*" In view of the later clause, I do not see what meaning can be obtained by laying special emphasis on the words "against the judgment-creditor." It may be that the reason of the order on the claim petition in that case was that the sale was made during attachment (See s. 64 of the present Code) but I do not see what argument can be derived from this fact unless the order on the claim petition which held that "the sale was invalid" expressly limited the operation of the order to claim petitions objecting to the particular attachment and saved other claim petitions to other possible attachments. The fact remains that the claim was dismissed with a general opinion that the sale was invalid, without any limitation on the effect of the opinion.

The next case is *Ibrahimbhai* v. *Kabulabhai* (7). Birdwood, J., said:—"The second attachment was a new and distinct act giving a new cause of action on which the plaintiff is entitled to a fresh enquiry and decision." This was followed in *Gopal Purshotam* v. *Baidivali* (8) in which Sargent, C. J., says "*When that attachment* was removed by the judgment-creditor's own act on 20th November 1888 there was no longer an attachment or any other proceedings etc." In *Krishna Prosad Roy* v. *Bipin Behary Roy* (9) their Lordships say at page 231: "The object of the claim preferred by the plaintiff under s. 278, C. P. C., was to obtain the removal *of the attachment* and when *that attachment* had been removed after payment of the decretal amount there was no longer *an attachment or any proceeding* in execution on which the order could operate to the prejudice of the plaintiff, and therefore there was no necessity to bring a suit to set aside the order. We are unable to accept the view suggested on behalf *of the appellants* that, in spite of the withdrawal *of the attachment*, the dismissal of the claim under section 283, C. P C., could, by virtue of the provision of s. 283, C. P. C., have the effect of finally determining the question of title between the parties."

The next case is *Koyyana Chittamma* v. *Doosey Gavaramma* (10). It does not appear clearly from the facts whether the judgment-debtor was a party to the claim proceedings though, on the whole, it looks as if he was not. The order on the claim petition was held conclusive against the claimant as between him and a subsequent vendor from the judgment-debtor. I am indebted to my learned brother, (Spencer, J.,) for the suggestion that this case can be justified on the ground that the subsequent vendor paid off the amount of the decree in execution of which the claim was preferred and, may, therefore, be regarded as having been subrogated to the rights of the execution-creditor. This was not the actual ground of the judgment which seems to proceed on a too literal reading of s. 283. The learned Judges distinguish the cases in *Umesh Chunder Roy* v. *Ray Bullubh Sen* (6), *Ibrahimbhai* v. *Kabulabhai* (7), *Gopal Purshotam* v. *Baidivali* (8) and *Krishna Prosad Roy* v. *Bipin Behary Roy* (9) on the ground that in all these cases, the raising of the first attachment was within a year of the order on the claim

(3) 30 M. 335; 17 M. L. J. 95; 2 M. L. T. 116.
(4) 8 Ind. Cas. 157; 34 M. 533; 8 M. L. T. 417; (1910) M. W. N. 741.
(5) 54 Ind. Cas. 530; 37 M. L. J. 547; 26 M. L. T. 513; (1920) M. W. M. 77.
(6) 8 C. 279; 10 C. L. R. 204; 4 Ind. Dec. (N. S.) 178.
(7) 13 B. 72; 7 Ind. Dec. (N. S.) 49.
(8) 18 B. 241; 9 Ind. Dec. (N. S.) 669.
(9) 31 C. 228.
(10) 29 M. 225; 16 M. L. J. 136.

proceedings. I find it difficulty to follow this ground of distinction. In the first place, if it is conceded that the order becomes useless and inoperative when the attachment ceased within one year of the order, this is a concession not allowed by the literal reading of the section. Secondly, if the operativeness of an order on a claim petition is to be regarded as conditional on the continuance of the attachment, it is difficult to see why the cessation of the attachment within one year should destroy the operativeness and the cessation of it beyond one year should have just the opposite effect merely because a suit to set aside could not be brought more than one year after the date of the order. It seems to me a novel legal conception. Thirdly, the fact that the decrees were paid off within one year seems to be an accident. Not one of the eight Judges laid any emphasis on the fact. The only difference I can see between the two cases (the raising of the attachment within one year and its raising beyond one year) is that in the former case, the unsuccessful claimant who waits incurs no risk as he knows for certain within one year that the attachment in execution of it has ceased to exist and in the latter he takes a risk by not suing as he cannot be certain that the attachment will be raised. But I do not see why when the event, on which he takes his chance, *viz.*, the cessation of the attachment by the payment of the decree or for other reason, happens, he should not take advantage of it simply because he took risks in so waiting. This distinction has not been proved by Seshagiri Iyer, J., in *Vedalingam Pillai* v. *Veerathal* (5) and the decision in *Koyyana Chittemma* v. *Doosey Gavaramma* (10) must be regarded as unsound except on the ground that the judgment-debtor must be regarded as a party to the order on the claim proceedings. This is how it was treated in all the cases in which it was cited with reference to this point—in *Krishnasami Naidu* v. *Somasundaram Chettiar* (3), *Sadaya Pillai* v. *Amurthachari* (4) and *Ponaka Balarami Reddi* v. *Hazi Mahomed Abdul Aziz* (11). In my opinion, after these cases, it is futile to rely on *Koyyana Chttiemma* v. *Doosey Gavaramma* (10) as a authority of any value.

Another distinction has been suggested by the respondents in respect of the cases in *Umesh Chunder Roy* v. *Raj Bullubh Sen* (6), *Ibrahimbhai* v. *Kabulabhai* (7), *Gopal Purshotam* v. *Baidivali* (8) and *Krishna Prosad Roy* v. *Bipin Behary Roy* (9). It is that the question of the conclusiveness of the order arose in a proceeding unconnected with the decree in the execution of which the claim was preferred. In *Umesh Chunder Roy* v. *Raj Bullubh Sen* (6) and *Ibrahimbhai* v. *Kabulabhai* (7) the point arose in connection with the execution of a second decree though in *Umesh Chunder Roy* v. *Rao Bullubh Sen* (6) it was a second decree based on the same right as the first. In *Gopal Purshotam* v. *Baidivali* (8) and *Krishna Prosad Roy* v. *Bipin Behary Roy* (9), the question arose in later suits unconnected with the decree though in the former the party opposed to the unsuccessful claimant was the successful decree-holder claiming in some other right. The contention amounts to this, *viz.*, the order is conclusive against the claimant in so far as he seeks to resist the particular decree though the attachments may be different but not conclusive as against the different decrees though of the some decree-holders and *a fortiori* of different decree-holders. The distinction no doubt helps the respondents in the present case but is opposed to the decision in *Gollampalli Subbayya* v. *Sankara Venkataratnam* (12). Incidently I may observe this distinction concedes that the decision in *Koyyana Chittemma* v. *Doosey Gavaramma* (10) and *Sangariah Chetty* v. *Chinnabhai* (13) are erroneous and that the language of O. XXI, r. 63, should not be taken too literally. I think the distinction in so far as it seeks to apply the conclusiveness of an order to different attachments in execution of the same decree is opposed to the principle of *Krishnaswami Naidu* v. *Somasundaram Chettiar* (3) the reasoning in which equally applies to a case where there is a decree for costs to the extent of Rs. 200 and for mesne pofits of the value of Rs. 3,500 and the first attachment was for costs only and the latter attachment is for the mesne profits. I also observe that the emphasis in all the four cases is on the non-identity of the attachments and not of the

(11) 26 Ind. Cas. 532; 26 M. L. J. 499.

(12) 42 Ind. Cas. 683; (1917) M. W. N. 851; 22 M. L. T. 496.

(13) 60 Ind. Cas. 780; 44 M. 268; 40 M. L. J. 7; 12 L. W. 725; 28 M. L. T. 420 (1921) M. W. N. 3.

decree as the words underlined (italicised) by me in the quotations from those judgments show.

If the language of O. XXI, r. 63 is read literally it may apply not only:—

(*a*) to claimants resisting rights worked out in pursuance of the attachment to which the claim is made (in my opinion the operation of the rule ought to be confined to this class) but also to,

(*b*) (1) between the claimant and other attachments under the same decree,

(2) between the claimant and attachments under other decrees of the same decree-holder,

(3) between the claimant and the decree-holder, whatever the right on which he relies,

(4) between the claimant and all other decree-holders of the same judgment-debtor and all other persons claiming rights against the same judgment-debtor such as mere creditors who have not obtained decrees,

(5) between the claimant and judgment-debtor (including his assignees),

(6) between the claimant and all persons (even if unconnected with the judgment-debtor) interested in denying the title of the claimant, (see *Vedalingam Pillai* v. *Veerathal* (5).

To allow the extension of the section so as to apply to class (6) is to create a species of order *in rem* which are unknown except in Probate and Matrimonial Proceedings. Even the doctrine of *res judicata* does not apply so as to bar a person (A) from urging his right against *C* by reason of a former adjudication (adverse to *A*) between *A* and *B*. (Justice Holloway points out in *Sri Raja Kakarlapudi Suriyanarayanarazu Garu* v. *Chellamkuri Chellamma* (14) that such a plea is allowed in continental jurisprudence.

To allow the extension to (5) is to ignore the distinction between the cases where a judgment-debtor is a party and where he is not which I pointed out at the beginning of the judgment.

To allow the extension to class (4) is to imagine that mere simple creditors and money decree-holders have got some interest in the property of their debtors and judgment-debtors though there is no charge on the property and not even attachment of it.

To allow the extension to classes (2) and (3) is to imagine that a person *A*, by merely obtaining a decree against *B* and attaching *B's* property *under it* has got a right to predicate that *B* is the owner of the property and not *C* for the purposes of all possible decrees he may obtain against *B* and all other purposes in respect of which he may come into conflict with *C* a right unknown to law.

To allow the extension to class (1) is inconsistent with *Krishnasami Naidu* v. *Somasundaram Chettiar* (3) and ignores the possibility of a decree being paid by the judgment-debtor, or of an attachment being raised.

My view is supported by the two Bombay decisions and the two Calcutta decisions I have already mentioned by *Ponaka Balarami Reddi* v. *Hazi Mahomed Abdul Aziz* (11) (though the point was not necessary for the decision), by *Gollampalli Subbayya* v. *Sankara Venkataratnam* (12) (a very strong case on the facts) and by *Manilal Girdhar Patel* v. *Nathalal Mahasukhram* (15). Ignoring *Koyyana Chittemma* v. *Doosey Gavaramma* (10) the only decision in favour of the appellants is *Sangariah Chetty* v. *Chinnabhi* (13). I have already commented on this in *Lakshmi Ammal* v. *Kadiresan Chettiar* (16) and none of the decisions I have referred to in this judgment [except *Gollampalli Subbayya* v. *Sankara Venkataratnam* (12)] has been cited in it. It was based on a decision in *Ramasamy Chetty* v. *Alagiri Chetty* (17) in which the only question decided was whether the suit abated by reason of the satisfaction of the decree. The Code provides for no abatement except on death. Their Lordships held that the suit did not abate. I do not think it is permissible to infer from this that the order on the claim inquiry continues operative after the cessation of the attachment in a case where no suit was filed. I think the filing of the suit makes all the difference. The decisions in *Ponusami Pillai* v. *Samu Ammal* (18), *Lakshumon Chettiar* v. *Parsivdu Pillai* (19) and *Velu Padayachi* v. *Arumugam Pillai* (20) do not help us as they are plain examples

(14) 5 M. H. C. R. 176.

(15) 59 Ind. Cas. 774; 45 B. 561; 22 Bom. L. R. 1446.

(16) 63 Ind. Cas. 431; 41 M. L. J. 198; 14 L. W. 12; (1921) M. W. N. 495.

(17) 27 Ind. Cas. 800.

(18) 38 Ind. Cas. 937; 31 M. L. J. 247.

(19) 52 Ind. Cas. 720; 37 M. L. J. 159; (1919) M. W. N. 653.

(20) 56 Ind. Cas. 481; 38 M. L. J. 397; 11 L. W. 343; 27 M. L. T. 312.

of the applicatton of O. XXI, r. 63 without the complications of the cessation of the first attachment. I think the decisions in *Sangariah Chetty* v. *Chinnabbi* (13) and *Gollampalli Subbayya* v. *Sankara Venkataratnam* (12) are irreconcilable. Some reliance has been placed on the language of s. 64 of the Code. When we remember that s. 64 and O. XXI, rr. 58—62 used to be in the same Chapter of the former Codes, s. 64 supports my view and shows that the object of the Legislature in providing against obstacles and objections to an attachment is the protection of rights created in pursuance of the attachment only.

The view I there took was that an order on a claim petition is final against the claimant in so far as the rights worked out in pursuance of the particular attachment are concerned. The only thing that I would now add in addition to the reasons given there is that O. XXI, r. 58 runs "where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, etc." The language of the rule, especially the words "such attachment" think, supports my reasoning in the passage quoted above. Seeing that there are a number of decisions of this High Court taking this view, namely, *Ponaka Balarami Reddi* v. *Haji Mahomed Abdul Aziz* (11), *Gollampalli Subbayya* v. *Sankara Venkataratnam* (12) and *Sadaya Pillai* v. *Amurthachari* (4) inasmuch as my learned brother agrees with my view, I do not think it is necessary to refer this case to the Full Bench solely on account of the decision in *Sangariah Chetty* v. *Chinnabi h*(13). The second appeal will, therefore, be allowed and the suit remanded for fresh disposal as regards 3rd defendant. The appellant will have a refund of the Court fees paid in this Court and in the lower Appellate Court. Costs in the first appeal and second appeal will be paid by the appellant as he had not raised the point about the cesser of attachment by filing the two execution petitions which have not been exhibited. Costs in the Court of first instance to abide the result.

Venkatasubba Rao, J.—I agree and have nothing to add.

V. N. V. *Appeal allowed.*

Z. K.

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ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 970 OF 1923.

February 5, 1925.

Present :—Mr. Justice Mukerji.

JAI SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Lala CHIRANJI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47 —Execution of decree—Sale—Dispute as to extent of property sold, whether must be decided by separate suit or in execution proceedings.

When a question arises between an auction-purchaser and the judgment-debtor as to what was the property that was sold, the matter is one to be investigated by a separate suit and not by an application in the Execution Court. The fact that the decree-holder is himself the auction-purchaser makes no difference. [p. 642, col. 1.]

Munna Lal v. *Collector of Shahjahanpur*, 74 Ind. Cas. 995; 45 A. 96; (1923) A. I. R. (A.) 470, *Bhagwati* v. *Banwari Lal*, 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185 and *Hargovind Fulchand* v. *Bhudar Raoji*, 83 Ind. Cas. 932; 48 B. 550; 26 Bom. L. R. 601; (1924) A. I. R. (B.) 429, relied on.

Second appeal against a decree of the Judge, Small Cause Court, exercising the powers of a Subordinate Judge, Agra, dated the 30th January 1923.

Mr. *A. Sanyal*, for the Appellants.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—The only question for decision in this appeal is whether the suit was maintainable or whether the plaintiffs-appellants' remedy lay in an application under s. 47 of the C. P. C. to the Executing Court.

The facts of the case are given in the judgment of the Court below and are briefly these, for the purposes of this judgment. The respondent No. 1 had a mortgage from one Har Prasaed. This was dated the 9th of August 1897. Har Prasad sold his share which was four annas to appellant No. 1 and the predecessor-in-title of the remaining appellants. There was a pre-emption suit by *Musammat* Akbari Begam, the predecessor-in-title of the respondents other than the respondent No. 1, with respect to the four annas share sold by Har Prasad. *Musammat* Akbari Begam's suit was compromised and by that compromise *Musammat* Akbari Begam obtained two annas' share out of four annas and the plaintiffs retained the remaining two annas. The plaintiffs or their predecessor-in-title also held a mortgage from Har Prasad, but nothing turns on that for the present. Chiranji Lal brought a suit

for sale of Har Prasad's four annas property but omitted to make *Musammat* Akbari Begam or her representatives parties to it. He made the present appellants or their predecessors-in-title parties with the allegation that they had purchased the entire property sold. The suit was not defended and was decreed *ex parte*. In the execution proceedings the decree-holder described the property as property in the possession of the appellants. That is a description which finds place in the sale certificate and also in the *dakhalnama* or acknowledgment of delivery of possession executed by the auction-purchaser. Chiranji Lal himself purchased in execution of his decree. The appellants now come and say that they held only two annas share in the property of Har Prasad, that the remaining two annas share was in the possession of the respondents other than Chiranji Lal and that, therefore, Chiranji Lal should give back possession over two annas. It seems to be the case that by several purchases the appellants own 12 annas share in the *mahal*, while the respondents other than Chiranji Lal own the remaining four annas share. It was because the plaintiffs owned more than two annas share that Chiranji Lal found it convenient to obtain possession over four annas share and also a mutation of name in his own favour in the Revenue Court.

The Courts below have dismissed the suit on the ground that a suit would not lie and the remedy of the appellants lay by an application to the Executing Court.

The question seems to be concluded by a recent judgment of this Court, *viz*: *Munna Lal* v. *Collector of Shahjahanpur* (1). That case is very similar to the facts of this case. In that case also the purchaser was originally the decree-holder and their Lordships held that when a question arose between auction-purchaser and the judgment-debtor as to what was the property that was sold the matter was one to be investigated by a separate suit and not by an application in the Execution Court. This ruling follows the Full Bench case of *Bhagwati* v. *Banwari Lal* (2). I may point out that the opinion that the position of a decree-holder is changed by his purchasing at auction is also supported by a recent Full Bench case of Bombay in *Hargovind Fulchand* v. *Bhudar Raoji*, (3).

If such be the case, *viz:* if Chiranji Lal's position as a decree-holder has been altered by his auction-purchase the question raised is no longer one between a decree-holder and a judgment-debtor. In this view the suit was maintainable.

For the respondent No. 1 it was argued that the question of fact in issue is really concluded by the judgment in the case. This point was not decided by the Courts below and I have not got enough material before me to decide it.

I allow the appeal, set aside the decrees of the Courts below and remand the suit to the Court of first instance through the lower Appellate Court with the direction that it be restored to its original number and dispose of according to law.

Costs here and hitherto will abide the result. The costs in this Court will include Counsel's fees on the higher scale.

Z. K. *Appeal allowed; Case remanded.*

(1) 74 Ind. Cas. 995; 45 A. 96; (1923) A. I. R. (A.) 470.

(2) 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185.

(3) 83 Ind. Cas. 932; 48 B. 550; 26 Bom. L. R. 601; (1924) A. I. R. (B.) 429.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1391 OF 1922.

November 21, 1924.

Present:— Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

ANU BISWAS AND OTHERS—PLAINTIFFS —APPELLANTS

versus

GOPAL SHEIKH AND OTHERS—DEFENDANTS —RESPONDENTS.

Declaration of title and possession, suit for—Plea of tenancy—Title, proof of—Procedure—Form of decree.

In answer to a suit for declaration of title to and recovery of possession of a certain piece of land the defendant pleaded that he was in possession of the land in dispute under a lease granted to him by one of the co-sharers of the plaintiff's vendor, to whose share the land in dispute had fallen on a partition, and that he was, therefore, not liable to ejectment. It was found that the plaintiff had established his title to the land in dispute but his suit was dismissed on the ground that he had failed to prove that the defendant was not a tenant or that the tenancy had been lawfully determined:

Held, (1) that the plaintiff having established his title to the land in dispute it was the duty of the

defendant who set up a tenancy from one of the co-sharers of the plaintiff's vendor to establish such a tenancy, and to show that the nature of the tenancy was such that it was binding upon the plaintiff; [p. 643, col. 2.]

(2) that if the defendant failed to prove the existence and the binding nature of his tenancy the plaintiff's suit must be decreed; [*ibid.*]

(3) that if the defendant was successful in establishing a tenancy which would be binding against the plaintiff, the plaintiff would still be entitled to a decree declaring his title to the property and the liability of the defendant to pay rent to the plaintiff. [p. 644, col. 1.]

Appeal against a decree of the Officiating Subordinate Judge, First Court, Faridpur, dated the 15th of March 1922, reversing that of the Munsif, Second Court at Goalundo, dated the 8th of October 1920.

Babus *Radhika Ranjan Guha* and *Janhabi Charan Das Gupta*, for the Appellants.

Mr. *Amiruddin Ahmed*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the plaintiffs against a judgment and decree of the Officiating Subordinate Judge of Faridpur dismissing the plaintiffs' suit. The plaintiffs' allegations upon which they claimed are shortly these: That one Idu was the original owner of the property in suit. That on Idu's death the property devolved upon the plaintiffs Nos. 2, 3 and defendant No. 2 and that defendant No. 2 sold his interest in the property to the plaintiff No. 1 by a conveyance executed on 21st December 1917. That the plaintiffs were in possession of the property but they were dispossessed by the defendant No. 1 in execution of a decree which that defendant obtained against them in a case under s. 9 of the Specific Relief Act. On these grounds, the plaintiffs prayed for declaration of their title as alleged and also for possession from defendant No. 1. The defence of defendant No. 1 was that, as a matter of fact, there was a partition between the heirs of Idu and that defendant No. 2 let out the lands in suit which fell exclusively to his share on partition to the defendant No. 1 in November 1917. Therefore, the defendant contended that he was rightfully in possession as a lessee under defendant No. 2 and was, therefore, not liable to be ejected.

The learned Munsif found that the title alleged by the plaintiffs was established. The learned Munsif further came to the conclusion that the partition set up by the defendant No. 1 was not proved. The lower Court further found that the tenancy set up by the defendant was not also established. On these findings the learned Munsif gave a decree to the plaintiffs. Then there was an appeal by the defendant No. 1 before the learned Subordinate Judge who, as I have already stated, set aside the decree of the learned Munsif and dismissed the plaintiffs' suit. It appears to me that the learned Subordinate Judge has entirely misapprehended the scope and the nature of the suit. The learned Subordinate Judge has started with the finding which is in affirmance with the finding of the First Court that the plaintiffs had made out their title to the land as it was recorded in the Record of Rights, *i. e.*, the title as alleged in the plaint. Having found that, the learned Subordinate Judge says that the defendant being in possession under the decree under s. 9 of the Specific Relief Act, the onus is upon the plaintiffs to show that he had no tenancy right on the land. Then the learned Subordinate Judge says that it is not necessary to find whether there was an actual partition as alleged by the defendant. Then the learned Subordinate Judge concludes his judgment in these words: "the incidents of the tenancy and the nature of it are not clear from the evidence before me and however flimsy that tenancy might be the plaintiffs cannot ask ejectment unless that tenancy has been lawfully determined."

In my opinion, these findings of the learned Subordinate Judge are insufficient for the disposal of the case, much less is it sufficient for the reversal of the decree made by the First Court. The plaintiffs having established their title to the land it was the duty of the defendant who sets up the tenancy from one of the co-sharers to establish such a tenancy and to show that the nature of the tenancy was such that it was binding upon the purchaser as the plaintiff No. 1 in this suit was. Then again, in order to make that lease binding against all the co-sharers, it was the duty of the defendant to establish satisfactorily that there was a partition between the co-sharers, before the alleged lease to the defendant No. 1, under which his lessor obtained a complete title to deal with the land by way of a lease in favour of defendant No. 1. Until the partition is established and until the defendant No. 1 shows the nature of the tenancy which he had obtain-

ed from defendant No. 2, he cannot successfully resist the claim of the plaintiffs. We think, therefore, that the judgment of the learned Subordinate Judge should be set aside and the case is sent back to him so that the appeal may be re-heard in the light of the observations which we have made in this judgment. I may, however, point out that although the learned Subordinate Judge agreed with the Munsif that the plaintiffs had made out their title, he dismissed the suit altogether. He was clearly wrong there. If the defendant No. 1 establishes a tenancy which would be binding against the plaintiff No. 1 subject to the rights of the defendant No. 1, there should be a decree declaring the title of the plaintiff No. 1, the defendant No. 1 should be declared liable to pay rent to the plaintiff No. 1, but if the defendant fails to prove the partition and the tenancy, as I have already indicated, the judgment of the learned Munsif will stand.

Costs of this appeal will abide the result.

Greaves, J.—I agree.

Z. K. *Appeal allowed; Case renanded.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 185 OF 1921.

November 26, 1924.

Present:—Mr. Justice Phillips and Mr. Justice Odgers.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF KISTNA —DEFENDANT—APPELLANT

versus

Dewan Bahadur YELLEPEDDI JANAKIRAMAYYA PANTULU GARU AND ANOTHER—PLAINTIFFS —RESPONDENTS.

Contract Act (IX of 1872), ss. 20, 65—Inam, *resumption of*—Ryotwari patta, *grant of*—*Resumption declared illegal*—*Revenue, recovered from holder of* patta, *refund of*—*Mistake.*

Government resumed a *devadayam inam* attached to a temple and granted a *ryotwari patta* in respect of it to the trustee of the temple and thereafter to a purchaser from him. Subsequently at the instance of third parties the resumption was declared illegal. In a suit by the purchaser from the trustee for refund of the assessment levied from him by Government during the whole period of litigation:

Held, (1) that the plaintiff when he accepted the *patta* was aware that the right of resumption by Government was being questioned and that, therefore, there was no mistake so as to render s. 20 of the Contract Act applicable; [p. 645, cols. 1 & 2.]

(2) that the issue of a *ryotwari patta* by Government to the plaintiff not only did not convey the land from Government to the grantee but did not even create a contract in respect of the land between them, and that plaintiff was consequently not entitled to any relief. [p. 646, col. 2.]

Secretary of State for India v. *Penumacha Venkatapatha Raju*, 17 Ind. Cas. 953; 23 M. L. J. 746; (1912) M. W. N. 1242, *Secretary of State for India* v. *Kasturi Reddi*, 26 M. 268 at p. 272; 12 M. L. J. 453, *Secretary of State for India* v. *Raghavachariar*, 83 Ind. Cas. 1009; 47 M. L. J. 503; (1924) M. W. N. 820; 20 L. W. 815; 47 M. 861; (1924) A. I. R. (M.) 913, *Boddupalli Jagannadham* v. *Secretary of State for India*, 27 M. 16, *Muhammad Esuf Sahib* v. *Abdul Sathar Sahib*, 49 Ind. Cas. 821; 42 M. 161; 25 M. L. T. 141; 36 M. L. J. 262; (1919) M. W. N. 228, relied on.

Appeal against a decree of the District Court, Kistna at Masulipatam, in O. S. No. 3 of 1919.

The Government Pleader, for the Appellant.

Messrs. *T. M. Krishnaswami Iyer* and *A. Venkatachalam*, for the Respondent.

JUDGMENT.

Odgers, J.—Government appeals from a decree of the District Court of Kistna whereby the plaintiff-respondent was held entitled to recover a sum paid by him to Government as *cist* of a certain village between 1912—16. The village in question was originally a *Devadayam inam* attached to a temple at Kara. Government resumed the *inam* in 1908 or 1909 on the ground that the services were not being performed and granted a *ryotwari patta* to one Ankitam Raja Rao who was in fact the hereditary trustee. The validity of the resumption was challenged in O. S. No. 28 of 1911 of the Temporary Subordinate Judge's Court, Masulipatam. Meanwhile Ankitam Raja Rao had transferred the village to three others. The suit (O. S. No. 28 of 1911) was instituted on 20th April, 1911, and on 26th April, 1911, the present plaintiff-respondent entered into an agreement with the three persons aforesaid to purchase the village. This was completed by Ex. K, 19th August 1911. Subsequently plaintiff-respondent paid the assessment demanded by Government and obtained a *patta*, Ex. N, of the village in his own name on 26th January 1914. The suit (O. S. No. 28 of 1911) was decided on 8th February 1916 the Court holding that the resumption was illegal and in the absence of an appeal this declaration became final and established the right of the temple to the *inam*. The plaintiff's case in the present suit under appeal was

that the consideration for the levy of the assessment had failed, he having purchased the property in the belief that Government was the owner and that his title had been recognised by the grant of the *patta* to him. The plaintiff also pleaded that he had obtained no benefit by the sale and grant of *patta* as the tenants had disputed his title to recover rent from them. The District Judge held that there was a contract between Government and plaintiff and that this contract was void under s. 20, Contract Act, as both parties were under a mistake as to a matter of fact essential to the agreement and that it was not necessary for plaintiff to show that he had had to pay damages to a 3rd party (in this case, the temple) before he could recover. Consequently under s. 65 of the Contract Act the plaintiff was held entitled to recover. It has not in fact been decided by the lower Court whether plaintiff did obtain any and what benefit from this transaction and we were urged by Mr. T. M. Krishnaswami Iyer to send the case back on this ground alone but on the view of the matter that I take, I think this will be unnecessary. I am by no means convinced that plaintiff was in April 1911 under any mistake of fact. Exhibit K recites that the lands sold to plaintiff are in the claim and enjoyment of the vendors. On 30th May 1912 plaintiff petitioned to relinquish 102 acres of what he had bought by Ex. I (*a*) which was accepted on 16th November 1912. In Ex. P plaintiff asks that in a suit between himself and a tenant, the case should be kept pending a possible appeal by Government against the order declaring the resumption illegal. That was in 16th February 1916. That suit and others were dismissed on 21st February 1916. In Ex. III, dated 25th August 1917, plaintiff applied for a refund of the assessment paid. The Collector in his order Ex. IV, dated 6th June 1918 points out that no mesne profits were claimed or allowed to the temple in O. S. No. 23 of 1911. He contends that no refund can be allowed as the *patta* with the fixed amount of assessment was accepted by the petitioner who was in possession of the village on strength of the *patta* and made the payment of assessment voluntarily. On these documents it is impossible to say that a case of mistake has been established. The facts are equally consistent with the plaintiff having with his eyes open contracted for the village in question and as being willing to run the risk either of an appeal by Government succeeding or of his ability to extract rent from the tenants. There is no evidence that plaintiffs did not know that suit, O. S. No. 28 of 1911, had been instituted at the date of his contract on 26th April 1911, and he had not gone into the witness-box to deny it. That suit was dismissed by the Subordinate Judge on 11th January 1913 and on remand, decreed on 8th February 1916. The plaintiff applied for *patta* on 26th January 1914 and was thus perfectly well aware at least at the latter date that the matter of the resumption of the *inam* was being litigated.

The Privy Council case cited in *Harnath Kuar* v. *Indar Bahadur Singh* (1) depended on a misapprehension of the private rights of the vendor. There can be no such misapprehension here when plaintiff accepted *patta* and when he knew the title of Government was being questioned in litigation. On the point of the existence of a contract between plaintiff and Government, it is necessary to consider the nature of the *patta*, as to whether it is a contract or a grant of the land itself. In the *Secretary of State for India* v. *Penumacha Venkatapatha Raju* (2), it was held that the liability to pay revenue does not rest on a contract or some relation resembling contract. In *Secretary of State for India* v. *Kasturi Reddi* (3), Bhashyam Iyengar, J., says it is in the nature of a mere bill and is not and does not purport to be in the nature of a grant or conveyance. He held that the question whether a *patta* was issued or not was immaterial on a question of title. See also *Secretary of State for India* v. *Raghavachariar* (4). The same learned Judge in *Gunnaiyan* v. *Kamakchi Ayyar* (5), considering the nature of resumption says: "Even when the Government exercises its right of resumption, it rarely, if ever, resumes the land even if the land itself had been granted as *inam*. It simply resumes the full assessment and

(1) 71 Ind. Cas. 629; 45 A. 179; (1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 346; 27 C. W. N. 949; 50 I. A. 69; 18 L. W. 383; 26 O. C. 223; 33 M. L. T. 216; 5 P. L. T. 281; 2 Pat L. R. 237 (P. C.).

(2) 17 Ind. Cas. 953; 23 M. L. J. 746; (1912) M. W. N. 1242.

(3) 26 M. 268 at p 272; 12 M. L. J. 453.

(4) 83 Ind. Cas. 1009; 47 M. L. J. 503; (1924) M. W. N. 820; 20 L. W. 815; 47 M. 861; (1924) A. I. R. (M.) 913.

(5) 26 M. 339 at p. 346.

it does so by the imposition of full assessment upon the land and converts it into ordinary *ryotwari* tenure." [See also *Boddupalli Jagannadham* v. *Secretary of State for India* (6) and *Muhammad Esuf Sahib* v. *Abdul Sathar Sahib* (7)].

These authorities are, in my opinion, conclusive on this question and, therefore, the issue of *patta* not only did not convey the land in question from Government to the respondent but did not even create a contract in respect of the land between them.

The remaining question is one of limitation. The District Judge has held that Art. 96 applies and that the suit was brought within 3 years of plaintiff's discovery of the alleged mistake. The respondent here relies on Art. 96 or 120. On the other hand appellant refers to s. 59 of the Revenue Recovery Act (II of 1864) made applicable by s. 29 (1) of the Limitation Act and alleges that the cause of action arose on 8th February 1916 when the resumption was declared illegal. Section 59 of Act II of 1864 reads as follows:—

"Nothing contained in this Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under this Act, except as hereinbefore provided, from applying to the Civil Courts for redress; provided that Civil Courts shall not take cognizance of any suit instituted by such parties for any such cause of action, unless such suit shall be instituted within six months from the time at which the cause of action arose."

It was held in *Secretary of State for India* v. *Nagaraja Aiyer* (8) that the section was confined to cases of persons being aggrieved by illegal or irregular proceedings taken for collection of revenue under the provisions of the Act. I am of opinion that the collection of assessment from the plaintiff might fall within this definition; but we have no details and there is no evidence of the circumstances under which the collections were made. It is not, however, necessary in the view I take of the facts in this case and of the effect of the grant and acceptance of a *patta* to decide the point definitely. In my opinion the appeal succeeds as to the return of the assessment levied and must be allowed with costs throughout.

Phillips, J.—I agree.

V. N. V. *Appeal allowed.*

(6) 27 M. 16.

(7) 49 Ind. Cas. 821; 42 M. 161; 25 M. L. T. 141; 36 M. L. J. 262; (1919) M. W. N. 228.

(8) 74 Ind. Cas. 281; 44 M. L. J. 645; 17 L. W. 618; 32 M. L. T. 230; (1923) M. W. N. 327; (1923) A. I. R. (M.) 665.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2380 OF 1924.

March 18, 1925.

Present:—Mr. Justice Campbell.

YUSAF ALI MAMOONJI—APPLICANT—APPELLANT

versus

ALIBHOY AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 13—Application for appointment of guardian—Procedure—Evidence, opportunity to produce.

The appellant, who was one of the paternal uncles of a minor Muhammadan girl, made an application for appointment as guardian of the girl. The other uncles of the girl objected to the appointment on the ground that the minor's father had appointed the objectors guardians of the minor by Will, and that at the time of the application the appellant was prosecuting a suit against the minor in which he sought a decree that the minor had no share in her father's property. On the basis of these allegations, and without giving the appellant any opportunity of producing evidence, the Court dismissed the appellant's application. Under the Will relied upon by the objectors the whole of the property of the deceased had been left to them and nothing had been left to the minor. The appellant alleged that the Will was a forgery:

Held, (1) that the appellant should have been given an opportunity to prove his allegations and to rebut the allegations made by the objectors;

(2) that if the Will was in fact a forgery it was not desirable to appoint the objectors as guardians of the minor;

(3) that in any case the Court could not have made an order relying on the genuineness of the Will without taking evidence in support of the Will;

(4) that, therefore, the order dismissing the appellant's application must be set aside and the case remanded to the lower Court for a fresh decision after giving parties an opportunity to produce evidence.

Miscellaneous first appeal from an order of the District Judge, Rawalpindi, dated the 20th June 1924.

Mr. *Shamair Chand* and Lala *Hargopal*, for the Appellant.

Mr. *Aziz Ahmad*, for the Respondents.

JUDGMENT.—This is an appeal

against an order by the District Judge, Rawalpindi, refusing to appoint a guardian to *Musammat* Zuhra Bai, the minor daughter of the deceased Seth Hassan Ali Mamoonji. The applicant was Yusaf Ali Mamoonji, one of the deceased's four full brothers.

The learned District Judge issued notice to the other relatives, and they appeared and objected by written petition that the applicant was not a fit person to be appointed guardian, that Seth Hassan Ali Mamoonji had appointed his other three full brothers guardians of the girl by Will, dated the 29th April 1916, and that at the time of the application the applicant was prosecuting a suit against the minor and others in which he sought a decree that the minor had no share in her father's property. These written objections were put into Court on the 18th June 1924, and on the 20th of June the order under appeal was passed and the application was rejected solely on the assumption that the alleged Will of the 16th June 1914 was genuine.

In appeal to this Court Seth Yusaf Ali Mamoonji contends that the Will is not genuine and that he was given no opportunity of producing any evidence in support of his application. According to the terms of the Will as quoted in the learned District Judge's order, the whole of the deceased's property was bequeathed to three of his full brothers who were enjoined to consider *Musammat* Zuhra Bai as their own daughter, but nothing was left in the way of property to the girl. If the Will is in fact a forgery it manifestly would be desirable to appoint some person other than these three uncles guardian of the minor girl.

There is nothing on the record over the signature of the learned District Judge to show either that the applicant was given a full hearing on the 18th June or that he was given any opportunity of producing evidence to show that the alleged Will was not genuine. There is nothing on the record to support the statement in the written pleas of the relatives that the applicant was at the time litigating against the minor, and this is denied by the applicant's Counsel before me. The case must go back to the lower Court for further inquiry, and the applicant must have an opportunity of giving evidence in support of his application. The alleged Will admittedly has never been proved, and the reasons for assuming it to be genuine have not been explained by the learned District Judge.

I accept the appeal with costs, set aside, the order of the Court below and return the application for a fresh decision. The respondents have resisted the remand strenuously on grounds which are not supported by the present contents of the record, and full Counsel's fee entered in the certificate will be granted to the appellant.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 142 OF 1923.

January 8, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Ryves.

GAJADHAR SINGH—PLAINTIFF—APPELLANT

versus

HARI SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Limitation Act (IX of 1908), Sch. I, Art. 120—Mortgage—Declaration of title, suit for, by mortgagor against mortgagee, whether maintainable—Revenue Records, entry in—Adjudication by Civil Court—Revenue proceedings after civil adjudication—Limitation, commencement of.

Where after an entry is made in the Revenue Records which is adverse to the interests of the plaintiff, the latter obtains an adjudication of a Civil Court in his favour relating to the subject of such entry, but subsequently to such adjudication and in spite of it, proceedings are taken in the Revenue Courts the result of which is adverse to the plaintiff, there is a fresh denial of his rights as the result of such proceedings, and limitation in respect of a suit for declaration of his rights by the plaintiff commences to run not from the date of the first adverse entry but from the date of the fresh denial of his rights after the adjudication by the Civil Court in his favour. [p. 649, col. 1.]

A mortgagor has sixty years from the date of the mortgage within which to redeem the mortgaged property by tendering the mortgage money. If before the expiry of that period it turns out that the mortgagee is denying the title of the mortgagor and is casting a cloud on his title and there is a danger that by lapse of time reliable evidence may disappear it is open to the mortgagor to bring a suit for a mere declaration of his title if he is not prepared to pay the mortgage money at once and to redeem the property. [p. 649, cols. 1 & 2.]

Mufti Ali Jafar v. *Fazal Husain Khan*, 67 Ind. Cas. 659; 20 A. L. J. 557; 4 U. P. L. R. (A.) 131; (1922) A. I. R. (A.) 349; 44 A. 622, distinguished.

Nathu Singh v. *Gumani Singh*, 18 A. 320; A. W. N. (1896) 86; 8 Ind. Dec. (N. S.) 919, followed.

Second appeal from a decree of the Subordinate Judge, Muttra, dated the 13th October, 1922.

Dr. *M. L. Agarwala*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for a declaration that the plaintiff is the owner of the property in suit and that the defendants have no right therein except as representatives of the mortgagee.

The Court of first instance decreed the claim and disallowed the various objections raised by the defendants.

On appeal the learned Subordinate Judge has allowed the appeal and dismissed the suit on three grounds:—

(1) That the suit was barred by time:

(2) That the suit was barred under s. 42 of the Specific Relief Act; and

(3) That the claim was barred by the provisions of s. 233 (*k*) of the Land Revenue Act.

The facts of this case are slightly complicated and it is necessary to refer to them briefly.

Dilsukh and Mansingh were two brothers and in 1876 they made a mortgage of their 3/16th share each in favour of the plaintiff's ancestor for a sum of Rs. 700 each. Subsequently Dilsukh died and in 1896, his widow *Musammat* Phulo and Mansingh made a second mortgage of their 6/16th share in the village to the same mortgagee for another sum of Rs. 1,400. In 1910 Mansingh purported to sell the entire 6/16th share to the defendants. By that time *Musammat* Phulo had died. When the defendants applied to the Revenue Court for entry of their names by virtue of this last sale-deed the daughters of Dilsukh raised certain objections but their objections were disallowed and the names of the defendants were entered in the revenue papers in 1911. In 1915, the two daughters proceeded to sell their 3/16th share to the plaintiff.

The defendants made a deposit under s. 83 of the C. P. C. to redeem the previous mortgages and the plaintiff submitted to redemption of the second mortgage which had been executed by *Musammat* Phulo and Mansingh jointly and also of Mansingh's half share in the first mortgage but they declined to allow redemption of the alleged half share of Dilsukh under the earlier mortgage of 1876.

Accordingly in 1916 the present defendants instituted a suit for redemption against the plaintiff. In that suit the defendants put forward two alternative claims. They said that, in the first place, they had acquired the interests of Dilsukh by virtue of the sale-deed of 1910 inasmuch as Dilsukh and Mansingh were really joint and in the alternative they alleged that in any case as they had redeemed the second mortgage of 1876 they were entitled to redeem the first mortgage as persons who had stepped into the shoes of the subsequent mortgagees. The Court tried the question of title and recorded clear findings that Mansingh and Dilsukh were really separate and that Mansingh had no right to Dilsukh's share in 1910. It accordingly held that the present defendants had no right to redeem the mortgage of 1876 as proprietors and representatives of Dilsukh but it held that inasmuch as the defendants had been allowed to redeem the second mortgage of 1896 made by *Musammat* Phulo and Mansingh they had stepped into the shoes of the subsequent mortgagee and in that way they were entitled to redeem the first mortgage as subsequent mortgagees. A decree for redemption was accordingly passed.

We may note that all this time the names of the defendants had been recorded in the revenue papers as mortgagees. They after the redemption applied that their names should be recorded as proprietors inasmuch as the mortgage had been satisfied in or about 1917. After the redemption decree they were actually entered as full proprietors.

In 1921 the present suit was instituted for the declaration mentioned above. The lower Appellate Court has held that the present claim is barred by limitation because the cause of action in favour of the plaintiff arose in 1911 when the objections of the daughters of Dilsukh, the predecessor-in-title of the present plaintiff, were disallowed. It has thought that the subsequent proceedings of 1917 in the Revenue Court were in continuation of the previous proceedings and did not give a fresh cause of action to the plaintiff. In our view this view is clearly erroneous. The lower Appellate Court has ignored the fact that in between 1911 and 1917 there was an adjudication by a Civil Court by which it was clearly held that the present defendants had not acquired the proprietary interest of Dilsukh and that

they were merely in the position of subsequent mortgagees. After that adjudication it is difficult to hold that it was still the duty of the present plaintiff to bring a suit for a declaration to the same effect within six years of 1911. The proceedings of 1917 in the Revenue Court were taken in spite of and subsequent to the adjudication by the Civil Court.

The denial of the plaintiff's title was, therefore, a fresh denial and not necessarily in continuation of the proceeding one. Under the circumstances the present suit having been instituted within six years of 1917 was not barred by time.

The learned Subordinate Judge seems to have been of opinion that inasmuch as it was open to the present plaintiff to bring a suit for redemption on payment of the mortgage money, but he has chosen merely to ask for a declaration, he has omitted to claim a consequential relief which he was entitled to claim and his suit for a mere declaration is, therefore, not maintainable. In support of this view he has relied on the case of *Mufti Ali Jafar* v. *Fazal Husain Khan* (1). In that case all that was held was that a relief by way of a declaration regarding the validity or invalidity of an alienation made by a trustee comes within the provisions of cl. (*h*) of s. 92 of the C. P. C. and a suit in respect of it must be brought in conformity with the provisions of that section and that, therefore, a mere suit for a declaration that the transfer was invalid without the sanction of the Legal Remembrancer was not maintainable. On the other hand the appellant relied on the case of *Nathu Singh* v. *Gumani Singh* (2) which is directly in point. It seems to us that the suit cannot fail on the technical ground that a further consequential relief has not been asked for. The plaintiff has sixty years from the time of the mortgage to redeem the property by tendering the mortgage money. If long before the expiry of that period it turns out that the defendants are denying the title of the mortgagor and are casting a cloud on his title and there is a danger that by lapse of time reliable evidence may disappear it is open to the plaintiff to bring a suit for a mere declaration even though he is not prepared to pay the mortgage money at that time. This was the view clearly expressed in the case last quoted with which we fully agree. The suit, therefore, cannot fail on this technical ground.

The last point taken by the learned Subordinate Judge was that the claim was barred by s. 233 (*k*) of the Land Revenue Act. The Courts below have proceeded on the assumption that Inderjit, the plaintiff's father was somehow or other bound by the partition proceedings and if he had been alive he himself would not have been entitled to maintain the suit. They have then proceeded to consider whether the present plaintiff could also be bound. This they have held to be so even though his name was not actually entered in the revenue papers. On the abstract question of law it is impossible to differ from the view taken by the Courts below. If the effect of the partition proceedings was to bind Inderjit conclusively it seems to us that the present plaintiff who is a member of a joint Hindu family with him would be equally bound even though his name was not actually entered in the revenue papers. If Inderjit as the head of the family and as the recorded proprietor had full opportunity to object then the other members of his family may be equally bound. The Courts below, however, have not set forth the necessary facts which would enable us to dispose of this point finally as to whether the effect of the partition proceedings was really such as to operate as a bar to the present case. All that appears at present is that some co-sharers had applied for the partition of the original *mahal* Himmat Singh, in which the property now in suit was then situated in *khewats* Nos. 1 and 7. Inderjit the father of the plaintiff was made a party to the partition proceedings. He died during the pendency of the proceedings and the plaintiff was brought on the record in his place at some probably late stage in the case and the only other thing that is known is that the property now in dispute was as a result of the partition allotted in *mahal* Bhanwar Singh which we understand belongs to the defendants. It is not quite clear whether Inderjit Singh had any share in the original *mahal* independently of the mortgaged property nor is it clear whether Inderjit was arrayed on the side of the applicants for partition or was on the side of the non-objectors. It is further not clear whether the result of the partition was that Inderjit's separate pro-

(1) 67 Ind. Cas. 653; 20 A. L. J. 557; 4 U. P. L. R. (A.) 131; (1922) A. I. R. (A.) 349; 44 A. 622.

(2) 18 A. 320; A. W. N (1895) 86; 8 Ind. Dec. (N. S.) 919.

perty, if any, (other than the property in suit) went out of Bhanwar Singh *mahal*. Without these facts having been made clear it is impossible to say whether there was or was not any express or implied conflict of interest between the plaintiff's predecessor-in-title Inderjit and the present defendants. It is, therefore, impossible to decide this appeal without clear findings on the following points :—

We accordingly send down the following issues to the lower Appellate Court for determination :—

(1) Did Inderjit possess any share in *mahal* Himmat Singh other than the properties mortgaged which are not in dispute?

(2) If so, did any property of Inderjit go out of a *mahal* other than *mahal* Bhanwar Singh ?

(3) Did Inderjit die before the expiry of the time fixed for filing objections ?

The Counsel for the parties are agreed that only fresh documentary evidence should be allowed and no oral evidence be permitted. The lower Appellate Court will allow parties to produce documentary evidence only. The findings should be returned preferably within one month, but if that be not possible then two months. On return of the findings the usual ten days will be allowed for filing objections.

Z. K. *Issues remitted.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1652 OF 1924.

March 18, 1925.

Present:—Mr. Justice Campbell.

MANSA RAM—APPELLANT

versus

Musammat NAURATI—RESPONDENT.

Guardians and Wards Act (VIII of 1890)—Order appointing guardian—Order directing third person to make payment for minor's support, legality of.

There is nothing in the Guardians and Wards Act which entitles a Court when appointing a person guardian of a minor to order a third party, who is not in possession of any property belonging to the minor, to pay anything towards the minor's support. [p. 650, col. 2.]

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Ambala, dated the 14th April 1924.

Mr. *Shamair Chand*, for the Appellant.

Lala *Jagan Nath Agarwal*, for the Respondent.

JUDGMENT.—This judgment will dispose of appeals Nos. 1652 and 2465 of 1924. They arise out of an order by the Senior Subordinate Judge, Ambala, appointing Mansa Ram, a collateral of her deceased father, as guardian of the person of *Musammat* Jota Devi, a minor. On Mansa Ram's application the learned Senior Subordinate Judge held, after taking evidence, that *Musammat* Naurati, the step-mother of the child in whose care she is at present, was living an immoral life and was, therefore, unable to retain custody of the minor. In regard to property it was decided that, since the minor had no property, it was only necessary to appoint Mansa Ram guardian of the person, and a rider was added to the order directing *Musammat* Naurati, who has succeeded to the property of the minor's father, to pay Rs. 12 per mensem for the maintenance of the minor and that that maintenance and also the girl's marriage expenses should be first charge on the property of her deceased father.

Musammat Naurati and Mansa Ram have both appealed. *Musammat* Naurati complains, firstly, that she has not been proved to be an improper person to look after the minor, and, secondly, that the order directing her to pay Rs. 12 per mensem was without jurisdiction.

This second contention is correct. There is nothing in the Guardians and Wards Act which entitles a Court, when appointing a person guardian of a minor, to order a third party to pay anything towards the minor's support. As regards the question of *Musammat* Naurati's character the learned Senior Subordinate Judge has stated that there is no direct evidence of immorality but that there is a great deal of reliable indirect evidence that her character is bad. I am not disposed to differ from this conclusion. The learned Senior Subordinate Judge had the witnesses before him and was in the best position to decide in respect of their credibility. I accept *Musammat* Naurati's appeal to the extent of setting aside the order that she should pay Rs. 12 per mensem for the maintenance of the minor. Mansa Ram, if so advised and if the Court permits, can sue for such sums as he may consider payable by *Musammat* Naurati out of Chuhar Mal's estate for the minor's maintenance and

marriage expenses ; but the learned Senior Subordinate Judge had no jurisdiction to make the order which he has passed. In other respects the appeal is dismissed.

Mansa Ram's appeal is No. 1652, and he contends that he should also be appointed guardian of the minor's property. In his original application he specified certain property as belonging to the minor. The Court below has held that the minor has no property, and there is no evidence that the property scheduled to the application belongs to the minor. Should any property be acquired hereafter by the minor Mansa Ram can make another application for being appointed guardian of that property.

In both appeals parties will bear their own costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1203 OF 1922.

November 17, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

AMARTA LAL KUMAR—PLAINTIFF—APPELLANT

versus

SISIR KUMAR BASU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VII, r. 11, O. XLIII, r. 1 (a)—Order directing payment of deficit Court-fees, failure to comply with—Rejection of plaint—Appeal, valuation of—Appellate Court, duty of.

A plaint was rejected under O. VII, r. 11, of the C. P. C., owing to the failure of the plaintiff to pay the deficit Court-fees directed to be paid by the Court. The plaintiff appealed against the order and valued his appeal at the original valuation put by him upon his claim and questioned the finding of the Trial Court as to the valuation of the suit. The Appellate Court rejected the appeal on the ground that the memorandum of appeal was insufficiently stamped:

Held, that it was the duty of the Appellate Court to decide the question as to what the real value of the suit was, and what the Court-fees payable upon that finding should be, and that after deciding that question the Appellate Court should have given an opportunity to the plaintiff to pay the deficit Court-fees and then remanded the case to the First Court for trial on the merits after the payment of proper Court-fees by the plaintiff. [p. 651, col. 2.]

Appeal against a decree of the District Judge, Dacca, dated the 15th of June 1921, affirming that of the Subordinate Judge, First Court, Dacca, dated the 17th of May 1921.

Babu *Ramani Mohan Chatterjee*, for the Appellant.

Dr. *Basak* and Babu *Prokas Chandra Pakrasi*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the plaintiff and arises out of an order made by the District Judge of Dacca, dated the 15th of June 1921. It appears that the plaintiff brought a suit for declaration of title to and recovery of possession of certain immoveable property. He valued his suit for the purpose of Court-fees at Rs. 60 and paid Court-fees *ad valorem* on that valuation. After the quantity and situation of the land had been ascertained by local investigation, the defendants raised a question that the suit had been undervalued and the Court-fee paid was insufficient. The learned Subordinate Judge enquired into the matter and found that the true value of the land in suit should be assessed at Rs. 9,905 and gave the plaintiff an opportunity of paying the deficit Court-fees. The plaintiff defaulted and the result was that the plaint was rejected under O. VII, r. 11. The plaintiff appealed against that order to the District Judge and valued his appeal at the same value as he had put upon the original plaint and questioned the finding of the Subordinate Judge as to the valuation of the suit. The learned District Judge disposed of the appeal in these words. As the memorandum of appeal is insufficiently stamped 'it is rejected.' It is clear from this order that the District Judge did not go into the question as to the true value of the properties in suit for the purpose of Court-fees and it is also clear that without coming to a finding upon the question he could not hold that the memorandum was insufficiently stamped.

The result is that we set aside the order of the District Judge and send back the case to him for a trial of the question as to what the real value of the property in suit is and what the Court-fees payable upon that finding should be. The plaintiff, after that question is decided, will be given an opportunity to pay the deficit Court-fees upon that value and then the District Judge will remand the case to the First Court for trial on the merits after payment of proper Court-fees before that Court.

The appellant will be entitled to his

costs in this appeal. We assess the hearing-fee at two gold *mohurs*.

Greaves, J.—I agree.

Z. K. *Appeal allowed; Case remanded.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2812 OF 1924.

March 17, 1925.

Present:—Mr. Justice Martineau.

ABDUL AZIZ AND OTHERS—DEFENDANTS—APPELLANTS

versus

ABDULLA AND ANOTHER—PLAINTIFFS, AND KHUDA BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Transfer by one of several vendees in favour of person having superior right, before institution of suit, effect of—Attestation of sale-deed—Estoppel.

If out of several vendees the one whose rights are inferior to those of the pre-emptor sells his share, before the institution of a suit for pre-emption, to a person having rights not inferior to those of the pre-emptor, the claim of the latter would be defeated. [p. 652, col. 2.]

Mughal v. *Jalal*, 69 P. R. 1898 and *Hira* v. *Sardara*, 59 Ind. Cas. 712; 32 P. W. R. 1921; 3 L. L. J. 117; 37 P. L. R. 1921, followed.

The attestation of a deed does not by itself estop the person attesting from denying that he knew of the contents of the deed or that he consented to the transaction which it effected. [p. 653, col. 1.]

Fazl Din v. *Lal Singh*, 20 Ind. Cas. 843; 164 P. W. R. 1913; 282 P. L. R. 1913, followed.

Second appeal from a decree of the District Judge, Ambala, dated the 5th August 1924, reversing that of the Additional Subordinate Judge, Fourth Class, Ambala, dated the 22nd January 1924.

Mr. *Shamair Chand*, for the Appellants.

Mr. *Muhammad Rafi*, for the Respondents.

JUDGMENT.—The plaintiffs in this case sued for pre-emption in respect of a sale of land effected by defendant No. 1 in favour of defendants Nos. 2 to 7, of whom defendants Nos. 4 to 7 had rights of pre-emption equal to those of the plaintiffs. Defendants Nos. 2 and 3 had inferior rights, but before the institution of the suit they executed a sale-deed conveying their share to Rohilla, defendant No. 9, who is the son of defendant No. 1 and has a right of pre-emption superior to that of the plaintiffs. The Trial Court dismissed the suit, but the District Judge on appeal held, (1) that defendants Nos. 4 to 7, having joined defendants Nos. 2 and 3, who were strangers, with themselves in the purchase, had lost their right of pre-emption, and (2) that the re-sale by defendants Nos. 2 and 3 to Rohilla was a fictitious transaction intended to defeat pre-emptors, and he, therefore, gave the plaintiffs a decree. The defendants have filed a second appeal.

In *Mughal* v. *Jalal* (1), it was held that if out of several vendees the one whose rights were inferior to those of the pre-emptor sold his share before the institution of the suit to a person having rights not inferior to the pre-emptor's the claim of the latter would be defeated, and that ruling was followed in *Hira* v. *Sardara* (2) to which reference is made on page 170 of Ellis' Law of Pre-emption, 4th Edition. If, therefore, the sale to Rohilla was a genuine sale the claim will fail.

Both Rohilla and his vendors say that there was an actual sale by the latter to the former, and there is no evidence to show that the sale was fictitious. There seems to have been a confusion in the mind of the learned District Judge between a fictitious or sham sale and a genuine sale which has been effected for the purpose of defeating pre-emptors. The circumstances which he mentions in his judgment in support of his finding show nothing more than that defendants Nos. 2 and 3, as soon as they came to know that plaintiffs were going to claim pre-emption, proceeded to sell their shares to Rohilla. From the fact that they intended to outwit the plaintiffs, it does not in the least follow that the sale to Rohilla was not a genuine sale. Counsel for the respondent relies on *Fazl Din* v. *Lal Singh* (3), but it is to be observed that in that case the second purchaser was the father of the first purchaser, whilst in the present case the second purchaser Rohilla is not related to the first purchasers. The lower Appellate Court's finding that the sale to Rohilla is fictitious, not being based on any evidence, cannot be supported.

It is urged for the respondents that Rohilla waived his right by attesting a sale-deed executed by defendant No 1, but this argument is met by *Pandurang Krishnaji*

(1) 69 P. R. 1898.

(2) 59 Ind. Cas. 712; 32 P. W. R. 1921; 3 L. L. J. 117; 37 P. L. R. 1921.

(3) 20 Ind. Cas. 843; 164 P. W. R. 1913; 282 P. L. R. 1913.

v. *Markandaya Tukaram* (4) in which it was held by the Privy Council that the attestation of a deed does not by itself estop the person attesting from denying that he knew of its contends or that he consented to the transaction which it effects. There is no evidence as to the circumstances in which Rohilla attested the deed, and there is nothing to show that he attested it in token of his consent to the sale.

The sale by defendants Nos. 2 to 3 to Rohilla, not having been shown to be fictitious, defeats the claim of the plaintiffs, whose rights of pre-emption are inferior to Rohilla's.

I accordingly accept the appeal, reverse the decree of the lower Appellate Court, and restore that of the Trial Court. The plaintiffs-respondents will pay the appellants' costs in this Court and in the lower Appellate Court. Costs in the Trial Court will be paid as directed by that Court.

Z. K. *Appeal accepted.*

(4) 65 Ind. Cas. 954; 49 C. 334; 26 C. W. N. 201; 3 U. P. L. R. (P. C.) 85; 5 N. L. J. 6; 20 A. L. J. 305; 42 M. L. J. 436; 15 L. W. 486; 30 M. L. T. 249; 35 C. L. J. 409; 24 Bom. L. R. 557; 18 N. L. R. 1; (1922) A. I R. (P. C.) 20; 49 I. A. 16 (P. C.).

CALCUTTA HIGH COURT.
FULL BENCH.

LETTERS PATENT APPEAL No. 1 OF 1924.

December 2, 1924.

Present:— Justice Sir N. R. Chatterjea, KT., Justice Sir Ewart Greaves, KT., and Mr. Justice Panton.

Raja PROBHAT CHANDRA BARUA— ASSESSEE—APPELLANT

versus

EMPEROR—RESPONDENT.

Letters Patent (Cal.), cl. 15—Income Tax Act (XI of 1922), s. 66—Reference to High Court—Opinion, whether "judgment"—Appeal, whether lies.

The opinion pronounced by the High Court on a reference made to it under s. 66 of the Income Tax Act is merely advisory and is pronounced by the High Court in the exercise of its consultative jurisdiction and is not a "judgment", within the meaning of cl. 15 of the Letters Patent of the Calcutta High Court. No appeal, therefore, lies against such an opinion under this clause. [p. 654, col. 2.]

Tata Iron and Steel Company Limited v. *Chief Revenue Authority, Bombay*, 74 Ind. Cas. 469; 50 I. A. 212; 21 A. L. J. 675; 25 Bom. L. R. 908; (1923) A. I. R. (P. C.) 148; (1923) M. W. N. 603; 45 M. L. J. 295; 18 L. W. 372; 9 O. & A. L. R. 783; 33 M. L. T. 301; 47 B. 724; 28 C. W. N. 307; 39 C. L. J. 16 (P. C.), relied on.

Letters Patent Appeal against the judgment of Mr. Justice Rankin, differing in opinion from Mr. Justice Page, dated the 4th and 8th of January 1924, in Reference No. 5 of 1923 and reported as 84 Ind. Cas. 31.

Mr. *H. D. Bose* (with him Babu *Mohini Mohan Chakravarti*), for the Appellant.

Babu *Surendra Nath Guha* (with him Moulvi *Nur-ud-din Ahmed*), for Respondent.

JUDGMENT.

Chatterjea, J.—This appeal is preferred under cl. 15 of the Letters Patent against a decision of Mr. Justice Rankin. There was a Reference under s. 66 (2) of the Indian Income Tax Act (XI of 1922) made by the Commissioner of Income Tax to the High Court. It was heard by a Bench consisting of Mr. Justice Rankin and Mr. Justice Page. The learned Judges differed in opinion and under cl. 36 of the Letters Patent the opinion of the Senior Judge Mr. Justice Rankin prevailed. As against that judgment the present appeal has been preferred.

A preliminary objection has been raised on behalf of the respondent that no appeal lies in this case under cl. 15 of the Letters Patent, and reliance has been placed upon the decision of the Judicial Committee in the case of *Tata Iron and Steel Company Limited* v. *Chief Revenue Authority Bombay* (1). The question in that case was whether an appeal lay to the Privy Council under cl. 39 of the Letters Patent of the Bombay High Court from a decision of the High Court upon a case stated and referred to the Court by the Chief Revenue Authority under s. 51 of the Indian Income Tax Act, 1918, which corresponds to s. 66 of the present Income Tax Act of 1922. Clause 39 of the Letters Patent of the Bombay High Court which is similar to the Letters Patent of the Calcutta High Court provides for an appeal to His Majesty in Council from a "final judgment, decree or order" of the High Court. Their Lordships in that case held that the judgment given by the High Court upon a case stated and referred to the Court under s. 51 of Act VII of 1918

(1) 74 Ind. Cas. 469; 50 I. A. 212; 21 A. L. J. 675; 25 Bom. L. R. 908; (1923) A. I. R. (P. C.) 148; (1923) M. W. N. 603; 45 M. L. J. 295; 18 L. W 372; 9 O & A. L. R. 783; 33 M. L. T. 301; 47 B. 724; 28 C. W. N. 307; 39 C. L. J. 16 (P. C.).

was not a "final judgment, decree or order" within the meaning of cl. 39 of the Letters Patent. The expression "final judgment" does not occur in cl. 15 of the Letters Patent. The word "judgment" only appears there. But so far as the present question is concerned there is no difference between a "final judgment" and a "judgment." The question is whether the word "judgment" is to be taken in the strict legal sense or as merely advisory. In the case quoted above their Lordships observe: "One must, therefore, ask oneself what is the nature and character of the acts which s. 51 of the Income Tax Act authorises and empowers the High Court to do....It provides that if, in the course of any assessment under this Act, or in any proceedings in connection therewith (save an immaterial exception) a question arises with reference to the interpretation of any provision of the Act or any rule thereunder, the Chief Revenue Authority may, either on his own motion or on reference from any officer of Subordinate Authority, draw up a statement of the case, and refer it with his own opinion thereon to the High Court, and shall so refer any such question on the application of the assessee unless he be satisfied that the application is frivolous. The opinion of the Revenue Authority thus dominates and conditions the right of the assessee." Then it is pointed out that "sub-s. (3) provides that on the hearning of this case the High Court shall decide the question raised thereby, and shall deliver judgment thereon containing the grounds on which the decision is founded, and shall send to the Revenue Authority a copy of this judgment under the seal of the Court and signature of the Registrar, and the Revenue Authority shall dispose of the case accordingly." Their Lordships further point out that "the amount of the tax-payers' liability is thus, definitely fixed, but nothing more is done. The decision of the High Court does not in any way enforce the discharge of that liability. It would appear clear to their Lordships that the word 'judgment' is not here used in its strict legal and proper sense. It is not an executive document directing something to be done or not to be done, but is merely the expression of the opinion of the majority of the Judges who heard the case, together with a statement of the grounds upon which those opinions are based." And finally their Lordships observe as follows:—"It would appear to their Lordships that, having regard to the authorities cited, and for the reasons already stated, the decision, judgment or order made by the Court under s. 51 of the Income Tax Act in this case was merely advisory and not in the proper and legal sense of the term final, and thus so far as these considerations are concerned, that the appeal is incompetent." All these observations apply to the present case, and the judgment given upon the case stated is merely advisory made by the Court in exercise of its consultative jurisdiction, and is not a judgment within the meaning of cl. 15 of the Letters Patent. That being so we think there is no appeal under that section.

A question has been raised by the learned Counsel for the appellant that the decision of Mr. Justice Rankin who was the Senior Judge which was held to have prevailed was without jurisdiction. But that is a matter upon which both the learned Judges were agreed and this Bench constituted to hear the appeal under s. 15, cl. (3) of the Letters Patent is not competent to consider the question as to whether the decision of the Division Bench upon a matter upon which both the learned Judges were agreed is or is not right.

The appeal is accordingly dismissed on the preliminary point.

We make no order as to costs of this appeal.

Greaves, J.—I agree.

Panton, J.—I agree.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 4 OF 1923.

January 2, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

RANJIT SINGH—PLAINTIFF—APPELLANT

versus

RAMMAN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Property sold in execution of decree against father—Sons, whether bound—Immoral debts—Burden of proof.

Where property belonging to a joint Hindu family has been sold in execution of a simple money-decree

obtained against the father alone, the sons cannot get rid of the sale without proving that the debt in respect of which the decree was obtained in execution of which the property was sold had been incurred by the father for what the Hindu Law would call an immoral purpose. [p. 655, cols. 1 & 2.]

Nanomi Babuasin v. *Modhun Mohun*, 13 C. 21 at p. 35; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. s.) 510 (P. C.) and *Brij Narain Rai* v. *Mangla Prasad*, 77 Ind. Cas. 689; 46 A. 95; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.), followed.

Letters Patent Appeal against a judgment of Mr. Justice Ryves, dated the 5th December 1922.

Sir Dr. *Tej Bahadur Sapru*, Mr. *J. M. Banerji* and Dr. *K. N. Katju* and Mr. *Shiva Prasad Sinha*, for the Appellant.

St. *C. Thompson*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was one the essential purpose of which, as rightly remarked by the learned District Judge before whom the suit came in first appeal, was to set aside an alienation of joint family property. This alienation had taken place by way of a sale in execution of a simple money decree obtained against the father alone. It is true that the son endeavoured to improve his position by bringing his case into Court in the form of a suit for partition of joint family property; but he asked the Court to treat the property sold at auction as part of the joint family property still capable of division between him and his father, and to assign the whole of it to the father's share. In effect this was asking the Court to hold that the auction-sale was void as against the son, or, at any rate, to the extent of the share which he would take on partition in the property sold. Now, it has been conceded before us in appeal that, on the principles laid down by their Lordships of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun* (1) and reaffirmed recently in the case of *Brij Narain Rai* v. *Mangla Prasad* (2), the son could not succeed in this suit without proving that the debt in respect of which a decree was obtained and the joint family property brought to sale had been incurred by his father for what the Hindu Law would call an immoral purpose. The Court of first instance seems to have held on the evidence that the father had borrowed this money for an immoral purpose; but the learned Subordinate Judge went on to hold that the auction-purchaser defendant had taken the property in good faith for valuable consideration and without any knowledge of the immoral taint attaching to the father's transaction. On this ground the Trial Court passed a decree for partition, but in a form which virtually negatived the claim of the plaintiff to have the sale set aside. The learned District Judge in appeal re-considered the evidence regarding the immoral nature of the debt. It has been one of the principal matters of controversy in this Court as to what the learned District Judge intend to find, and actually did find, on this point. At the end of its judgment, however, the lower Appellate Court definitely agrees with the Trial Court that the auction-purchaser had no notice of the immoral nature of the debt, if it was in fact immoral, and had acted in good faith. On this express ground the learned District Judge dismissed the appeal before him and affirmed the decision of the Trial Court. There was a second appeal which came before a Single Judge of this Court for disposal and the learned Judge of this Court has based his decision wholly upon the view taken by him as to the meaning and effect of the judgment recorded by the lower Appellate Court. We do not think it necessary to go into detail as to the precise circumstances of the case. There was evidence produced which, if believed, would warrant a finding that this debt had been incurred by a Hindu father for immoral purposes, that is to say, in furtherance of immoral relations which he had contracted with a woman who was an actress and a courtesan. The learned District Judge says that the oral evidence on this point had not greatly commended itself even to the opinion of the Trial Court, and that, in his opinion, it was definitely worthless. He then goes on to remark that the finding of the Trial Court as to the immoral nature of the debt was based mainly on the evidence of the plaintiff's father. He adds the following words:

"Under the circumstances I would be inclined to demur to this finding."

Now, the expression "under the circumstances" does seem to us to refer back

(1) 13 C. 21 at p. 35; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. s.) 510 (P. C.).

(2) 77 Ind. Cas. 689; 46 A. 95; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.).

to certain remarks at the beginning of the judgment, where the learned District Judge, rightly or wrongly, expresses a definite opinion that the suit was collusive in its nature, the father and his son acting together in order to recover certain property from the hands of a *bona fide* purchaser for value. In this view of the judgment as a whole the learned Judge of this Court held that he had before him a definite finding that the debt which was the foundation of the entire transaction was not tainted with immorality; and he has accordingly dismissed the second appeal. He expressly remarked that he would have remitted the case to the lower Appellate Court for a specific finding on the issue regarding the immoral nature of the debt, if he did not feel perfectly satisfied from the judgment of that Court what its finding on such an issue must inevitably be. In the appeal which comes before us under the Letters Patent there are certain pleas which seem to suggest a contention that the plaintiff in this suit was not necessarily bound to prove the immoral nature of the debt. In so far as any such pleas appear in this memorandum of appeal, we are content to say that they have not been pressed in argument and are clearly unsustainable. There is a plea taken to the effect that certain admitted facts regarding the purposes for which the father had contracted the debt would be sufficient in themselves to warrant a finding that the purpose for which the loan was taken was an immoral one in the eye of the Hindu Law. This plea, again, has not been seriously pressed in argument and would not, in our opinion, be sustainable. The main contention before us is that the learned Judge of this Court has misunderstood and misinterpreted the judgment of the lower Appellate Court, and that the main issue in the case could not be determined against the plaintiff without a definite finding on the part of the lower Appellate Court as to the alleged immoral nature of the debt. On behalf of the respondents it was contended that the Trial Court and the lower Appellate Court were after all right, and that the question is concluded against the plaintiff by the finding that the auction-purchaser acted in good faith and had no notice of the alleged immoral nature of the debt contracted by the father. In this connection a number of authorities have been cited before us, and the real question is whether certain principles of law laid down by their Lordships of the Privy Council in the well-known case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (3) have or have not been modified by later pronouncements of their Lordships and in particular by the two cases quoted at the beginning of this judgment. It has been suggested before us that there are two recent decisions of this Court, both reported in Volume 21 of the Allahabad Law Journal Reports, at pages 683 and 809 respectively [*Sitla Prasad* v. *Chameli Bahu* (4) and *Judubir* v. *Gajadhar* (5)] which show that three learned Judges of this Court have recently affirmed the principle apparently laid down in *Suraj Bunsi Koer's case* (3) in the sense in which it was understood by the Trial Court and by the lower Appellate Court in the present suit. On this point we desire only to make one comment, which is that the head-note on each of these two cases in the Law Journal Reports does, in our opinion, go beyond what the learned Judges actually decided, if the judgments themselves are carefully considered. We have come to the conclusion, however, that the learned Judge of this Court was substantially right in the manner in which he dealt with this case. The most that the plaintiff, coming before this Court in second appeal, could have asked this Court to do would have been to remit to the lower Appellate Court a definite issue regarding the immoral nature of the debt, or rather to insist upon a clear and specific finding on the part of the learned District Judge upon this issue, which was considered and discussed by him. Undoubtedly, if such a finding had been called for from the learned District Judge who actually heard and disposed of this suit in first appeal his finding would have been against the plaintiffs, as the learned Judge of this Court has rightly remarked. We do not think that the plaintiff is entitled to be allowed an off chance of success upon this question which is after all, in substance, a question of fact, because an issue, if now remitted, might conceivably come up for determination before a District Judge

(3) 5 C. 148 at p. 171; 6 I. A. 88; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(4) 75 Ind. Cas. 316; 21 A. L. J. 683; 9 O. & A. L. R. 766; (1924) A. I. R. (A.) 111.

(5) 75 Ind. Cas. 785; 21 A. L. J. 809; (1924) A. I. R. (A.) 169; L. R. 5 A. 53 Civ.

other than the learned Judge who pronounced the decision of first appeal in the present suit in the year 1921. In our opinion this appeal should fail on this ground alone, and we dismiss it accordingly with costs, including fees on the higher scale.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1542 OF 1922.

December 4, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

MOHAMED GOLAM RABBANI CHOWDHURY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

TARANATH DEB—PLAINTIFF—RESPONDENT.

Landlord and tenant—Denial of landlord's title, proof of—Forfeiture of tenancy—Burden of proof—Duty of Court.

It is only in case of a tenant being inducted on the land by a landlord that the tenant cannot deny the title of his landlord at the inception of his tenancy. In cases where the landlord's title is merely derivative the tenant may, without incurring any forfeiture of his rights, put the landlord to proof of his title. In such a case it is the duty of the landlord who seeks to eject the tenant on the ground of forfeiture resulting from denial of the landlord's title to allege facts which would establish that the tenant had incurred forfeiture of his tenancy by such denial. This can only be done by proving the statement made by the tenant which is relied on as showing that he has denied the landlord's title. It is not enough for the landlord to bring forward merely a judgment pronounced in a former suit. It is necessary to prove the tenant's actual statement in order that the Court might judge what the tenant really meant to say and whether what he said amounted to a forfeiture. If such a statement is contained in a written document the primary evidence is the document itself which should be placed before the Court. The mere statement of the opinion of the landlord himself upon certain words used by the tenant that forfeiture has been incurred is no evidence at all for the purpose. [p. 658, cols. 1 & 2.]

Courts of Equity do not usually lean towards giving relief on the ground of forfeiture. They will enforce a forfeiture only when the facts are clearly established that the forfeiture has been incurred. [p. 658, col. 2.]

Appeal against a decree of the District Judge, Sylhet, dated the 28th of March 1922, affirming that of the Munsif, First Court at Moulavi Bazar, dated the 28th of September 1920.

Dr. *Basak* and Babu *Probodh Chandra Kar*, for the Appellants.

Babu *Harendra Kumar Das*, for the Respondent.

JUDGMENT.

Chakravarti, J.—This is an appeal by the defendants and arises out of a suit brought by the plaintiff for a declaration of his title to four parcels of land and also for recovery of possession against all the defendants. But so far as defendant No. 1 was concerned the plaintiff's case was that that defendant was his tenant but in a suit for rent brought by the plaintiff against the defendant he (the defendant) put in a written statement denying the plaintiff's title to the land and set up a title of defendants Nos. 2 and 3 as the owners of the land. The plaintiff alleges that on such a denial having been made he withdrew the rent suit and now brought this suit for *khas* possession against the defendant on the ground that the defendant No. 1 had forfeited his tenancy under the plaintiff. The defence was that the land belonged to defendants Nos. 2 and 3 and that if it was found that the plaintiff was the owner of the land then defendant No. 1 was ready to pay rent to him. The Court of first instance gave a decree to the plaintiff for possession against all the defendants. That decree was affirmed on appeal by the District Judge. This second appeal is on behalf of defendants Nos. 1 and 2. So far as defendant No. 2 is concerned, we think that the decree against him should be confirmed. So far as defendant No. 1 is concerned the learned Vakil who appeared for him urged in this second appeal that upon the facts found by the learned District Judge no case of forfeiture of defendant No. 1's tenancy has been made out. He further argued that the statement upon which the plaintiff's case of forfeiture was based was not proved in the case. The judgments of both Courts show that those Courts found a denial by the defendants upon the evidence other than the statement itself. Upon this ground it was contended that the decree so far as it allows the plaintiff's *khas* possession as against defendant No. 1 was not correct. We think that this contention is right. It appears to us that in this case there was an issue as to whether or not the plaintiff was entitled to get *khas* possession against the defendant. That issue raises the question of the plaintiff's right to get *khas* possession based on

forfeiture incurred by the tenant, defendant No. 1 by the denial of the plaintiff's title. We do not know upon the facts found whether the defendant was really inducted on the land by the plaintiff or not. It is only in case of a tenant being inducted on the land by a landlord that the tenant cannot deny the title of his landlord at the inception of his tenancy. In cases where the plaintiff becomes the landlord by a derivative title it has been held that the tenant may without incurring any forfeiture to his landlord put him to the proof of his title. In these cases it is a clear duty of the plaintiff to allege facts which would establish that the tenant had incurred forfeiture of his tenancy by denial of his landlord's title. Then again so far as I know the law was laid down by Sir Richard Garth in the case of *Ahollya Debya* v. *Bhairab Chandra Patra* (1). Sir Richard Garth in the course of that decision observes as follows: "The plaintiffs sue to recover *khas* possession of certain land on the ground that the defendant, who is the tenant occupying that land under the plaintiffs, has forfeited her tenancy by denying the plaintiffs' title in a former suit which they brought against her for arrears of rent. She is alleged to have done this in the written statement which she made in that suit. In order, therefore, to prove this allegation in this suit, it was absolutely necessary for the plaintiffs to show what the statement of the defendant actually was; and this could only be done by proving the statement itself. It was not enough for the plaintiffs to bring forward merely the judgment of the Court in the former suit. It was necessary to prove the defendant's actual statement in order that the Court might judge what the defendant really meant to say, and whether what she said amounted to a forfeiture. There was no difficulty in proving this statement, and the issues which were raised in the case by the Munsif obliged the plaintiffs to do so, because one of those issues was, 'whether the defendant's tenancy will prevail against the plaintiffs, and whether the latter are entitled to *khas* possession.' Now the question whether the latter, that is, whether the plaintiffs, were entitled to *khas* possession, depended entirely on this alleged forfeiture."

Applying the principles laid down in that case it appears to us that the plaintiff did not lay down the foundation of his case so far as *khas* possession was concerned. In this case the denial is said to have been made in a written statement. The plaintiff was bound to put that statement in evidence so that the Court might determine upon the words themselves as contained in that written statement whether the forfeiture was incurred or not. Then if such a statement is contained in a written document the primary evidence is the document itself which should be placed before the Court. This was not done in the present case. The mere statement of the opinion of the plaintiff himself upon certain words used by the defendant that the forfeiture had been incurred is no evidence at all. The learned Vakil for the respondent has contended that the defendant did not deny that he had repudiated his tenancy under the plaintiff. For the reasons which I have indicated this is immaterial. It was the duty of the plaintiff to establish his case. We think that there was no evidence properly so called of the denial by the defendant. The decree was based upon that ground cannot be sustained. The learned Vakil for the respondent presses upon us for a remand with a view to enable him to prove the defendant's statement. In this matter also I am supported by the authority of Sir Richard Couch, when under similar circumstances he refused to adopt that course. It is not necessary to point out that Courts of Equity do not usually lean towards giving relief on the ground of forfeiture. It only operates when the facts are clearly established that the forfeiture has been incurred and we do not think that the plaintiff should have an opportunity again to establish his case. On the ground the decree so far as *khas* possession against defendant No. 1 is concerned should be varied. In other respects the decree will stand.

The appeal of defendant No. 2 fails and is dismissed with costs. The order as to costs by the lower Courts will stand.

It should be declared that the plaintiff will be entitled to receive rent from defendant No. 1.

Greaves, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 25 W. R. 147.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1425 OF 1924.

January 9, 1925.

Present:—Mr. Mukerji.

SAMIR KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

BASI RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 102—Provincial Small Cause Courts Act (IX of 1887), s. 23—Suit to recover balance of consideration for sale of crops, nature of—Small Cause Court, jurisdiction of—Appeal, second, whether lies—Question of title raised by defendant, effect of.

The question whether a suit is cognizable by a Court of Small Causes or not must depend on the nature of the suit and not on the nature of the defence set up. [p. 659, col. 2.]

Plaintiffs sued to recover the sum of Rs. 149 from the defendants on the allegation that they were the owners of certain groves and had sold the crop of the groves for a particular season to the defendants who had failed to pay the balance of the consideration for such sale:

Held, that the suit was based on an allegation of pure contract and was cognizable by a Court of Small Causes and that the value of the suit being below Rs. 500 a second appeal was not competent in the case. [*ibid.*]

Churaman v. *Balli*, 9 A. 591; A. W. N. (1887) 121; 5 Ind. Dec. (N. S.) 831 and *Sitab Rai* v. *Dubal Nagesia*, 6 C. L. J. 218, distinguished.

When an intricate question of title to property arises in the course of a small cause suit the Court of Small Causes is authorized, by s. 23 of the Provincial Small Cause Courts Act, to return the plaint for presentation to a regular Court, but the character of the suit is not changed merely because a question of title has been raised by the defendant and a suit of the nature of a small cause is not thereby exempted from the operation of s. 102 of the C. P. C. [p. 659, col. 2; p. 660, col. 1.]

Second appeal against a decree of the Subordinate Judge, Moradabad, dated the 16th August 1924.

Mr. *Hamid Hasan*, for the Appellants.

JUDGMENT.—No second appeal lies in this case. The suit was brought by the plaintiffs-respondents on the allegation that they were the owners of certain groves, that they had sold the crop of the groves for a particular season to the defendants-appellants for a sum of Rs. 50, that they had paid Re. 1 as earnest money and had failed to pay the balance.

The suit succeeded partly in the Court of first instance and wholly in the Court of first appeal.

The defence was that the defendants were the occupancy tenants of the land and the grove and they never purchased any crop.

The first question that struck me at hearing of the appeal was that no second appeal lay to this Court. The learned Counsel for the appellants has relied on two cases—one decided by this Court and the other decided by the Calcutta High Court. The case of this Court was that of *Churaman* v. *Balli* (1). In this case the suit was for recovery of Rs. 25 per year as *malikana* and the decision of the Court was that such a suit was not a suit cognizable by Mofussil Small Cause Courts Act of 1865. That Act of 1865 is no longer in force and the Full Bench ruling was given on the language of that Act. The case of the Calcutta High Court was that of *Sitab Rai* v. *Dubal Nagesia* (2). The suit as it was brought contained a prayer for a declaration that a certain forest was a reserve forest. That itself would exempt the suit from the jurisdiction of a Court of Small Causes. The head-note shows that their Lordships laid down that no second appeal lay under s. 586 of the C. P. C., where the original suit was of the nature cognizable in a Court of Small Causes.

The question whether a suit is cognizable by a Court of Small Causes or not must depend on the nature of the suit and not on the nature of the defence set up. Under s. 15 of the Provincial Small Cause Courts Act, 1887, all suits of a civil nature of value not exceeding Rs. 500 would be cognizable by a Court of Small Causes provided they are not specifically exempted from the cognizance of the Court. No clause in the Second Schedule has been pointed out to me as showing that a suit of the nature of the present one was exempted from the cognisance of the Court of Small Causes. The suit was based on an allegation of pure contract and it was, therefore, cognizable by a Court of Small Causes. It is true that when an intricate question of title to property arises, a Court of Small Causes is authorized by s. 23 of the Provincial Small Cause Courts Act to return the plaint for presentation to a regular Court. But from this it does not follow that merely because a question of title is raised in defence the character of the suit is changed.

Section 102 of the C. P. C., is clear in its terms and lays down that no second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes where the amount or value of the subject-matter does

(1) 9 A. 591; A. W. N. (1887) 122; 5 Ind. Dec. (N. S.) 831.

(2) 6 C. L. J. 218.

not exceed Rs. 500. There is no proviso attached to the section such as would exempt cases, in which a question of title has been raised by the defendant, from the operation of the section.

I have no doubt, therefore, that no second appeal lies and the present appeal is accordingly dismissed under O. XLI, r. 11, C. P. C.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1491 OF 1922.

December 3, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

FATEMA BIBI AND OTHERS—DEFENDANTS NOS. 2, 4 AND 5—APPELLANTS

versus

RADHA SYAM SAHA BANIK—PLAINTIFF, AND OTHERS—DEFENDANTS NOS. 1 AND 3—RESPONDENTS.

Muhammadan Law—Jointness, presumption of—Debt incurred by member of Muhammadan family—Liability of other members.

There is no presumption of jointness in the case of a Muhammadan family, and when money is borrowed by one member of a Muhammadan family he alone is liable to repay it and the other members of the family do not incur any liability in respect of the loan, merely because they have also benefited from the loan.

Appeal against a decree of the Subordinate Judge, Sixth Court, Dacca, dated the 8th of March 1922, modifying that of the Munsif, Fourth Court of that place, dated the 30th of June 1921.

Babu *Kali Kinkar Chakravarti*, for the Appellants.

Babu *Bepin Chandra Bose*, for the Respondends.

JUDGMENT.

Chakravarti, J.—This is an appeal by defendants Nos. 2, 4 and 5 and arises out of a suit brought by the plaintiff for recovery of the money due on *khata* accounts, said to have been advanced to defendant No. 3, the brother of some of the minor defendants and their mother. It is the plaintiff's own case and the books show that the money was advanced to defendant No. 3. It appears that defendant No. 3 and all the other defendants are sons and the widow of one Moula Bux. The money was borrowed after the death of Moula Bux. The plaintiff sued defendant No. 3 and along with him the other defendants. The defence of defendants Nos. 2, 4 and 5 was that they did not borrow the money and in fact two of them were minors and that they, therefore, were not liable. The First Court dismissed the suit against these defendants and gave a decree against defendant No. 3 who had borrowed the money and who did not deny the loan. On appeal by the plaintiff the learned Subordinate Judge has not only made defendant No. 3, liable but with the other defendants also that is, the step-mother of defendant No. 3 and his two minor step-brothers. The sole ground upon which the learned Subordinate Judge decreed his claim against these defendants was that the whole family was jointly benefited by the advances which were meant for them and were enjoyed by all the members. Now it is quite clear that the judgment cannot be supported. This was a Muhammadan family no question of any presumption under the Hindu Law arising here. If defendant No. 3 chose to borrow money on his credit, he was alone liable for the money, simply and not the minors and their mother who were given the benefit of that money by defendant No. 3. That does not create any liability of these defendants for the loan. It seems to us, therefore that the judgment of the learned Subordinate Judge is wrong and should be set aside and the judgment of the First Court restored with costs of this Court and the lower Appellate Court.

Greaves, J.—I agree.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 293 OF 1924.

September 1, 1924.

Present:—Mr. Justice Venkatasubba Rao.

VENKATA RAMANI IYER AND ANOTHER—PLAINTIFFS NOS. 1 AND 2—PETITIONERS

versus

M. NARAYANASWAMI IYER AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), ss. 7 (iv) (c), 17, Sch. II, Art. 17 (iii)—Decision as to category of suit, whether final—Hindu Law—Joint family—Alienation by co-parceners—Suit for declaration—Court-fees payable.

A decision as to the category to which a suit or appeal belongs is not final under s. 12 of the Court Fees Act. [p. 661, col. 2.]

Lakshmi Amma v. *Janamajayan Nambiyar*, 4 M. L. J. 183, followed.

The determination of the category to which a suit belongs must depend upon the relief which the plaintiff prays for, because Court-fees must be determined with reference to the prayer contained in the plaint. The Court must ascertain what the plaintiff actually asks for in his plaint and must not speculate what may be the ulterior effect of his success. [*ibid.*]

Where a plaintiff is bound to ask both for a declaration and the setting aside of a document but prays merely for declaration, the suit must be treated for purposes of Court-fee as one for a declaration. It is not for the Court to say that the plaintiff should have framed his plaint differently and that if he had done so a higher Court-fee would have been payable and that, therefore, the plaint before the Court should be treated as containing a prayer which it does not in truth contain. If a plaintiff contents himself with asking for a declaration, where he ought to ask for a declaration and consequential relief, the suit is liable to be dismissed not by reason of the improper valuation of the suit, but because it infringes the provisions of s. 42 of the Specific Relief Act. [p. 662, col. 1.]

A suit by a member of a joint Hindu family for a declaration that a mortgage executed by his undivided father and brother is not supported by consideration and not binding upon him falls within the purview of Art. 17 *(iii)* of Sch. II and not of s. 7 *(iv)*, *(c)* of the Court Fees Act. [p. 661, col. 2.]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, Tiruvalur, dated the 25th March 1924, in O. S. No. 12 of 1923.

Messrs. *K. S. Ramabhadra Iyer* and *K. S. Sankara Iyer*, for the Appellants.

Messrs. *T. R. Ramachandra Iyer* and *S. R. Dikshit*, for the Respondents.

JUDGMENT.—This civil revision petition raises the question of the correctness of the order of the Subordinate Judge regarding the Court-fee payable on the plaint before him. The plaintiffs have filed this suit in respect of a mortgage executed by defendants Nos. 2 and 3, that is, their father and brother respectively, in favour of the 1st defendant. The plaintiffs claim that they are members of an undivided Hindu family along with defendants Nos. 2 and 3 that the mortgage is not supported by consideration and that it is not binding upon them. The plaintiffs contend that Court-fee is payable under Sch. II, Art. 17 *(a)* (1) of the Court Fees Act, that is, that the plaint is filed to obtain a declaratory decree and no consequential relief is asked. On the other hand, the defendants urge that the suit falls within s. 7, cl. (4) *(c)* of the Court Fees Act, in other words that the plaintiffs seek to obtain a declaratory decree as well as consequential relief. The learned Subordinate Judge agreeing with the defendants' contention directed the plaintiffs to pay additional Court-fee.

A preliminary objection was raised by the defendants-respondents that the decision of the lower Court is final under s. 12, of the Court Fees Act. This objection must be overruled as the question is concluded by the authority of *Lakshmi Amma* v. *Janamajayan Nambiyar* (1), where it was held that a decision as to the category to which a suit or appeal belongs is not final.

The real question, therefore, to be decided is, whether the suit is governed by s. 7, cl. (4) *(c)* or by Sch. II, Art. 17 *(a)* (1). The answer must, in my opinion, depend upon the relief which the plaintiff prays for, because Court-fee must be determined with reference to the prayer contained in the plaint. The plaintiffs here ask for a declaration that the mortgage is not supported by consideration and is not binding upon them. The learned Subordinate Judge thinks that the plaintiffs have asked, or perhaps he thinks ought to have asked, for not merely a declaration but also for consequential relief, namely the setting aside of the document. Maclean, C. J., seems with respect to have stated the law correctly on this point in his judgment in *Zinnatunnessa Khatun* v. *Girindra Nath Mukeriee* (2): "The safest course in these cases is to ascertain what the plaintiff actually asks for by his plaint, and not to speculate upon what may be the alterior effect of his success." If that test is applied, the suit has been properly valued, and the order of the learned Subordinate Judge cannot be supported.

But the same result would follow although a different line of reasoning is adopted as has been done in *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon* (3) and *Arunachalam Chetty* v. *Rangaswamy Pillai* (4) and *Vellora Karuppan Vetil*

(1) 4 M. L. J. 183.
(2) 30 C. 788.
(3) 30 M. 18; 1 M. L. T. 412.
(4) 28 Ind. Cas. 79; 38 M. 922; 28 M. L. J. 118; (1915) M. W. N. 118; 17 M. L. T. 154.

v. *Kallur Vengayil* (5). The plaintiffs not being parties to the document, it is settled law, that they are not bound to get rid of it by having it actually cancelled. The first two of these three decisions lay down that the Courts must look at the substance of the plaint and not at the language of it, and if the plaintiff is bound to have the document set aside, the plaint must be treated as including a prayer for consequential relief; but if it is not incumbent on the plaintiff to get rid of the document, the plaint must be treated as one for a declaration only. In the present case, the plaintiffs are not parties to the document in question and even applying this test, the suit is merely one for declaration.

Were the matter *res integra* I would base my decision on the principle accepted by the Calcutta High Court. It seems to me not logical to say that the relief is not properly valued because the plaint does not ask for an appropriate remedy. If the plaintiff is bound to ask both for a declaration and the setting aside of a document but prays merely for a declaration, in my opinion, the suit must be treated for purposes of Court-fees as one for declaration. It is not for the Court to say that the plaintiff should have framed his plaint differently and, if he had done so, a higher Court-fee would become payable and, therefore, the plaint before the Court should be treated as containing a prayer which it does not in truth contain. If a plaintiff contents himself with asking for a declaration, whereas he ought to ask for a declaration and consequential relief, the suit is liable to be dismissed not because of improper valuation of the suit, but because it infringes the provision of s. 42 of the Specific Relief Act which enacts that no Court shall give relief by way of a declaration where the plaintiff is able to seek further relief but omits to do so. It is unnecessary to pursue this matter further. The matter is concluded by authority and so far as the present point is concerned, whichever line of argument is accepted, the same result follows.

Lastly, an objection was taken that the order having been made in the course of a suit, is not liable to be revised by this Court. In similar cases the High Court exercised its powers in revision and, in my opinion, rightly and I overrule this objection.

In the result, the civil revision petition is allowed and the costs will be costs in the cause.

V. N. V. *Petition allowed.*
Z. K.

(5) 78 Ind. Cas. 118; 19 L. W. 249; (1924) M. W. N. 310; (1924) A. I. R. (M.) 611.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1015 OF 1923.
February 20, 1925.
Present:—Mr. Justice Lindsay.
THAKUR PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS
versus
Musammat GULAB KUNWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Hindu Law—Joint family—Alienation of family property—Suit to challenge alienation—Limitation—Reversioner capable of challenging alienation in existence at date of alienation, effect of.

If at the date of an alienation of joint family property there is in existence any person who has a cause of action for a suit to set aside the alienation, time begins to run from the date of the alienation and cannot be extended by the subsequent birth of other members of the family who would also be entitled to challenge the alienation. In such a case, after the expiry of twelve years from the date of the alienation, the alienation cannot be challenged at the instance of another person whether he was or was not in existence at the date of the alienation.

Ranodip Singh v. *Parmeshwar Prasad*, 86 Ind. Cas. 249; (1925) A. I. R. (P. C.) 33; 48 M. L. J. 29; 21 L. W. 236; 2 O. W. N. 1; 23 A. L. J. 176; 27 Bom. L. R. 175; 12 O. L. J. 74; 26 P. L. R. 113; L. R. 6 A. (P. C.) 47; (1925) M. W. N 262; 27 O. C. 343 (P. C.), followed.

Second appeal from a decree of the District Judge, Azamgarh, dated the 21st April 1923.

Mr. *P. L. Banerji*, for the Appellants.
Dr *S. N. Sen*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was brought in order to avoid a certain transfer of what was alleged to be joint family property, made by one Madhuban Das on the 27th November 1903.

The suit was brought by two sons of Madhuban Das and one son of Sri Kishen who was brother of Madhuban Das. Sri Kishen himself was arrayed as a defendant in the case.

It is not necessary for me to enter into the grounds taken in the memorandum of appeal for a question of limitation has now

arisen on the case put forward by Mr. Sen who appears for the repondents. According to this argument the suit was in reality time-barred, and so it appears to be having regard to the recent decision of their Lordships of the Privy Council in *Ranodip Singh* v. *Parmeshwar Prasad* (1) decided by the Judicial Committee on the 17th of November 1924.

The principle laid down by their Lordships in that case is that, if at the date of the transfer there was in existence any person who had a cause of action for a suit to set aside the alienation, time begins to run and cannot be extended by the subsequent birth of other members of the family who would also be entitled to challenge the alienation. It is admitted here that on the date on which the alienation was made Sri Kishen was in existence and had a right to challenge the alienation which was made by his brother, and that being so, time expired, either after twelve years from the 27th November 1903 or after three years from the date on which Sri Kishan attained majority. It is admitted that, taking into account either period, the suit must be deemed to be barred. I, therefore, dismiss the appeal with costs including in this Court-fees on the higher scale.

Z. K. *Appeal dismissed*

(1) 86 Ind. Cas. 249; (1925) A. I. R. (P. C.) 33; 48 M. L. J. 29; 21 L. W. 236; 2 O. W. N. 1; 23 A. L. J. 176; 27 Bom. L. R. 175; 12 O. L. J. 74; 26 P. L. R. 113; L R. 6 A. (P. C.) 47; (1925) M. W. N. 262; 27 O. C. 343 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1342 OF 1923 AND APPEAL AGAINST ORDER No. 385 OF 1923

November 27, 1924.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

CHOCKALINGA CHETTIAR—DEFENDANT—APPELLANT

versus

MUTHUSWAMI CHETTIAR—PLAINTIFF—RESPONDENT.

Partnership—Partner—Arrangement to share in profits, effect of—Appeal, second—Partner or agent—Mixed question of law and fact.

An arrangement to share in the profits does not necessarily show that the person who shares such profits is a partner of the firm; but this fact must be considered along with the evidence relating to other characteristics of a partnership, such as sharing of losses, etc., in arriving at a conclusion whether the parties intended to carry on business in partnership. [p. 664, col. 1.]

The question whether a person is a partner with or agent of another is a mixed question of fact and law, which the High Court is entitled to consider in second appeal. [*ibid.*]

Second appeal against a decree of the Court of the District Judge, West Tanjore, in A. S. No. 254 of 1921, preferred against that of the Court of the District Munsif, Tanjore, in O. S. No. 171 of 1919.

Appeal against an order of the Court of the District Munsif, West Tanjore at Tanjore, dated the 6th April 1923, in A. S. No. 71 of 1922, preferred against the final decree in, O. S. No. 171 of 1919, on the file of the Court of the District Munsif, Tanjore.

Mr. *T. V. Muthukrishna Iyer*, for the Appellant.

Mr. *S. Varada Chariar*, for the Respondent.

JUDGMENT.—This second appeal by the defendant arises in connection with a preliminary decree passed by the District Munsif of Tanjore in a suit instituted by the plaintiff for the recovery of the amount found due to him on settlement of accounts on the ground that he has been an agent under the defendant in a trade which the latter had been carrying on, on the understanding that his remuneration was to be one-fourth of the total profits of each year. The suit was for the recovery of one-fourth share in the profits deducting out of it Rs. 488-3-6 due by the plaintiff to the defendant The defendant-appellant contended amongst other things, that the plaintiff was not an agent, that he, the plaintiff and one Natesa Chetty not a party to the suit, had been trading in partnership business, that the plaintiff was entitled to one-fourth share of the profits only on the footing of a partner, that he was bound to bear a proportionate share of the losses like any other partner and that the account should be examined on that basis.

The main issue for decision is whether the plaintiff is a partner along with the defendant and another as alleged by the defendant, or whether the plaintiff was only an agent as alleged by him in the plaint. The learned District Munsif, on an examination of the evidence oral and documentary in the case, came to the conclusion

that the plaintiff was a partner entitled to one-fourth share of the profits after bearing his due share of the losses of the firm and that the amount due to the plaintiff should be found out on an examination of the accounts of the firm on that basis. In that view he passed a preliminary decree directing the appointment of a Commissioner to examine the accounts and settle the amounts due to the several partners. On appeal the learned District Judge in a very short judgment came to the conclusion that the plaintiff was not a partner but only an agent of the firm and that the accounts should be examined on the basis that he as an agent was entitled to one-fourth share of the net profits. He, therefore, set aside the decree of the District Munsif and remanded the suit to the lower Court for passing a final decree in accordance with his findings.

In this second appeal only one question has been argued, whether the plaintiff is a partner of the defendant or simply an agent. The learned Vakil for the appellant has contended before us that the conclusion of the learned District Judge that the plaintiff is only an agent is based upon a misconstruction of the accounts of the firm and a misreading of the documentary evidence in the case. As the question is one of mixed fact and law, we are entitled to test the correctness of the learned Judge's conclusion by an examination of the relevant evidence in the case and this is what has been done in the course of the arguments by the learned Vakils appearing for both the parties.

An arrangement to share in the profits does not necessarily show that the person who shares such profits is a partner of the firm; but this fact will have to be considered along with the evidence relating to other characteristics of a partnership such as sharing of losses, etc., in arriving at a conclusion whether the parties intended to carry on business in partnership. Apart from the oral evidence which is not very conclusive, two sets of documents have been referred to in this case (1) income-tax papers, especially Exs. K and X (2), the accounts of the firm. As regards the income-tax papers, it may be said that they do not help the case of the plaintiff very much and are at best only inconclusive. Exhibit K, a copy of the income-tax appeal petition preferred by the defendant no doubt says that he alone carried on his trade individually but the K form notice was issued in the three joint names of the plaintiff, Appavoo Chetty, and the defendant. In Ex. X, which is a statement in writing given before the Tahsildar by the plaintiff he describes himself as a partner of Chocalingam Chettiar, the defendant says "We have been carrying on business in partnership for the last six or seven years." This document is dated the 26th of October 1918 and the plaintiff has clearly stated in it that he has been carrying on a joint trade. As already stated these income-tax papers and Ex. J relied on by the learned Vakil for the respondent do not enable us to express an opinion one way or the other definitely; but a perusal of the accounts filed in this case conclusively shows that the plaintiff was a partner with the defendant and not his agent. Three settlements of accounts in this case have been brought to our notice (1) at the end of the first year accounts were settled and the profits were divided between the plaintiff and the defendant, (2) in the second year there was no division of the profits (3). Exhibit II shows the settlements of accounts for three years excluding the first year. These settlements of accounts show that amounts are carried forward from one year to another year and that in doing so, interest charged as outstandings is taken into consideration as also the value of the stock on hand. What is most important is that the adjustment shows that in making a division of profits the profits allotted to each share are set off and adjusted towards the prior debit. It is not satisfactorily explained as to why the plaintiff has been debited with loss. His own case was that the loss of any year should not be taken into consideration against him; but we find that at least one debit for loss had been made to the plaintiff and this has not been satisfactorily explained. The plaintiff is nowhere described as *'karyain'* in the accounts. It appears to us that the learned District Judge has not interpreted the accounts correctly. A perusal of these accounts shows that the plaintiff must have been a partner and not an agent of the defendant.

We, therefore, set aside the order of the District Judge directing the Commissioner to take an account on the basis that the appellant is an agent entitled to one-fourth share of the profits and remanding the suit to the lower Court for passing a final decree on that basis. We agree with the District

Munsif that the accounts should be examined on the basis that the plaintiff is a partner. We, therefore restore the preliminary decree passed by him. The appellant will get his costs here and in the Court below.

APPEAL AGAINST ORDER No. 385 OF 1923.

The District Munsif after the passing of the preliminary decree heard objections and passed a final decree. As that preliminary decree was modified by the District Judge he set aside the final decree and remanded the suit for a fresh final decree. As we have now set aside his decree passed in appeal against the preliminary decree passed by the District Munsif, the District Judge will have to hear the appeal filed against the District Munsif's final decree and dispose of it according to law. We, therefore, set aside his order for passing a fresh final decree and direct him to hear the appeal against the final decree. We make no order as to costs in this civil miscellaneous appeal.

V. N. V.
Z. K. *Order set aside.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 141 OF 1923.
January 9, 1925.
Present:—Mr. Justice Sulaiman
and Mr. Justice Ryves.
Lala MAKHAN LAL—PLAINTIFF—APPELLANT
versus
Lala SOHAN LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Decree-holder, one of several, purchasing property at auction-sale in lieu of decretal amount—Purchase, whether on behalf of all decree-holders—Presumption.

Ordinarily if one of several decree-holders purchases property belonging to the judgment-debtor at the auction-sale in lieu of the decretal amount, the purchase, in the absence of anything positive to the contrary, must be deemed to have been made on behalf of all the interested decree-holders. The conduct of some of the decree-holders may, however, preclude such a presumption in a particular case. [p. 666, cols. 1 & 2; p. 667, col. 1.]

Case-law referred to.

Second appeal from a decree of the District Judge, Agra.

Mr. *Gulzari Lal* and Dr. *S. N. Sen*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for recovery of possession of one-third share in certain properties. The Courts below have differed. The Court of first instance decreed the claim but the lower Appellate Court has dismissed it so far as possession of the property is concerned but has awarded a decree for money in stead.

In 1887 a mortgage was made by one Chhatta in favour of Makhan Lal and the defendants jointly for a sum of Rs. 2,700 About the last day of limitation a suit was instituted by the mortgagees other than Makhan Lal for sale on the strength of a certified copy, the original document being in possession of Makhan Lal who had himself neither instituted a suit nor joined with the others. Makhan Lal also held certain subsequent mortgages and he was, therefore, impleaded in a dual capacity as a mortgagee and a subsequent mortgagee. It is true that Makhan Lal made some attempts after the institution of the suit to have his name transferred from the array of the defendants to that of the plaintiffs but that application was rejected presumably on the ground that he being also a subsequent mortgagee could not be impleaded as a plaintiff. The suit was decreed on the 13th of April 1911, and a final decree for a sum of Rs. 10,000 and odd was passed on the 21st of February 1913. In this decree Makhan Lal was shown among the defendants-judgment-debtors although no doubt he was also a co-mortgagee. The decree-holders namely the mortgagees other than Makhan Lal applied for permission to bid at auction-sale and permission was granted to them. On the 23rd of August 1916 the entire mortgaged property was put up at auction and purchased by the decree-holders (namely, the mortgagees other than Makhan Lal) for a sum of Rs. 5,800. As the personal remedy had become barred by time it was impossible to realize the balance of the decretal amount.

Had the property fetched more than the decretal amount, Makhan Lal would have also received some money on account of his subsequent mortgages. As the property was sold for less amount than was due on the prior mortgage his subsequent mortgages became useless to him. He applied to the Court of the Collector who had sold the property as an ancestral one for setting aside the sale. The first application was dated the 16th of September 1916 and in this he complained that Piare Lal one of the plaintiffs had purchased the property *for*

the decree-holders at an inadequate price and that the sale should be set aside. Before the Collector Makhan Lal at one time expressed his readiness to pay up the purchase-money and have the sale set aside. The case was postponed but no arrangement could be made and, therefore, ultimately he asked the Collector to finally set aside the sale.

On the 15th of June, the Collector set aside the sale but on an appeal to the Commissioner preferred by the plaintiffs-decree-holders the order of the Collector was set aside and the sale confirmed, it being held that the property had been sold for an adequate price. After this the decree-holders apparently certified payment of part of the decretal amount and obtained a sale certificate in their own names. In that Makhan Lal's name is shown as one of the judgment-debtors. It is a fact that they did not pay any cash towards the purchase-money but the sale consideration was set off as part payment of the decretal amount.

Makhan Lal has since instituted the present suit claiming as a co-mortgagee that he is entitled to get one-third of the property purchased by his other co-mortgagees.

The learned Subordinate Judge came to the conclusion that the conduct of Makhan Lal in the proceedings to set aside the sale did not preclude him from falling back on his rights as a co-mortgagee. He was of opinion that inasmuch as the property had been acquired out of the decretal amount which was due jointly to all the mortgagees, Makhan Lal was entitled to get a share in the property.

On appeal the learned District Judge has taken a contrary view. He came to the conclusion that the decree-holders did not use more than their share of the mortgage-money when they subsequently set off the purchase price of Rs. 5,800. He also thought that the property purchased must be deemed to have been purchased by the decree-holders themselves and that Makhan Lal has no interest in it. He, however, granted Makhan Lal a decree for the sum of money representing his share in the sale-proceeds.

The case came up before a Single Judge of this Court who has referred it to a Bench of two Judges.

It cannot be disputed that as a general proposition of law, if only one of several decree-holders purchases the property at auction in lieu of the decretal amount the purchase in the absence of anything positive to the contrary must be deemed to have been made on behalf of all the interested decree-holders. This was the view clearly expressed in the Full Bench case of *Kesri* v. *Ganga Sahai* (1). The decision in that case was affirmed on appeal by their Lordships of the Privy Council in the case of *Ganga Sahai* v. *Kesri* (2). The learned Subordinate Judge, however, relied on the case of *Ramjas Das* v. *Mohan Lal* (3) decided by a Single Judge of this Court reported as *Ramjas Das* v. *Mohan Lal* (3), where the opinion was expressed that even though a mortgagee is not actually a decree-holder but a *pro forma* defendant and even though the property is purchased ostensibly in the name of the decree-holders, the mortgagee-respondent may be entitled to a share in it if the purchase is made in lieu of the decretal amount. On the other hand, the learned Advocate for the respondents has invited our attention to another judgment of a Single Judge of this Court in Second Appeal No. 911 of 1921, decided on the 1st of December 1922 which was affirmed in an appeal under the Letters Patent No. 47 of 1923) on the 3rd of May 1923 which seems to uphold a contrary view. Even if it be conceded that ordinarily if the purchase is made by the decree-holders in lieu of the decretal amount and the payment is merely set off against the decree then it may be deemed that the purchase is made on behalf of all the persons interested in the decretal amount whether plaintiffs or defendants. We have to see whether that inference can be properly drawn in view of the conduct of both the parties throughout the proceedings in this case. We have noted that Makhan Lal, to start with, had refused to join in the suit and had not himself brought any suit within limitation on the basis of the original document which he retained in his possession. Then he occupied a double capacity namely of co-mortgagee as well as of subsequent mortgagee. When the decree was passed, permission was granted to the decree-holders to bid. Makhan Lal apparently made no attempt to bid himself. After the sale had taken place Makhan Lal applied to have the sale set aside. In his

(1) 11 Ind. Cas. 517; 33 A. 563; 8 A. L. J. 616 (F. B.).
(2) 30 Ind. Cas. 265; 37 A. 545 at p. 555; 19 C. W. N. 1175; 18 M. L. T. 203; 29 M. L. J. 329; 2 L. W. 837; 13 A. L. J. 999; 17 Bom. L. R. 998; 22 C. L. J. 503; (1915 M. W. N. 713; 42 I. A. 177 (P. C.),
(3) 25 Ind. Cas. 735.

application he clearly stated that Piare Lal had purchased the property for the decree-holders. He never suggested that the purchase had also been made in his interest. Throughout those proceedings his attitude was that the sale should be set aside and the property re-sold so that he himself may bid and purchase it at a higher figure thereby either getting a larger share in the sale-proceeds or also getting something towards his subsequent mortgages. At one stage he was even prepared to pay down the money and have the sale set aside but that he ultimately did not do. When the sale was set aside by the Collector the other mortgagees appealed to the Commissioner and inspite of Makhan Lal's opposition, the appeal was decreed. Later on the other decree-holders applied for the sale certificate and the sale certificate was granted to them only. Having regard to the attitude of both the parties it is impossible to draw the inference that when the purchase was made it was made on behalf of Makhan Lal also. Their Lordships of the Privy Council in the case of *Ganga Sahai* v. *Kesri* (2), remarked that the Courts in India cannot but refuse to allow one decree-holder to perpetrate a fraud against his co-decree-holders under cover of any of the provisions of the C. P. C. In this particular case it cannot be suggested that any fraud was attempted to be perpetrated or was, in fact, perpetrated on Makhan Lal, who knew full well what was happening. It is true that the property was purchased in lieu of the decretal amount. It is also true that the decree-holders did not pay down the money in cash nor deposit the share of Makhan Lal in Court but, in our opinion, these circumstances by themselves would not justify us in presuming that the sale was made for Makhan Lal also when the conduct of both the parties was such as to preclude any such presumption.

In this view of the matter we are of opinion that it is no longer possible to hold that Makhan Lal has actually an interest in the property which was purchased.

We accordingly uphold the decree of the lower Appellate Court and dismiss the appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 377 OF 1922.

December 10, 1924.

Present:—Mr. Justice Ramesam.

BACHU CHINNA NAGAPPA—DEFENDANT No. 1—APPELLANT

versus

BACHU NARANAPPA AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Hindu Law—Widow—Compromise by widow, whether amounts to alienation—Reversioner, whether bound.

Whether a compromise entered into by a Hindu widow is *bona fide* and binding on the reversioners or amounts to an alienation depends upon the terms obtained by the widow in the compromise, *i.e.*, whether she was surrendering any portion of her rights as ascertained with reference to the facts, and how much, whether she was reserving any benefit for herself personally as opposed to the estate, and whether the real facts were known to her. The fact that the widow obtains a benefit under the compromise which is peculiar to herself would be good proof of want of *bona fides*. [p 668, col. 1.]

Where a Hindu widow obtains under a compromise a portion of her husband's estate absolutely for herself, the enlargement of her personal estate does not bind the reversioners, and the antecedent title with reference to which she obtains the property being that of her husband the rights of the reversioners with regard to that property are not destroyed. [*ibid.*]

Where a compromise by which a Hindu widow surrenders property to which she is entitled on the true facts is held to be not *bona fide*, it amounts to an alienation and is not binding on the reversioners. [p. 668, col. 2.]

Second appeal against a decree of the District Court, Anantapur, in Appeal No. 80 of 1921, preferred against that of the Court of the District Munsif, Anantapur, in O. S. No. 115 of 1920.

Messrs. *A. Venkatrayaliah* and *L. Venkatanarasiah*, for the Appellant.

Mr. *B. Somayya*, for the Respondents.

JUDGMENT.—The 2nd defendant sued the 1st defendant for recovery of her husband's share of the family properties alleging that her husband and 1st defendant were divided. The Original Suit No. 708 of 1919 on the file of the Court of the District Munsif of Penukonda was compromised by which she admitted there was no division, accepted three acres and odd absolutely for herself, and gave up the rest of the property moveable and immoveable. The Courts below found that the compromise was binding on the parties to it and no fraud on the 2nd defendant (the then plaintiff) has been proved but that the 2nd defendant and the 1st defendant colluded and entered into the compromise,

by which she obtained a benefit personal for herself and it is not binding on the plaintiff who is the reversioner. In all such cases the questions (1) whether the compromise of the widow is *bona fide* and (2) whether the compromise amounts to an alienation depend on the true facts as found in the later suit, on the terms obtained by the widow in the compromise, *i. e.*, whether she was surrendering any portion of her rights as now ascertained with reference to the facts and how much, whether she was reserving any benefit for herself personally as opposed to the estate, and lastly whether the real facts were known to her. That she obtained a benefit peculiar to herself should be a good proof of want of *bona fides*. [See *Imrit Konwur* v. *Roop Narain Singh* (1) distinguished *Ramsumran Prasad* v. *Shyam Kumari*, (2).]

In the first place as to the three acres obtained by the widow it is clear that the compromise in this case cannot be upheld on the footing of a family settlement for the widow did not act for herself and the enlargement of her personal estate cannot bind the reversioner. The antecedent title, with reference to which, she got the three and odd acres was that of her husband and plaintiff still remains a reversioner for that property [*Khuuni Lal* v. *Gobind Krishna Narain* (3).]

Coming to the rest, the Courts below have found that the facts are such that the compromise could not be *bona fide*. The 2nd defendant went to Court on the footing that there was a division but abandoned it for no apparent reason whereas the division is now completely established and must have been known to her. [see *Sant Kumar* v. *Deo Savan* (4).] The decision in *Madan Lal* v. *Chuttan Singh* (5), is a decision on the facts. In *Behari Lal* v. *Daud Husain* (6), the lower Appellate Court found there was a *bona fide* settlement and the finding was accepted by the High Court.

(1) 6 C. L. R. 76.

(2) 69 Ind. Cas. 71; 1 Pat. 741 at p. 747; 31 M. L. T. 200; 3 P. L. T. 749; (1922) A. I. R. (P. C.) 356; 16 L. W. 956; 21 A. L. J. 18; 9 O. & A. L. R. (P. C.) 175; 27 C. W. N. 269; 37 C. L. J. 356; 44 M. L. J. 751; 25 Bom. L. R. 634; 49 I. A. 342 (P. C.).

(3) 10 Ind. Cas 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; (1911) 1 M. W. N. 432; 38 I. A. 87 (P. C.).

(4) 8 A. 365; A. W. N. (1886) 129; 5 Ind. Dec. (N. S.) 135.

(5) 15 Ind. Cas. 297; 10 A. L. J. 101.

(6) 18 Ind. Cas. 721; 35 A. 240; 11 A. L. J. 352.

In *Kadakkari. Nadan* v. *Nadakkannu Nadan* (7), there was no finding when the case came up originally before the High Court. A finding on the question whether the compromise was *bona fide* was called for. The District Judge found it was *bona fide* and the finding was accepted by the High Court. As to *Timmaji Amma Garu* v. *Subbaraju Nayanivaru* (8), it is enough to observe that *Imrit Konwur* v. *Roop Narain Singh* (1) and *Sant Kumar* v. *Deo Saran* (4) were concurred and that I cannot agree with all other observations in it. It seems to me that, whenever a compromise by which the widow surrenders property to which she is entitled on the true facts, has been found to be not *bona fide*, it amounts to an alienation.

It may be that in *Timmaji Amma Garu* v. *Subbaraju Nayanivaru* (8), the compromise was *bona fide*.

The second appeal is dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

(7) 62 Ind. Cas. 752; (1921) M. W. N. 342; 13 L. W. 533.

(8) 5 Ind. Cas. 640; 33 M. 473; (1910) M. W. N. 60; 20 M. L. J. 204; 7 M. L. T. 340.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 986 OF 1923.

February 5, 1925.

Present:—Mr. Justice Mukerji.

RAMRUP PANDE AND OTHERS—DEFENDANTS—APPELLANTS

versus

SARJU PANDE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Succession—Sons of pre-deceased son, whether entitled to succeed along with surviving sons—Agra Tenancy Act (II of 1901), s. 22.

On the death of a separated Hindu his property must be divided among his sons and his grandsons by a predeceased son, the latter being entitled to the share to which their father would have been entitled had he been alive. The same rule applies to the devolution of the tenancy rights possessed by the deceased by virtue of the rule laid down in s. 22 of the Agra Tenancy Act.

Second appeal against a decree of the Second Additional District Judge, Gorakhpur, dated the 1st of May 1923.

Mr. *Shiva Prasad Sinha*, for the Appellants.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—These two Appeals Nos. 986 and 987 of 1923 arise from similar circumstances, the only difference being that in one case the property in dispute is *zemindari* property and in the other case it is a tenancy.

One Kanhaiya had six sons, one of these being Ramjas. The respondents in these appeals, who were the plaintiffs in the Court of first instance, are sons of Ramjas. They are suing to recover a sixth share in the property left by their grandfather Kanhaiya. It has been found, as a matter of fact, that Kanhaiya died separate from his sons and grandsons. The question raised is whether Kanhaiya's property would go only to his sons or also to his grandsons by a deceased son.

So far as *zemindari* property is concerned it is conceded that the defendants-appellants have no case. The property is bound to be divided into six shares and one share must go to the sons of Kanhaiya's deceased son Ramjas.

So far as the tenancy is concerned it is contended that the nearer male descendant must exclude the more remote ones. The law or the point is laid down in s. 22 of the Tenancy Act, 1901, and is as follows:—

"When.....a tenant dies, his interest in the holding shall devolve as follows:—

(*a*) on his male lineal descendants in the male line of descent."

According to the language of the law the tenancy is to go to the male lineal descendants in the male line of descent. The word "descendants" would imply that there may be more than one descendant and they also may be in different degrees. No particular principle is involved in the rule which may indicate that the remote descendants were to be excluded by the nearer ones. In the circumstances the letter of the law and the spirit of the law are one and the same and the nephews and the sons all must share.

The result is that the appeals fail and they are hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Z. K. *Appeals dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 25 OF 1924.

December 12, 1924.

Present:—Mr. Justice Krishnan and Mr. Justice Waller.

GOPINATHA CHOWDHARI AND ANOTHER —DEFENDANTS—APPELLANTS

versus

KRISTNO CHOWDHARI—PLAINTIFF —RESPONDENT.

Transfer of Property Act (IV of 1882), s. 98—Mortgage, construction of- Anomalous mortgage—Lease for fixed period—Continuance in possession—Payment of rent—Implied tenancy.

The terms of a mortgage in favour of the plaintiff were as follows:—"Having given to you the land for cultivation for an equal share for a period of three years, I have taken a loan of Rs. 750. This amount shall bear interest at the rate of 10 per cent. per year and the interest of each year shall be added on to the principal amount and the same accumulated. You shall obtain payment of the principal and interest by means of sale of the mortgaged property. As regards the *rajabhagam* paddy, etc., you shall be given the *rajabhagam* paddy at the *rajabhagam* rates." Eight years after the date of the mortgage the mortgagor gave a lease of the mortgaged property to the defendant who dispossessed the plaintiff. In a suit by the latter for possession:

Held, (1) that the document was in its terms neither a simple nor a usufructuary mortgage but was an anomalous mortgage and the rights of the parties must be determined according to its terms; [p. 670, cols. 1 & 2.]

(2) that the plaintiff had only a right to keep possession of the property for a period of three years fixed in the deed; [p. 670, col. 2.]

(3) that plaintiff's continuance in possession subsequently on payment of the *rajabhagam* to the mortgagor created an implied tenancy which in this case was a yearly one, the property leased being agricultural land; [*ibid.*]

(4) that till the plaintiff's tenancy was properly and legally put an end to, he was entitled to enforce it. [*ibid.*]

Appeal against an order of remand of the Court of the Additional Subordinate Judge, Berhampore, dated the 8th September 1922, and made in Appeal Suit No. 28 of 1922 (Appeal Suit No. 258 of 1920, on the file of the District Court of Ganjam), preferred against a decree of the Court of the District Munsif, Aska, in Original Suit No. 335 of 1919.

This appeal came on for hearing on the 4th of December 1923.

Mr. *C. Sambasiva Rao*, for the Appellants.

Mr. *N. Rama Rao*, for the Respondent.

JUDGMENT.—This is an appeal against the order of remand by the Additional Subordinate Judge of Berhampore, in a suit brought by the respondent-plaintiff for the recovery of possession of

the suit land from the 1st defendant who is now in possession. The land admittedly belongs to one Sadhuvani. The plaintiff claims from her under the deed, Ex. A of 1909, the construction of which is one of the questions argued before us. The 1st defendant claims by a lease, Ex. II, dated 1917, from the same lady, Sadhuvani. The District Munsif held that the plaintiff had no right to possession at all under Ex. A, and without further considering the case dismissed his suit. On appeal the Subordinate Judge has sent the case down for trial on the merits. He is apparently of opinion that the document is an anomalous mortgage, and that its terms are ambiguous and that further extraneous evidence should be adduced to explain its terms. The respondent before us has not attempted to support this view that there is anything ambiguous and that extraneous evidence should be allowed to explain its terms. We are of the same opinion. We think that the order of the Subordinate Judge that extraneous evidence should be allowed is not correct. Exhibit A says: "Having given to you the land described in para. 3 for cultivation for an equal share for a period of three years, I have taken a loan of Rs. 750." It then sets out the way in which Rs. 750 has been accounted for. It then sets out further: "This amount shall bear interest at the rate of Rs. 10 per cent. per year and the interest of each year shall be added on to the principal amount and the same accumulated. You shall obtain payment of the principal and interest by means of sale of the mortgaged property. As regards the *rajabhagam* paddy, etc., you shall be giving the *rajabhagam* paddy at the *rajabhagam* rates. If the *rajabhagam* paddy for any year is not delivered in that year, the above-mentioned amount, namely, the mortgage amount, shall not bear interest." And it contains a further covenant that "in that event the mortgagee shall realize the money due to him by sale of a portion or sufficient part of the mortgaged land and leave the remaining lands to the mortgagor." The document is certainly in its terms neither a simple mortgage nor a usufructuary mortgage. It is not a simple mortgage as possession of the property has been given to the mortgagee and it is not a usufructuary mortgage because there is no provision that any portion of the usufruct should be taken towards the principal or the interest on the mortgage. It is, we think, an anomalous mortgage and we should decide the rights of the parties under it according to its terms under s. 98 of the Transfer of Property Act. It is suggested that this is really a lease for a period of three years. We are unable to accede to that suggestion as it has got the necessary incidents of a mortgage. There is the mortgage-money with the provision for interest on it, there is a provision for the sale of the property for realizing the mortgage money and there is a provision made also for possession of the property being given to the mortgagee for a fixed period. Under the document we have come to the conclusion that the respondent-mortgagee has only a right to keep possession of the property for a period of three years fixed in the deed and after the completion of the period of three years the covenant says: "You shall obtain payment of the principal and interest by means of sale of the mortgaged property." That is, he can sell up the property and realize the money. There is the further covenant that if the *rajabhagam* paddy is not paid in any year, that is, even within three years, the mortgage-money shall become payable and shall be realized by sale of the property within that period itself though it will not carry interest for that year. In our view, under the document itself the plaintiff cannot be said to have any further right to possession of the property and his right to sell the property for realizing his money within three years has long ago expired as the mortgage is of 1909. But it has been alleged that though three years have expired the mortgagee has continued to be in possession of this property for several years after that paying *rajabhagam* to the owner of the land, the mortgagor, and that the same had been received by the owner, Sadhuvani That, we think, would have created a right in the plaintiff in the nature of an implied tenancy; as this is agricultural land, the tenancy will be a yearly one. Till that tenancy is properly and legally put an end to, the plaintiff would certainly have a right of tenancy which he could enforce in this suit. The question whether the mortgagee continued in possession after the expiry of the three years and did pay *rajabhagam* to the mortgagor and whether the mortgagor did receive that *rajabhagam* has not been dealt with by the Subordinate Judge. We must, there-

fore, call for a finding from him on this question. If the Subordinate Judge finds that a tenancy has been so created, he will also consider the question whether that tenancy has been properly determined before the date of the suit, as there is a plea on the defendants' side that by a notice to quit the tenancy has been so determined. The finding on these two points will be returned on the evidence on record. If the Subordinate Judge finds in favour of the plaintiff on the above questions he would also return a finding upon the third issue in the case and the parties will be allowed to adduce fresh evidence on that issue as it does not seem to have been tried by the District Munsif. The finding will be returned in two months from the date of the receipt of this order and ten days for objections.

In compliance with the order contained in the above judgment, the Subordinate Judge of Berhampore submitted the following

FINDINGS.—1. In obedience to the remand order issued by the High Court on 4th December 1923, the following finding is submitted.

2. The issues framed by the High Court and sent down to this Court for recording findings are:—

(1) Did the mortgagee continue in possession of the suit land after the expiry of the three years and pay *rajabhagam* to the mortgagor and did the mortgagor receive that *rajabhagam?*

(2) If it is found that an implied tenancy has been so created, was that tenancy properly determined before the date of suit?

(3) To what damages, if any, is the plaintiff entitled?

3. *1st issue.*—Sadhuvani who was the mortgagor under Ex. A swore as P. W. No. 3 that the plaintiff continued in possession of the suit land after the expiry of the lease on 3rd July 1912, and was in possession even when she gave a lease to the 1st defendant on 10th May 1917 (Ex. II). She further stated that the plaintiff was paying *rajabhagam* to her in respect of the suit land from 1912 until he was dispossessed of the land by the 1st defendant in December 1918. P. W. No. 1 also stated that the plaintiff was paying *rajabhagam* on the suit land to Sadhuvani until he was dispossessed from the land. This witness was a prior mortgagee of the suit land from Sadhuvani. The defendants did not adduce any rebutting evidence on this point. I believe the evidence of P. Ws. Nos. 1 and 3 and find the 1st issue in the affirmative.

4. *2nd issue.*—It is clear from the evidence above set forth that plaintiff was treated as a tenant by Sadhuvani and that she had no right to eject him from the suit land without proper notice to quit. The defendants say that Ex. C is a notice to quit sent to plaintiff by Sadhuvani and 1st defendant after the execution of Ex. II. Exhibit C is dated 12th May 1917. It recites that Sadhuvani gave a lease of the suit land to the 1st defendant on 10th May 1917 and that plaintiff should quit the suit lands within eight days after the receipt of the notice. This is the only paper relied on by the defendants in support of their plea that the plaintiff's tenancy was determined by a notice to quit. I am of opinion that this notice is improper inasmuch as the plaintiff was asked to vacate the suit land in eight days after the receipt of the notice. Even a tenancy from month to month cannot be determined by a notice to quit in eight days. The defendants' Vakil did not quote any authority in support of his contention. I accordingly find on the 2nd issue that the plaintiff's tenancy was not properly determined before the date of suit.

5. *3rd issue.*—The parties were invited to adduce further evidence on this issue. The plaintiff did not examine any new witnesses The defendants, however, examined two new witnesses on the question of damages.

6. The suit land consists of 3 acres 96 cents of which 2 acres 84 cents are river fed, 73 cents rain fed and 39 cents dry. The other item comprised in the plaint schedule is a vacant dwelling site, and it does not fetch any income. P. W. No. 1 stated in his evidence that plaintiff raised crop on the suit land in 1918 and that the defendants had cut and carried it away. He stated that the suit land yielded 10 *bharanams* of paddy in 1918, and that the paddy was sold at Rs. 20 per *bharanam*. P. W. No. 2 stated that the suit land yielded 9 or 10 *bharanams* of paddy in 1918 and that its price was Rs. 30 per *bharanam*. D. W. No. 2 stated that 1918 was famine year and that the suit

land yielded 1 or 2 *nauties* of paddy per *bharanam*. D. W. No. 3 stated that the Government gave remission in 1918, that the suit land yielded 1 to 3 *nauties* of paddy per *bharanam*, and that the suit land was partly watered by the river Bodonadi. The documentary evidence available to the defendants to show that 1918 was a famine year was not adduced. The *karnam* of the village should have been summoned to show the exact yield of the land in 1918. I disbelieve the oral evidence adduced by the defendants. The plaintiff has claimed Rs. 200 as damages. His witnesses have proved that the plaintiff had raised the crop in 1918 and that the defendants had carried it away. The plaintiff is, therefore, entitled to the entire yield of the suit land in 1918. I accept the estimate given by P. Ws. Nos. 1 and 2 as correct, and find that the plaintiff is entitled to Rs. 200 as damages.

This appeal came on for final hearing after the return of the findings of the lower Appellate Court.

JUDGMENT.—We accept the findings and as the result we give a decree to plaintiff for possession of the suit lands and mesne profits Rs. 200. Plaintiff will have his costs throughout.

V. N. V.
Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1516 OF 1922.

December 4, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

UMEDALI MUNSHI—DEFENDANT—APPELLANT

versus

GOYJADDI MOLLA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Landlord and tenant—Suit for rent*—Ex parte *decree—Ejectment suit—Decree, whether operates as* res judicata.

Where a plaintiff, alleging himself to be the landlord of the defendant sues the latter for rent and obtains an *ex parte* decree against him, which is subsequently satisfied by the defendant, the decree operates as *res judicata* on the question of the relationship of landlord and tenant between the parties in a subsequent suit for ejectment.

Appeal against a decree of the Subordinate Judge, Second Court, Faridpur, dated the 7th of March 1922, affirming that of the Munsif, First Court at Chikandi, dated the 28th July 1921.

Babus *Jahnabi Churun Das Gapta* and *Probodh Chandra Kar*, for the Appellant.

Babu *Surendra Nath Das Gupta II*, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by the principal defendant in a suit for ejectment. The plaintiffs' case was that they with the *pro forma* defendants owned 8-annas of the defendant's *jama* and the first defendant was an under-*raiyat*. The allegation of the first defendant was that he was an occupancy *raiyat* and that he had held the land for more than 20 years.

The two points urged before us were, firstly, that the *ex parte* decree referred to in the judgment which was obtained by the plaintiffs against the defendant for rent and which was subsequently satisfied did not operate as *res judicata* as the lower Appellate Court has found that it did. It is stated that as there was no judgment at all but merely a decree passed it is impossible to say whether the issue was actually decided. But it seems to us that this argument is untenable and that the lower Appellate Court was quite right in holding that the *ex parte* decree which was subsequently satisfied operated as *res judicata* on the question of landlord and tenant.

Secondly, it is urged that the lower Appellate Court was wrong in finding that the plaintiffs were the sole landlords. This matter, however, seems to us to have been decided by the *ex parte* decree as the lower Appellate Court has found. These are the only questions that were urged before us and for the reasons which I have stated they do not seem to be of any weight.

The appeal, accordingly, fails and must be dismissed with costs.

Chakravarti, J.—I agree.

Z. K. *Appeal dismissed.*

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 54 OF 1919.

September 10, 1920.

Present:—Mr. Maung Kin, Officiating Chief Justice, and Mr. Justice Rigg.

SHWE KIN AND OTHERS—APPELLANTS

versus

MAUNG SIN—RESPONDENT.

Burmese Buddhist Law—Adoption—Kittima *adoption*—Apatittha *adoption—Surrounding circumstances —Relationship of parties—Amendment of plaint—Alternative claim.*

Among the Burmese, the *keittima* and the *apatittha* forms of adoption are quite distinct. The former is an adoption with a view to inherit and the latter merely for bringing up the child out of pity. [p. 676, col. 2; p. 677, col. 1.]

The Burmese expression for the English word "adopted" does not clearly give the idea of adoption as one's own child. The expression is used in connection both with the *kittima* form of adoption and the *apatittha* form. Therefore, the use of the expression by an alleged adoptor without the necessary amplifying words is not a sufficient proof of a *kittima* adoption. [p. 676, col. 2.]

The treatment of a niece by his alleged adoptive father somewhat like a daughter does not raise any presumption of an adoption with a view to inherit, especially when she is an orphan child. If the parties were strangers the fact would be very important. [p. 677, col. 2.]

A plaint based on a *kittima* adoption cannot be amended in appeal by an alternative claim of an *apatittha* adoption, as the two forms of adoption are entirely different. [p. 679, col. 1.]

Maung Tha So v. *Lu Pe*, 41 Ind. Cal. 749, 11 Bur. L. T. 246, referred to.

Appeal against a decision of the District Judge. Hanthawaddy.

Mr. *Dantra*, for the Appellants.

Mr. *Sin Hla Aung*, for the Respondent.

JUDGMENT.

Maung Kin, Offg. C. J.—The point for consideration in this appeal is whether Maung Shwe Din and his wife, Ma Nan Ton, adopted Ma Kin as their daughter with a view to inherit from them.

The appellants, Maung San Thein, Ma Thein Tin and Ma Hla Kin are the children of Ma Kin and they claim to be interested as heirs in the estate of Maung Shwe Din and Ma Nan Ton, not only because their mother was adopted by the old couple but also because they were themselves adopted by them after the death of their mother. Their claim to have been adopted after the death of their mother may be dismissed at once; as there is no evidence to establish it. The alleged adoption of Ma Kin is claimed to have been proved by the evidence of persons present at the actual adoption, by admissions made by Maung Shwe Din to various people, by conduct on the part of Shwe Din towards Ma Kin and her children, and by evidence claimed to amount to that of publicity and notoriety of the alleged relationship.

The facts, which are either admitted or satisfactorily proved, are the following:—Ma Kin was the daughter of Ma Nan On and Maung Tha Maung. Ma Nan On and Ma Nan Ton were sisters. After she was born Ma Kin's parents were separated. Subsequently, Ma Nan On married Maung Pha. Not long after her second marriage, Ma Nan On died. Ma Kin lived in the house of Shwe Din and Ma Nan Ton, when she was quite small. She continued to live there and was married there to Maung Aung Kyu. After her marriage she continued to live in the house till her death. She left the three children abovenamed. After her death, Aung Kyu left the house but the children remained on and lived there till the death of Maung Shwe Din. Of Ma Kin's three children, the boy, Maung San Thein, was entered into the priesthood by Maung Shwe Din. After the death of Ma Nan Ton, which took place some years ago, Maung Shwe Din married Ma Nge and after her death he married Ma Ma who predeceased him. At the time Ma Kin lived in the house of Maung Shwe Din and Ma Nan Ton, they had no children and it does not appear that they ever had any children of their own.

The evidence as to the actual adoption is that of three witnesses, *viz.*, Maung Pha, Ma Kin Gyi and Maung Tha Ku. The *lugyis* who are said to have been present are all dead. Maung Pha is Ma Nan On's second husband. He says he gave Ma Kin in adoption to Shwe Din and Ma Nan Ton when she was three years old, because they said they wanted to make her their heir and asked for her for that purpose and that after the adoption Ma Kin went over to the house of her adoptive parents and lived there. Later in his evidence he said that he and Ma Nan On gave the child away and that Ma Nan On was very anxious to do so. After the adoption, the witness ceased to have any further relationship with Ma Kin. He is now a hired labourer and is obviously unreliable unless he is corroborated by independent evidence. He says that, besides the *lugyis* who are dead, Saya Pe Gyi and Ma Kin Gyi were present, but Saya Pe Gyi does not in his evidence claim to have been present

at the adoption. Ma Kin Gyi speaks to being present at the adoption when Maung Pha gave the child away and says that Ma Nan On had died when the child was given in adoption; thus contradicting Maung Pha who says that his wife was anxious that the child should be given away. Ma Kin Gyi further says that when she saw Ma Kin in Maung Shwe Din's house the child was eight or nine years old. The witness is a resident of Tadaywa where the parties lived during the time material to this case and is now 72 years old, and one would expect her to be in a position to speak to the publicity of the alleged relationship between Ma Kin and Maung Shwe Din, but there is not a word about it in her evidence. In my opinion, such a witness as Ma Kin Gyi is not entitled to any weight in regard to such an important transaction. There is no reason shown why she should have been present. She does not claim to have been a particular friend of any of the parties to the transaction. Her evidence lacks details such as would be expected and, in my opinion, it is unconvincing. Maung Tha Ku is a man of 65. He has no occupation. He was born in Tadaywa and has always lived there. He says he was present at the adoption and that Ma Kin was two or three years old at the time. He himself was about 20 years old. He just happened to be present when the important transaction occurred. He appears to be certain that both Ma Nan On and Maung Pha were present. He was not mentioned by Maung Pha as one of those present. On his own showing, he would then be too young to have been called in to witness the transaction. He is a man of no standing at all. He, too, does not speak about the publicity of the alleged relationship. He has always lived in the village and has been a ten-house gaung and, if the general repute in the village was that Ma Kin was the adopted daughter of Maung Shwe Din and Ma Nan Ton, he should have been in a position to speak about it. In my opinion, it is easy to obtain such evidence as his and it is not safe to rely on it. It seems to me to be extremely doubtful that a formal adoption, such as these witnesses have spoken to, ever took place, because there is an entire absence of evidence of repute at or about the time of the alleged adoption. Maung Pe Gyi, a man of 80 and a resident of Tada, says that Maung Shwe Din told him some forty years ago that he had adopted Ma Kin as his daughter and that Shwe Din treated her as his own child. He came to know of the adoption, because Shwe Din told him about it. He does not appear to have had any knowledge of it before then. According to him, Ma Kin would be about ten years old at the time Shwe Din told him. As regards the notoriety of the relationship he says that, after he had been told in this way, he also heard of it in the village. He admits that Shwe Din was not in the habit of telling him about his business or family affairs and he does not tell us what led to the conversation about Ma Kin. His evidence appears to show that he knew practically nothing about Ma Nan On and Maung Tha Maung. He has no personal knowledge of Ma Kin's marriage and does not appear to have been a particular friend of Maung Shwe Din. He is, by occupation, a physician and is apparently of not very good standing. He states definitely that Ma Kin was treated by Shwe Din as his own child but has to admit that he cannot say how Shwe Din would have treated Ma Kin merely as a niece. Maung Pu Ke is also a witness who was told by Shwe Din that he had adopted Ma Kin. He says this was before Ma Kin's marriage, but he was not present at her marriage nor was he invited to it. He does not appear to know much about Ma Kin till after she was thirteen or fourteen years old, because only then did he come to know that Ma Nan On was Ma Kin's mother and sister of Ma Nan Ton. He does not know where Tha Maung and Ma Nan On lived and where the latter died. He first saw Ma Kin when she was twelve or fourteen years old, and did not know before that she had been adopted by Shwe Din. Apparently, the witness did not know anything about the adoption until Ma Kin was about to marry. He also says that, after he came to know of Ma Kin's relationship with Shwe Din, he came to know that all the village also knew of it. He is a man of 74 and a resident of Tada and should, I think, have known much more about the alleged relationship than he professes to do in his evidence, and, in my opinion, if the adoption had taken place as alleged and all the village knew of it, it is rather strange that this witness should have come to know of it only when he was told of it by Shwe Din before Ma Kin's marriage and the

conversation he reports between him and Shwe Din about Ma Kin lacks details, inasmuch as he merely says: "Shwe Din told me before Ma Kin got married that he had adopted her." He says nothing about what led to this conversation, so that, if Shwe Din did tell him about the position of the child in his house, the Court would be in a position to say what would have been the position assigned to her by Shwe Din. If the case was that Pu Ke and Shwe Din were great friends and were on a particular occasion talking about their domestic affairs and in particular as to what would happen if Shwe Din died and this led to the conversation about Ma Kin, there would be some reason for attaching some weight to the witness's report, but that does not appear to be the case at all. Maung Shwe Din might have told Pu Ke that he was bringing up his wife's niece or that he was giving her shelter and protection and the witness might have magnified Shwe Din's statement into something more than he meant to say. We now come to the evidence of U Wuria. The witness is 66 years old and is a *pongyi*. He has been at Tada for twenty-eight years. He counted Shwe Din and Ma Kin among his supporters. He says, about twenty years ago he met Ma Nan Ton and Ma Kin at the Shwedagon Pagoda and that Ma Nan Ton informed him that she had come with her daughter, Ma Kin, to Rangoon to buy bazaar. He also says that it is said in the village that Ma Kin had been adopted by the old couple. He makes out that he at first, thought that Ma Kin was Shwe Din's daughter but he had not enquired about her as Shwe Din was not at first one of his supporters and when he did enquire about her Shwe Din told him that she was a daughter of Ma Nan Ton's sister and that he and his wife had adopted her. He does not tell us when this was but he says that when he first saw her in Shwe Din's house Ma Kin was seventeen or eighteen years old and that this was about twenty years ago and before she was married. He spoke to Shwe Din about her four or five years later. So that Ma Kin must have been well over twenty years age when the *pongyi* asked Shwe Din about her. Thus, it is clear that he knew nothing about her, who she was and what she was to Shwe Din, before his enquiry. He produces Exs. 4 and 5 which are tapes used for binding palm leaf manuscripts. It appears that in 1275 *B. E.* Shwe Din began to think about making a big ahlu. Amongst the things he wanted to give away were scriptures, an image and a brass bell. The *pongyi* says he went up to Mandalay to buy scriptures. He appears to have bought altogether eight sets of scriptures. Of these, only two sets were bound by the tapes, that is, one tape for each of these two sets. One of the tapes has an inscription woven in it giving the names of the people who were the donors. The donors were Shwe Din, Shwe Kin, the first appellant, the eldest grandson Maung San Thein and Ma Thein Tin and Ma Hla Kin. The other tape gives no names, but it is stated on it in a general way that Shwe Din and his sons and daughters were the donors. U Wuria says that he was instructed by Maung Shwe Din to insert the names of the donors in the tapes and that he did so in one of them. It is, rather strange that similar tapes cannot be produced for the remaining six sets of scriptures. The bell has an inscription on it, but only the name of Maung Shwe Din is mentioned as the donor. (See Ex. 6, which is a true copy of the inscription). The *pongyi* composed it, but he says it was not under instructions from Shwe Din and he did this on his own responsibility. One would have thought that if he had been given instructions to have the names of the children of Ma Kin woven in the tapes he would naturally have put their names in the inscription which he composed, but he gave his reasons for not doing so in the following sentence in his evidence: "As all the names had been entered on the tape, Ex. 4, I did not think it necessary to repeat them in the inscription on the bell." I am unable to accept this statement at all. An inscription on the bell containing all the names of the donors would have been a more permanent memorial of their joint charitable act than an inscription on a tape. Much reliance has been placed upon Ex. 4. Taking it by itself it does not mean very much in the case. It only means that there were five persons giving an *ahlu* and the word " " placed before Maung San Thein's name does not really indicate much in favour of the adoption, because the three young people were Shwe Din's grandnephews and there is no other word but " " to apply to them ("" means ordinarily

grandchild"). The *pongyi* himself admits, and it is perfectly correct, that there is no word for grandnephew in the Burmese language and that the son of a niece would be called grandson by his grand-uncle. The witness also says that nephews and nieces are sometimes, but seldom, called sons and daughters respectively, especially if they had lost their own parents. I think the *pongyi* would have been nearer the mark had he not put in the words "but seldom." The witness states in one part of his evidence:—"The rumours I heard in the village were to the effect that Ma Kin was a *keittima* adopted daughter. It means the same thing as 'မွေးစားတယ်။' That is, why I did not use the word '*keittima*' before." I think it very doubtful that villagers would use the word "*keittima*" and I think the *pongyi* is at least exaggerating when he put "*keittima*" into the mouths of the villagers. So far as I know good *pongyis* do not care to give evidence and generally avoid being placed in a position such as would afterwards render them liable to appear as witnesses in a Court of Justice. U Wuria has given evidence in another adoption case when he produced a tape similar to Ex. 4 in support of the adoption. I do not say that there was anything wrong in that, nor is there anything wrong in giving evidence in this case. *Pongyis*, like others, must obey the orders of the Court, and when they are summoned to attend Courts they are bound to do so. But he has allowed a divorce-deed to be drawn up in his *kyaung*, although he says he had nothing to do with it. He has given evidence with regard to another document which was executed in his *kyaung* at the same time as the divorce-deed. I do not consider that Ex. 4 helps the case of the claimants, because there was nothing unusual in Maung Shwe Din's including the names of his grandnephews and grandnieces as co-donors with him. He was losing nothing by doing so and, according to the religious belief, the others may gain much thereby. The *ahlu* was not brought to a completion till 1277 *B. E.* and Shwe Din died in the following year. It is not far-fetched to suggest that the tape might have been made for the purpose of this case, and Mr. Dantra for the claimants argues that that suggestion is tantamount to saying that the *pongyi* was a party to the conspiracy, but I do not think it necessary to allege any conspiracy against the *pongyi*. There are indications in his evidence that he has a leaning in favour of the claimants and, if the suggestion is well-founded, he may have been induced to believe Ex. 4 to be the one he ordered and that, when he gave the order, he mentioned these names. The next witness is Maung Po. He is only forty years of age. He says he was present at Shwe Din's marriage with Ma Nge. There were *lugyis* present on the side of the bride and they asked Shwe Din who his heirs were and that Shwe Din said that he had a *keittima* daugther, Ma Kin. This marriage, according to the witness, was eight or nine years ago. He does not say what had become of the *lugyis* who asked the question and he is the only witness on this point on the side of the claimants. He tells a cock-and bull story of how he came to be present at the marriage. I think he is obviously a false witness. Maung Wa is another witness for the claimants. He is 56 years old and has been 30 years at Tada. About 5 years before Shwe Din's death, he was asked by Shwe Din to witness a document by which he was giving 22 acres of land to his grand-children. He also says that Shwe Din told him that Ma Kin was his adopted daughter and that this was at the time of the execution of Ex. 1. He further says that this was 4 to 8 years after he had first seen Ma Kin, but he cannot say what her age was then and can only say that she was grown up, and that, before Shwe Din told him of the adoption, he thought she was his own daughter. Taking his evidence to be wholly true, it appears that, for many years after Ma Kin was left in the house of Shwe Din, the witness did not know of the adoption. He merely says that Shwe Din told him that he had adopted Ma Kin but he does not tell us for what purpose and probably he did not question Shwe Din on the point. Where such a witness fails in doing this it is doubtful whether his evidence is of any value because the Burmese equivalent of "adopted" "မွေးစားသည်" does not clearly give the idea of adoption as one's own child as the English word may. Even in the Dhammathats there is a distinction between "ကောင်းမွေခံဆိုး မွေခံ။မွေးစားသောသား" and ကောက်ယူမွေးစားသောသား။". The former expression means an adoption with a view to inherit and the latter merely brought

up out of pity, the former being known as the *keittima* form and the latter as the *apatittha* form. So that the conversation, such as is reported by Maung Wa on one occasion, without any details as to what led to it is not good enough to support a claim for *keittima* adoption. The next witnesses are Aung Dun and Ma Tin Hlaing who are 44 and 52 years of age, respectively. Aung Dun professes to have been Ma Kin's playmate. He says, once he had a dispute with another boy as to whether Ma Kin was Shwe Din's own daughter; so he went and asked Shwe Din about it and he was told that she was his adopted daughter. His evidence is obviously useless. Ma Tin Hlaing says she first saw Ma Kin when she was about seventeen years old and that in 1257 *B. E.*, that is, about 25 years ago, Shwe Din and Ma Nan Ton told her that they had adopted Ma Kin. Ma Kin was at the time living with the old couple and treated as their daughter. She is a *bazaar* seller and of no standing. My remarks as to the necessity of having details of the conversation apply to this witness also. Maung Gyi, who describes himself as a playmate of Ma Kin, speaks about people saying that Ma Kin was Shwe Din's adopted daughter. He is a man of no standing. He follows a Doctor to learn eye-doctoring, but has not so far treated any patient for any eye-disease. The father of the claimants is Aung Kyu. He says he believed that the old couple were Ma Kin's natural parents when he married her, but he learnt later on that they were not her natural parents but that they had adopted her with rights of inheritance. Maung Kya Zan is a man of no occupation and is alleged to be an inveterate gambler. He also speaks to Shwe Din telling him about the adoption when he went to Shwe Din's house on a casual visit. He admits that there was no particular occasion for Shwe Din to tell him about it. His evidence is obviously useless. The result of the above review of the evidence for the claimants is, that the evidence relating to the alleged adoption is unsatisfactory and unconvincing and that the alleged admissions made by Shwe Din are not particularly useful to the claimants because some of the witnesses who speak to them are not worthy of credit and also because, even if the admissions were made, they are not so clear and unequivocal as to amount to admissions of a *keittima* adoption. The use of the words " ငဖ:ဝ:ဝ:ဝ:ဝ်ဒ် " by witnesses without the necessary amplifying words is not a sufficient proof of a *keittima* adoption because, as I had said before, the expression can be used in connection with both the *keittima* form of adoption and the *apatittha* form. Further there is no evidence of publicity of the relationship at or about the time of the alleged adoption and the evidence adduced to show the existence of subsequent publicity of the relationship is meagre and insufficient inasmuch as most of the witnesses did not know of the relationship by repute until they were actually told about it by Shwe Din. The fact that Ma Kin was treated by Shwe Din somewhat like a daughter might be useful to the claimants if Ma Kin was not his wife's niece. If Ma Kin was a stranger to Shwe Din, that fact would be very important. The fact that Ma Nan Ton called Ma Kin her daughter is not an unusual factor in a case like this. She would naturally, as is the custom amongst the Burmese, call her niece her daughter, especially when she was an orphan child. Similarly the fact that Shwe Din called the claimants his grandnephews and nieces is also of not much use. There is an entire absence of evidence to show how Ma Kin addressed Shwe Din and Ma Nan Ton. As in almost every adoption case the way the alleged adopted child addresses the adoptive parents is considered to be important one way or the other and much is generally made of the fact that the claimant called the alleged adoptive parents father and mother. The absence of evidence on this point leads one to assume that Ma Kin never called Shwe Din and Ma Nan Ton father and mother. The claimants rely on certain promissory-notes and foils of promissory-notes in a promissory-note book because their names and their mother's name are joined with Shwe Din's as lenders of the moneys lent on the documents, but these documents have not been proved at all. Moreover, the book bears some traces of having been restitched, so that the promissory-note book must be discarded as proving nothing in favour of the claimants. Certain promissory-notes have been produced on which Shwe Din and the claimants have borrowed money from certain Chetties. The fact affords no proof in favour of the claimants, because it is a well known thing that Chetties get

the signature of every body who might be in a position to create trouble after the death of the person who really borrowed the money.

We now turn to the case for the defence. Shwe Din was the plaintiff's brother. The plaintiff gives an account of how Ma Kin came to be an inmate of Shwe Din's house. Maung Tha Maung divorced Ma Nan On as he suspected her of infidelity. She then went to live in Ma Nan Ton's house. Shortly afterwards she eloped with Maung Pha and went and lived at Shwepaukpin. A few years afterwards Ma Nan On returned to Ma Nan Ton's house. At the time she had a little child by Maung Pha. Soon after both Ma Nan On and the baby died in Ma Nan Ton's house. After this Maung Pha has no further interest in the relatives of his deceased wife and went away from the village leaving Ma Kin behind with Ma Nan Ton. Ma Kin was then eight years old. The girl's position was this: her mother was dead; her step-father had deserted her and her father, Tha Maung, had disappeared. So that it was quite natural that Maung Shwe Din and Ma Nan Ton should give the child shelter and protection. That was how she came to grow up in Shwe Din's house and remained there till she died. Her children would naturally continue to live in that house. Po Mya, Ko Pein and Ma Yeik are witnesses who support the plaintiff's story. They are all respectable people. The learned District Judge saw no reason to disbelieve them and accepted their story as being substantially correct. Po Mya is a respectable person, so is Ko Pein and their evidence shows that they knew the people concerned and their affairs well. I am unable to see what reason can be assigned for saying that they are not disinterested. Ma Yeik was the wife of Ma Kin's paternal uncle. She would be a person to know of the adoption of Ma Kin if it ever took place and aslo to know of Ma Kin's exact position in the family of Shwe Din and Ma Nan Ton. As regards her, it has been urged that she might have taken the child under her protection, but she did not and that she was, therefore, apparently not well disposed towards Ma Kin. I am unable to follow this argument, because Ma Yiek was not a near relation of Ma Kin's and there was her well-to-do aunt in whose house the child was left unprotected. There was ready at hand some one to look after the child and there was no necessity for Ma Yeik to take any trouble over it. Po Mya says that at the marriage of Shwe Din with Ma Nge he was one of the *lugyis* and that Shwe Din declared that he had no children. Maung Po Thaung gives evidence that he was related to Ma Ma and that at her marriage with Shwe Din the latter declared that the children living with him were not his heirs. On the side of the claimants we have the evidence of Maung Po who said he was present at Ma Nge's marriage. I have already shown reasons for not attaching any weight to his evidence. If the evidence on the side of the plaintiff as to what Shwe Din said at his subsequent marriages is trustworthy, the question remains what is the value of it. The learned District Judge has attached much value to it, but I do not think it is really very important, because it is just as likely as not that Shwe Din might be telling a lie. But, if we can find that Shwe Din positively asserted that the children living with him were his heirs, the evidence would be of great importance.

I forgot to deal with the evidence relating to the transfer of 33 acres of paddy land to the claimants and the 1st appellant Maung Shwe Kin. There is no doubt that Shwe Din did make a gift of this land to these four persons, of which half was to go to Shwe Kin and the other half to the others. But the evidence clearly shows that his intention was that they should take their respective shares only on his death, because after the transfer he continued to deal with the property as he had hitherto done. This gift does not appear to me to indicate any truth in the claim of the claimants, namely, that their mother was the *keittima* adopted daughter of Maung Shwe Din and Ma Nan Ton. It appears that Shwe Kin had been working for Shwe Din for some time. Ma Kin had lived in Shwe Din's house for some considerable time before she died and must have helped Shwe Din in his household affairs. The children of Ma Kin also continued to live in the house and they must also have been a source of comfort to him and he might very probably out of gratitude for the assistance they had rendered have thought of giving them some share in his property after his death. If they were his adopted children, there is no necessity for his arranging to give them

this piece of land intending that the gift should take effect only after his death, because in that case they would inherit all his property and a gift of this sort would have been unnecessary. There was a scramble for the property on the part of Shwe Kin and the claimants before Shwe Din died. Shwe Din is alleged to have executed Ex. 16 whereby he gave Shwe Kin and the claimants some of his property in equal shares by way of inheritance. The learned District Judge says that in his opinion, the transaction only shows that the claimants knew that their position was unsafe. I agree with him. There is one other point which appears to be much against the claimants. It appears that Shwe Kin and they had got some of the lands belonging to Shwe Din transferred into their names. Shwe Din came to hear of this and at once got the land re-transferred to his name. In Ex. C., which is a register of holdings, it is stated that the re-mutation was made because Shwe Kin and the others were not Shwe Din's children. In Exs. 11 and 15 it is stated that the four, not wishing to say anything in U Shwe Din's life time had allowed the lands to appear only in the name of U Shwe Din. There are discrepancies in the entries in Register No. IX and the register of holdings, but I do not think they count for much as the fact remains that U Shwe Din objected. In my opinion the claimants have failed to prove that their mother, Ma Kin, was the *keittima* daughter of Shwe Din and Ma Nan Ton. Their Counsel at the hearing of the appeal asked us to allow them to make a claim as the children of an *apatittha* daughter of the old couple. In *Maung Tha So* v. *Maung Lu Pe* (1). I held that the two forms of adoption are entirely different; that a plaint based upon a *keittima* adoption cannot be amended in appeal by an alternative claim of an *apatittha* adoption. I have no reason to change my views on this point.

Shwe Kin, the 1st appellant, is represented by Mr. Maung Gyi and at the hearing Counsel said that his name was inserted as an appellant by mistake and that Shwe Kin was quite satisfied with the decree of the lower Court. His appeal must, therefore, be dismissed, but the question remains as to whether he should be ordered to pay the costs of the other side. It is obvious that his name was entered as appellant by mistake and he has not pressed this appeal. I am, therefore, of opinion that he should not be made to bear the costs of the respondent.

The appeal of the other 3 appellants is dismissed with costs.

Rigg, J.—I concur in thinking the adoption has not been proved.

N. H. *Appeal dismissed.*

(1) 41 Ind. Cas 749; 11 Bur. L. T. 246.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1120 OF 1923.

February 26, 1925.

Present:—Mr. Justice Stuart.

Pandit BHAGWAT PRASAD MISIR AND OTHERS—DEFENDANTS—APPELLANTS

versus

BALDEO PRASAD MISIR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Co-sharer—Khudkasht *plots, dispossession from*—*Possession, decree for, whether can be obtained.*

When a co-sharer in a village has rightfully acquired land as his *khudkasht* and is in separate physical possession of it, and another co-sharer forcibly dispossesses him, the former is entitled to a decree for physical possession of the land from which he has been dispossessed and not merely to a decree for joint possession. [p. 680, col. 1.]

Second appeal from a decree of the second Additional District Judge, Gorakhpur, dated the 26th April 1923.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *Shambhu Nath Chaube*, for the Respondents.

JUDGMENT.—The plaintiffs to this suit were purchasers of certain plots in a village in the Gorakhpur District. At the time of purchase they obtained the equity of redemption only over the plots now in dispute. The plot had been mortgaged with possession to two persons called Probhakar, defendant-appellant No. 2 and Rajbali deceased the father of Ram Niwas Misir, defendant appellant No. 4. In 1912 the plaintiffs sued to redeem the plots over which they had purchased the equity of redemption. Rajbali having died and being represented only by Ram Niwas the mortgagees sued were Probhakar and Ram Niwas. The matter was decided amicably under a compromise and a decree was drawn up on the 11th March 1913 declaring the mortgage redeemed and assigning the plots

in question to the plaintiffs. This decree was against Probhakar and Ram Niwas. The plaintiffs obtained physical possession over these plots and cultivated them.

Subsequently Probhakar and Ram Niwas with Bhagwati Prasad and Radhakhant interfered with their possession by action taken over the standing crops. They undoubtedly based this interference upon an entry in the village papers which seemed to show that they had some title to the plots in question.

The preceding facts have been found by the lower Appellate Court. The following findings must be emphasised. After the decree of 1913 the plaintiffs were in possession of these plots. The plaintiffs were in separate and exclusive possession of these plots by cultivating them. The defendants dispossessed them. The possession subsequently passed under an order of the Criminal Court to the Police as a breach of peace was apprehended. The lower Appellate Court has given the plaintiffs-respondents a decree for physical possession over these plots. This decree is attacked in appeal on two grounds. It is attacked on the ground that the decree of the 11th March 1913 is not good as giving title to the plaintiffs.

The argument here is that the predecessors-in-interest of all the present defendants-appellants were interested in the matter and that the defendants-appellants Nos. 1 and 3 were no parties to the decree. There is no force in this plea. The mortgagees were Probhakar defendant-appellant No. 2 and the father of Ram Niwas. The mortgagors were the plaintiffs' vendors. The decree had only to be redeemed as against the mortgagees.

The next point taken was that the compromise was signed only by Probhakar and not by Ram Niwas. I have searched the record and do not find that the compromise is on it or that the compromise was ever proved. The suggestion is apparently that if Ram Niwas did not sign the compromise it was signed by Probhakar on his behalf. There cannot be the slightest doubt as to the fact that the decree was binding against both of them.

Another point argued here was to the effect that Ram Niwas was a minor. He clearly was not a minor at the time the decree was passed though he apparently was described as a minor in the plaint. But he is described as a major in the decree. Apart from that, from the present pleadings it appears that Ram Niwas was 30 years old in 1921 which would make him a major in 1912. The redempion was a good redemption and the plaintiffs had title to the plots.

The next point taken is that they should not have been granted a decree for physical possession because they and the defendants are *zemindars* in the propeity. The learned Counsel has quoted in support of his argument the decision in *Bisheshar Singh* v. *Hanuman Singh* (1) and *Sarbjit Singh* v. *Rajkumar Rai* (2). The headnote in the first decision might be a little clearer. All that these decisions lay down is that when co-sharers or tenants-in-common are jointly in cultivation of a particular area the ouster of one by the other entitles the party ousted to a decree for joint possession. The decisions further lay down that when such a co-tenant intrudes upon joint land the remedy of the persons intruded against is to obtain a decree for joint possession, but nowhere do these decisions or any other lay down that when a co-sharer in a village has rightfully acquired land as his *khudkasht* and another co-sharer forcibly dispossesses him the Courts should do otherwise than restore the man forcibly dispossessed to physical possession.

Here the plaintiffs were in separate physical possession of the plots in question and were dispossessed illegally by the defendants. The lower Appellate Court was obviously right in giving the plaintiffs a decree for physical possession.

This decision disposes of all the points argued before me. There were other grounds of appeal but they were abandoned. I dismiss this appeal with costs on the higher scale.

Z. K. *Appeal dismissed.*

(1) 63 Ind. Cas. 802; 19 A. L. J. 780; 3 U. P. L. R. (A.) 143; 44 A. 1; (1922) A. I. R. (A.) 314.

(2) 63 Ind. Cas. 806; 19 A. L. J. 783; 3 U. P. L. R. (A.) 146; 44 A. 5; (1922) A. I. R. (A.) 162.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 80 OF 1922.

November 21, 1924.

Present:—Mr. Justice Spencer and Mr. Justice Srinivasa Iyengar.

EDMUND BENDIT AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

EDGAR RAPHAD PRUDHOMME—DEFENDANT—RESPONDENT.

Contract—Sale of goods—"Force majeure", *meaning of—War conditions—Vessel commandeered by Government—Performance of contract, whether excused—Impossibility of performance—Vendor, liabitity of.*

It is not reasonable to ask a person who has entered into a particular contract to supply goods, to break his other contracts or to make others to break their contracts in order to perform that particular contract. If a party to a contract cannot perform his part without breaking other contracts, then the existence of those other contracts might be deemed to hinder or prevent him from performing the contract in question. [p. 685, cols. 1 & 2]

It is not sufficient for a party to a contract to point to something in the nature of a *force majeure* and seek to escape liability in respect of the contract. It is necessary to go further and establish by satisfactory evidence that the circumstance or occurrence which is called *force majeure* was the real cause which prevented the performance of the contract. [p. 684, col. 1.]

Where a contract to supply goods is entered into during a period when there is to the knowledge of the parties difficulty in securing tonnage for the cargo, such difficulty or even the impossibility of procuring tonnage cannot be aptly described by the expression *force majeure*. [p. 684, col. 2.]

Where a commercial man finds himself face to face with an upsetting of his plans and calculations brought about by *force majeure*, he is not bound to prove more than that he made his best endeavours as a man of ordinary prudence would and should, who was anxious to procure some tonnage for himself under the prevailing conditions. [p. 685, col. 1.]

Where in a contract for sale and delivery of goods the manner of the performance of the contract is not indicated or included as necessarily being in the contemplation of the parties, the difficulty or even impossibility of performing the contract in the manner contemplated by one of the contracting parties would be no excuse for non-performance. But if the manner of performance is indicated in the contract or otherwise comes to be included as a term in the contract then the *force majeure* clause would apply to any case of *force majeure* preventing the performance of the contract in that manner. [p. 685, col. 2.]

Whenever the possibility of performance is referred to in commercial contracts, what must be considered and contemplated is the possibility in a commercially reasonable sense and not a suppositious possibility. [p. 686, col. 1.]

Defendant, a merchant in Madras, contracted in November 1916 with the plaintiffs, a firm in Marseilles, to ship 400 tons of groundnut kernels to Marseilles in December-January 1916-1917 on C. I. F., terms, the goods to be of a particular brand. The defendant booked the necessary tonnage on S. S. *Seapool* but the vessel was commandeered by the Government on 14th November for purposes connected with the War. In spite of his best endeavours the defendant was unable to obtain accommodation for this cargo on any other steamer. The contract contained *force majeure* clauses discharging the parties from performance of the contract in cases of war, revolution, etc. In a suit by the plaintiffs for damages:

Held, (1) that the defendant was not liable for non-performance of the contract; [p. 683, col. 2.]

(2) that the contract being a C. I. F. contract, under which the defendant had to tender Bills of Lading for goods of a particular brand, a tender of goods of some other brand would not have been a strict compliance with the terms of the contract, such as the plaintiffs were bound to accept and that, therefore, the defendant could not have bought groundnuts at Marseilles or London and supplied them to the plaintiffs. [*ibid.*]

Hansson v. *Hamel and Horley Ltd.*, (1922) 2 A. C. 36; 91 L. J. K. B. 433; 127 L. T. 74; 27 Com. Cas. 321; 66 S. J. 421; 38 T. L. R. 466, relied on.

Appeal from the judgment of Mr. Justice Coutts-Trotter, dated the 28th of August 1922, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in C. S. No. 280 of 1921.

Mr. *Vere Mockett*, for the Appellants.

The Advocate-General, for the Respondents.

JUDGMENT.

Spencer, J.—The respondent, a merchant of Madras, contracted on November 10th, 1916 with the appellants, who are a firm in Marseilles, to ship 400 tons of groundnut kernels to Marseilles in the December-January 1916-1917 season on a C. I. F. contract, the goods to be of H. P. brand. He booked the necessary tonnage on the S. S. *Seapool*, a vessel chartered by Messrs. Cordon Woodroffe & Co., but it was commandeered by the Government on November 14th for purposes connected with the War. In spite of his best endeavours the respondent was unable to obtain accommodation for this cargo on any other steamer leaving the "kernels" ports, that is ports on the Coromandel coast from which kernels are usually shipped, *viz.*, Madras, Pondicherry, Cuddalore, Negapatam and Porto Novo. He, therefore, wrote on December 22nd, 1916 and January 11th 1917 to the appellants pleading *force majeure* and asking them to consider the contracts as cancelled. The appellants refused to do so, rejecting the plea that this was a case of *force majeure* and suggested trying other lines and other ports. The respondent tried all the shipping agents in vain. He then made a proposal that he should endeaour to work off old contracts by

shipping a portion of the goods contracted for under old contracts along with the portions of the goods to be supplied under new contracts, but the appellants only treated this as a virtual admission of his liability and an attempt to diminish his debt. They were unwilling to accept the proposal exactly as it was offered and, it fell through. There was no extention of the time for performance for an indefinite period by mutual agreement. In the end they put the respondent into Court in March 1921 and lost their case in the Trial Court, on the findings of the Judge (1) that *force majeure* would discharge the defendant from the performance of his original contract (2) that inability to obtain tonnage is *force majeure* within the meaning of that expression as construed in English Courts.

It may be noted in this connection that both the standard contract forms in use by the parties (Ex. A and Ex. 1) contain *force majeure* clauses. Exhibit 1 which is respondent's version is the less definite of the two. It mentions two kinds of *force majeure* which would render the contract null and void except so far as it had already been partly performed. One is prohibition of export of the article from the country, a second is blockade, and there are others not mentioned. Such are cases of *force majeure* preventing the execution of the contract. Exhibit A is a more explicit, as it enumerates war, revolution, strikes, epidemics as well as other unforeseen circumstances which might prevent the goods from reaching the port of embarkation or from being shipped or despatched and so would render the contract void. Section 56 of the Indian Contract Act simply says that a contract to do an act which after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful; and s. 65 provides that in such event any person who has received any advantage under the contract is bound to compensate the person from whom he received it.

The term "*force majeure*" which is borrowed from the Code Napoleon has received interpretation in several decisions of the English Courts in recent years. In *Matsoukis* v. *Preistman & Co.* (1). Mr. Justice Bailhache after considering the definition given by an eminent Belgian lawyer of *force majeure* as meaning "causes you cannot prevent and for which you are not responsible"—a definition which would certainly include inability to obtain tonnage owing to war conditions prevailing in the port or ports from which the goods were to be despatched—himself gave it a more restricted meaning. In his opinion *force majeure* would include strikes and break down of machinery but not bad weather, or football matches, or a funeral. In *Lebeaunpin* v. *Crispin & Co.* (2) Mr. Justice Mc.Cardie observed: a *force majeure* clause should be construed in each case with a close attention to the words which precede or follow it and with due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument."

In *Dixon & Sons Ltd.* v. *Henderson, Craig & Co. Ltd.* (3) the fact that British ships were no longer available by reason of the war for carriage of woodpulp from Canada to Grimsby in England was held to be a hindrance to the performance of a contract for delivery of pulp and came within the meaning of the *force majeure* clause in the contract under consideration in that case. If the hindrance was insurmountable, it would amount to prevention, which was another term used in the contract which would relieve the sellers from liability, and the Court of Appeal held that the arbitrators were accordingly justified in finding the sellers not liable.

In the present case, the matter is simplified by the fact that the expression "*force majeure*" does not stand alone, but the clause in which it occurs in Exs. A and I contains examples of what was intended to be conveyed by the term. War is one of the examples and the words *et cetera* at the end of the enumeration denote that there are others.

In their letter (Ex. K) of January 10th 1917 the appellants admitted that, if shipment by the *Seapool* had been one of the declared terms of the contract between them and the respondent, the latter would be exonerated by the fact of that steamer being subsequenlly requisitioned by the Government. What, however, they failed to appreciate was that the respondent was not asking to have the contract considered as cancelled

(1) (1915) 1 K. B. 681; 84 L. J. K. B. 937; 113 L. T. 48; 20 Com. Cas. 252.

(2) (1920) 2 K. B. 714; 89 L. J. K. B. 1024; 25 Com. Cas. 335; 64 S. J. 652; 36 T. L. R. 739.

(3) (1919) 2 K. B. 778; 87 L. J. K. B. 683; 118 L. T. 28; 23 Com. Cas. 294.

merely on account of the *Seapool* being requisitioned but that the combination of two circumstances (1) the commandeering of the *Seapool* on which he had already booked accommodation for the consignment of groundnuts, (2) the total lack of any other ships with available accommodation not already booked up by earlier applicants made it impossible for the respondent to fulfil his engagement under Exs. VII and VII (*a*) in the seasons December-January, 1916-1917.

It has been contended both in the Trial Court and here that the respondent might have shipped this consignment of groundnuts on the *Jossipheglu*, or the *Khiva*, or the *Grigua* or the *Voyazides* or the *Locksley Hall* or the *City of Florence*; but the evidence on the point to which we have referred makes it clear that all the space on the steamers calling at Marsellies in December or January was already booked before the commandeering of the *Seapool* became known on November 14th, and that the respondent could not have foreseen the fact that he would be prevented from sending the consignment by the ship in which he had booked space, and could not have made other arrangements; also that if he could have booked space in a steamer leaving Madras after January 1917, the consignment would not have reached the consignees within the contract time. On the facts I agree with the conclusion of the learned Judge who heard the evidence "that it was a physical impossibility for Mr. Prudomme to get tonnage to take this cargo at any rate of freight, however, high during the contract period."

But on the *Voyazides* and "*Jossiphoglu*" the respondent sent consignments of groundnuts to Chabrire Morel and Compoi of Marseilles on earlier contracts with those consignees. It is suggested by appellants' Counsel that the respondent might have kept his contract with the appellants by buying in these consignments or other consignments made by other merchants trading in groundnut and diverting them to his consignees.

But it is not stated that any such consignments of groundnuts were sent except under previous contracts and in *Tennants Ltd.* v. *Wilson & Co.* (4) it was observed by Lord Loreburn that it would not be reasonable to ask a person, who had entered into a particular contract to supply goods, to break his other contracts or to make others break their contracts in order to perform this contract. If a party to a contract could not perform his part without breaking other contracts then the existence of those other contracts in the opinion of their Lordships might be deemed to hinder or prevent him from performing the contract in question. At considerable expense and loss the respondent might, it is suggested, have bought groundnuts in Marsellies itself and tendered them to appellants in performance of his contract, or he might have sent this consignment to some port from which it might have been transhipped to Marsellies. But if he had adopted either of these courses he would still have been unable to make a good tender which the appellants would have been bound to accept, for the contract between the parties was a C. I. F. contract under which he had to tender Bills of Lading for 400 tons of groundnut kernels of H. P. brand shipped by steamer from a kernel port to Marsellies. A tender of groundnuts of some other brand or of Bills of Lading from some other port such as Bombay or London would not have been a strict compliance with the terms of the contract such as appellants would have been bound to take up [*vide Hansson* v. *Hamel and Horley Ltd.* 5)].

The fact which appears from the judgment in O. S. A. No. 73 of 1921, that in respect of the commandeering of this very steamer *Seapool* a French Court of Arbitration in regard to another contract held that the sellers could not successfully plead *force majeure* as a defence on the ground that goods of the proper month's shipment might have been bought up either on the high seas or locally in Marseilles, no doubt at a great advance in price, is immaterial for the decision of this appeal, because the details of that contract are not before us so as to enable us to judge of the correctness of the view taken by those arbitrators; and their decision is by no means binding upon us.

For these reasons I can come to no other conclusion than that the judgment appealed against is right, and the appeal is, therefore, dismissed with costs.

(4) (1917) A. C. 495 at p. 510; 86 L. J. K. B. 1191; 116 L. T. 780; 61 S. J. 575; 33 T. L. R. 454.

(5) (1922) 2 A. C. 36; 91 L. J. K. B 433; 127 L. T. 74; 27 Com. Cas. 321; 66 S. J. 421; 38 T. L. R. 466.

Srinivasa Iyengar, J.—I agree that the appeal should be dismissed with costs. I wish only to add a few sentences with regard to the main contentions raised in the argument on behalf of the appellants. It seems to me really unnecessary to canvass for the purpose of this case the meaning or definition of *force majeure*. The only thing that was contended to amount to *force majeure* was the commandeering of the *Seapool* by the Government. I did not understand Mr. Mockett, the learned Counsel for the appellants, in his argument, to contend that such commandeering would not amount to *force majeure*. But in all such cases, it is not sufficient for the contracting party to point to something in the nature of a *force majeure* and seek to escape liability. It is absolutely necessary to go further and establish by satisfactory evidence that the circumstance or occurrence which is called *force majeure* was the real cause, which, to use the language of the contract in question, prevented the performance of the contract. Now, if the commandeering of the *Seapool* had taken place, say on the 30th or 31st of January, almost at the last moment, so as to upset all the calculations and arrangements of the defendant, there could possibly be no doubt that the *force majeure* would have been the immediate cause of the failure of the defendant to ship the goods and perform the contract. But the real difficulty in this case arose by reason of the *Seapool* having been commandeered as early as the 14th of November whereas the shipments had to be in December-January. The defendant's plea which was found by the learned Judge in the Court below to have been made good, was, that till the end of January the defendant made every effort to book the cargo and failed not because the high rate of freight obtaining made his contract commercially impracticable but because he could not get tonnage for the cargo at any price whatever. It may almost seem from this finding that the real or immediate cause for Mr. Brudhomme not performing the contract was not the commandeering of the *Seapool* but his inability to procure tonnage in any vessel. No doubt this inability has been found as a fact by the learned Judge and has not been seriously assailed before us. But the inability to procure the necessary tonnage could not possibly be *force majeure* because the contract itself was during the war and the difficulty of securing space for cargo to be exported must have been in the contemplation of the contracting parties, and the difficulty or even the impossibility as it may be, of procuring tonnage was the result of the extraordinary competition prevailing at the time and could not aptly be described by the expression *force majeure*, however, elastic and varying its connotation may be accepted to be. In these circumstances, unless the commandeering of the Seapool could be found to be the real or immediate cause of Mr. Prudhomme not performing the contract, the *force majeure* clause in the contract will not help him. After giving the matter my very careful consideration, I have come to the conclusion that in this case in spite of the interval of time between the 14th of November and the close of the period fixed for the performance of the contract, the commandeering of the *Seapool* was the real or immediate cause, cause not in any scientific sense nor even in the language of ordinary perlance, but in a commercial sense. The fact was that Mr. Prudhomme as a commercial man made certain arrangements for shipping, entered into engagements for the purpose of procuring necessary tonnage and then entered into the suit contracts. Then suddenly on the 14th of November he finds his plans are upset by the vessel being commandeered by which he had arranged to ship the goods. If, thereafter, he was able to obtain tonnage in any of the ships in such a manner as to enable him to fulfil the contract or indeed if he made no efforts at all to procure any such tonnage, the cause of his nonperformance of the contract would not have been the commandeering of the *Seapool*. But it is a matter of common experience that what in ordinary circumstances would not have been the cause of any particular effect might become such cause when conjoined with certain other circumstances and then it is nonetheless the cause or effective cause, though not the sole cause. This was really what the learned Judge found. In this view any examination of the various cases with regard to the meaning of *force majeure* becomes unnecessary.

Two other arguments were addressed to us by Mr. Mockett, the learned Counsel for the appellants. It was said that if Mr. Prudhomme was not able to obtain any tonnage in Madras or Pondicherri, there

was no evidence that he could not have obtained such tonnage from any of the 'kernal' ports on the Coromandel coast. This aspect of the contention would require him to establish conclusively a negative. It is significant that no evidence whatever has been adduced on behalf of the plaintiffs regarding the possibility of obtaining any such tonnage at any such port. The kind and quantity of evidence that would be required to establish a negative of that nature would obviously vary according to circumstances. I have no doubt whatever that the learned Judge who arrived at the finding did so after a consideration of all those circumstances, and the argument before us has failed to satisfy us that that finding of fact has not been arrived at on proper or sufficient material. Further, having regard to the fact that the inability to procure tonnage after the commandeering of the *Seapool* must be held to have been relied upon not as in itself constituting *force majeure* but merely as a contributing cause to make the *force majeure* of the commandeering the effective cause of non-performance. I cannot help considering that the nature and quantity of evidence required to establish the negative need not be so exhaustive or conclusive as may be required if what was relied upon was solely the impossibility of obtaining tonnage. In such circumstances I am prepared to hold that when a commercial man finds himself face to face with an upsetting of his plans and calculations brought about by *force majeure* he is not bound to prove more than that he made his best endeavours as a man of ordinary prudence would and should, who was anxious to procure some tonnage for himself in such circumstances.

This test at any rate on the evidence on the record on behalf of the defendant as accepted by the learned Judge, is amply satisfied in the present case.

The third and last contention on behalf of the appellants was that the defendant finding that the *Seapool* was commandeered and finding himself unable to procure any other tonnage, should still have performed the contract by purchasing at Marseilles goods of the description contracted for and supplying to the plaintiffs such goods on the documents relating to shipments thereof so as to carry out the contracts.

To begin with, I must observe that this contention does not appear to have been submitted to the learned Judge in the Court below. In the second place, it is perfectly clear that any purchase of similar goods in the market locally at Marseilles and tendering them in performance of the contract would not have been performance according to the terms and the tenor of the contract and the buyers would have been entitled to refuse to accept the same. I am not also sure whether even the purchase of documents relating to December-January shipments of goods from the ports referred to, would have been proper performance; because there is a stipulation in the contract as regard the brand "H.P." (Hope Prudhomme) and there is no evidence and no facts which would justify me in holding that this stipulation with regard to the brand did not include besides the mark "H. P." (Hope Prudhomme) an implied condition regarding selection of goods by Mr. Hope Prudhomme. There is no evidence whatever that such documents were available in Marseilles which even, if the defendant could have procured them at any price, were such as the plaintiffs would be bound to accept as in performance of the contract.

Mr. Mockett relied upon the case of *Greenway* v. *Jones & Co.* (6). But that was a case of an ordinary contract for sale and delivery of goods and what was held was that the omission to deliver was not due to war or any other cause referred to in the contract. If in a contract for sale and delivery of goods, the manner of the performance of the contrect is not indicated or included as necessarily being in the contemplation of parties, then it necessarily follows that difficulties or even impossibility in the performance of the contract in the manner contemplated by one of the contracting parties would be no excuse for non-performance. But if the manner of performance is really indicated in the contract, or otherwise comes to be included as a term in the contract, then the *force majeure* clause would apply to any case of *force majeure* preventing the performance of the contract in that manner.

On a consideration of the whole contract in this case I have no hesitation in coming to the conclusion that the manner of performance of the contract included a

(6) (1916) 32 T. L. R. 184.

shipment of goods to be selected by the defendant.

I am further of the opinion that whenever the possibility of performance is referred to in commercial contracts, what must be considered and contemplated is the possibility in a commercially reasonable sense and not merely a suppositious possibility.

It follows from these considerations that the contract between the parties was that the defendant should purchase and ship goods of the descriptions contracted for and that if the plaintiffs were minded to do so, they would have been entitled to refuse any goods or documents not so proceeding; and it also follows that having regard to the manner in which commercially speaking, the defendant was expected and required to perform the contract there was no obligation on his part to proceed to Marseilles and look out for goods or documents of the description which might possibly have satisfied the requirements of the contract.

The decision of the learned Judge, therefore, to the effect that the defendant had made good his defence is right and the plaintiff's action was rightly dismissed.

V. N. V. *Appeal dismissed.*

Z. K.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 9 OF 1922.

March 7, 1923.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice May Oung.

MAUNG PO KAN—PLAINTIFF—APPELLANT

versus

DAW AT AND OTHERS—DEFENDANTS—RESPONDENTS.

Buddhisl Law, Burmese—Adoption—Kittima *form, essentials of*—*Wife, whether can adopt without knowledge or consent of husband*—*Public declaration*—"Shinbyu", *effect of*—"Mwe-za-de", *significance of.*

A *kittima* son or daughter should be adopted with the intention, publicly signified, of taking the adoptee as a son or daughter who will inherit. The intention may be expressed at the time of the taking or later; or may be inferred from a long course of conduct making such intention public. It may happen that a child is at first taken casually and without any intention that it should ultimately occupy the same legal position as that of a natural-born child, but later on, for a variety of reasons, the adoptive parents may come to look upon the son or daughter as their own and invest the child with privileges and duties which clearly show the subsequent formation of the required intention. [p. 693, col. 2.]

The use of the word "*mwe-za-de*" by the witnesses in describing an adoption is not sufficient to establish a *kittima* adoption. [p. 691, col. 1.]

Shwe Kin v. *Maung Sin*, 87 Ind. Cas. 673; 10 L. B. R. 376 at pp. 384,385, followed.

When the donor of an image, or a religious or other charitable building, sets up a public record of a gift and in it mentions the names of his or her relatives, both dead and living, it can safely be assumed that the relationship between the donor and those whose names are thus included is definitely admitted and proclaimed, and where one of them is an adopted son, but is referred to simply as a son, it must be taken that a *kittima* adoption was intended. [p. 691, col. 2.]

Among Burman Buddhists, when a person undertakes to be the sponsor of a boy, who is going to enter the monkhood as a novice, he generally acts in *loco parentis* to that boy; but the fundamental idea in his doing so is that he is himself acquiring merit therefrom, and hence it is a universal custom for well-to-do persons to *shinbyu* not only their own sons, but also the sons of others whenever opportunity offers. Thus, though the act of performing the ceremony is, in some cases, *prima facie* evidence that the donor of the feast regarded the novice as his son, it is by no means a clear indication in every instance that anything more than a charitable intent, sometimes coupled with a love of display, was in the donor's mind. Where several boys are *shinbyued* at the same time, and none of them is a natural-born son, no presumption in favour of adoption can properly arise in the absence of a direct and public declaration of relationship at or about the time of the ceremony. [p. 689, col. 1.]

One of a Burman Buddhist couple cannot legally adopt an heir without the knowledge or consent of the other. The plaintiff lost his mother while still an infant and his father was unable to rear him. *M. N.* with her husband's subsequent approval, gave the child a home, fed and clothed him, and took some interest in his education. While he was still a little boy, she made statements and allowed it to be known that she had adopted a son, and many people in the village looked upon the plaintiff as the adopted son of *M. N.* When he grew to adolescence, she took part in his *shinbyu* along with six other boys, and, later, finding that he was not inclined to study, utilized his services in field work. She took no interest in his marriage, or in his wife and children, and, beyond permitting his wife to use a vacant house belonging to her as a maternity shelter, did not provide any place of residence for them. In return for his labour during many years, the plaintiff was allowed to work a small area of paddy land on payment of rent, and his name was included as joint owner of a piece of land bought by her and two others:

Held, that on the state of facts proved it could not be held that there had been a *kittima* adoption of the plaintiff by *M. N.* and her husband. [p. 693, col. 1.]

Appeal from a judgment and decree of the District Court, Hanthawaddy.

Mr. *Ba Tin*, for the Appellant.

Mr. *Mya Bu*, for the Respondents.

JUDGMENT.—The plaintiff (now appellant) claimed that he had been adopted as a *kittima* son by a Burman Buddhist couple, Ma Ngwe and Maung Wet Gyi. Later the couple were divorced, and the plaintiff continued to live and work with Ma Ngwe as her son. Ma Ngwe having then died, he sued the defendants for her property left in their hands. The first defendant, Daw At, was Ma Ngwe's mother, the second defendant, Maung Ba, her brother, and the third defendant, Ma Lay (since deceased), her sister. The plaintiff averred that, as the *kittima* son of Ma Ngwe, he was her solé heir and, therefore, entitled to the whole of her property.

The defendants denied the alleged adoption but admitted "that the plaintiff lived with Ma Ngwe for some years and rendered his services to her prior to the month of *Waso* 1277 B.E." They pleaded further that, since the month of *Waso* 1277 B.E., the plaintiff lived apart from Ma Ngwe; that there was an entire discontinuance of filial and family relations between them; and that, therefore, even if the Court should find that the plaintiff was a *kittima* adopted son of Ma Ngwe, he had lost his right and status. They also stated that in the month of *Tabodwe* 1279 B.E., the plaintiff attempted to kill or injure Ma Ngwe with an axe, and urged that, even if the plaintiff previously had any right of inheritance, he lost it on account of such attempts. At the hearing the defendants set up a further case, *viz.*, that the plaintiff had really been adopted by one Po Shwe Daung, an employee of Ma Ngwe or Daw At, or both.

The primary question at issue is whether the plaintiff was adopted by Ma Ngwe and her husband, Maung Wet Gyi, with the status of a *kittima* son. Maung Wet Gyi, the husband, was alive when the suit was instituted, and had been assisting the plaintiff to establish his claim; but he unfortunately died before the hearing, and the Court was left without his testimony. The learned District Judge found on the evidence against the plaintiff and dismissed his suit with costs.

A large mass of evidence, both direct and circumstantial, oral and documentary, was produced on both sides. The case has been argued before us in great detail, and we desire to express our appreciation of the assistance which both the learned Counsel have rendered to us in sifting the evidence.

The first point requiring consideration is the evidence as to the actual taking over of the plaintiff. This is said to have taken place when the plaintiff was about a year old; he is now about thirty. At that time Maung Wet Gyi and Ma Ngwe were living together in a house apart from Daw At's and had lost their only natural-born son. It is not suggested and it cannot be the fact, that Ma Ngwe was past child-bearing age, and there is nothing to show that either she or her husband had previously evinced any desire to take a child in adoption. The plaintiff is the son of one Maung Shwe Baw and, while still an infant, had lost his mother. Maung Shwe Baw brought the child to the house of his sister—wife of Maung Kya Zwe—and asked her to suckle it; she could not do so, as she had a child of her own, and the plaintiff had to be brought up on condensed milk. This went on for about a year, at the end of which, according to Maung Kya Zwe (third P. W.), Daw At and Ma Ngwe accompanied by a man whose name he is unable to give, came to his house and "asked for the child in adoption with a view to inherit." He says: "Both Ma Ngwe and Daw At asked me for the child. Daw At's request was made to get the child for Ma Ngwe. I advised Maung Shwe Baw to give the child to them saying that Daw At and Ma Ngwe were well off. *Daw At* told me: 'When I was on my way here I met a fortune-teller and that fortune-teller has predicted that I shall get a Wednesday-borne boy and by getting him I shall become more prosperous than before.' *I gave the child to Daw At.* She then said, 'This child is taken in adoption with a view to inherit. I name it Maung Kan.' They then left my house." In cross-examination he stated that there was no conversation between Maung Shwe Baw and Ma Ngwe or Daw At, and that Maung Shwe Baw was upstairs and left the matter to him. He is supported by his daughter, Ma The Hnya (fourth P. W.), who must have been about sixteen years old at the time of the alleged adoption. She stated that she remembered Daw At and Ma Ngwe asking for the child and that her father gave it away, the plaintiff's father being then in the house. In cross-examination she repeated that Maung Kya Zwe gave the child "to Daw At and Ma Ngwe," and stated that both ladies asked for it "as an heir."

There are three points about this story which stand out prominently:—

(*i*) Maung Wet Gyi was not present, and there is no evidence that he knew of, or agreed to, the adoption. We know of no authority, either in the *Dhammathats* or in the decided cases, under which one of a Burman Buddhist couple can legally adopt an heir without the knowledge or consent of the other.

(*ii*) The taking of the child was not public. Its people were apparently anxious to hand it over to anyone who could give it a good home, and welcomed the chance of doing so to well-to-do persons.

(*iii*) The child was apparently given to Daw At, or just as much to Daw At as to Ma Ngwe. It is impossible to hold on the evidence that it was given to Ma Ngwe alone.

There were two persons alive who might have borne further testimony to the circumstances attending the actual giving and taking of the child; but they either could not be called, or else, the parties deliberately took the risk of proceedings without them. Maung Shwe Baw had visited Maung Kya Zwe's house while the suit was pending in the Court below; but it is said that he could not be found when the case was ripe for hearing; no subpoena was taken out in his name. Daw At was too old to come to Rangoon, but she was admittedly in good health, and a commission to examine her at her village might have been applied for. Be the cause what it may, we are left with the facts that the plaintiff was a motherless infant whom its own people were unable to rear, and that he was taken over by two rich and charitable ladies. The statements of Maung Kya Zwe and his daughter that the child was definitely adopted with the intention and on the basis that it should ultimately inherit some one's property may assume importance in conjunction with the other and subsequent circumstances. But, so far we must hold that the essential ingredients of a *kittima* adoption by Maung Wet Gyi and Ma Ngwe are almost wholly wanting.

We shall now follow the plaintiff's movements after his departure from Maung Kya Zwe's house. From the evidence of Maung Saw Maung (seventeenth P. W.), formerly a son-in-law of Daw At, and a person who is still on good terms with the defendants, it is clear that the plaintiff was first taken to the house by Maung Wet Gyi and Ma Ngwe, where the latter, with the help of an employe, Po Shwe Daung, looked after the child's needs and brought him up by hand; and that the plaintiff used to sleep with Po Shwe Daung. At this time Ma Ngwe told the witness that the plaintiff was her adopted son, using the expression *mwe-za-de-tha*; witness admits that she never said *amwe-za*, *amwe-gan*, *mwe de* or "adopted with a view to inherit." About the same time Maung Wet Gyi told his father in the presence of Maung Saw Hlaing (tenth P. W.) that he had adopted a child, using the same expression as his wife had used. During this period of his life that is, between his second and ninth or tenth years, the plaintiff was placed in a village school managed by Maung San Hpu (first P. W.) who later became a Pleader. According to him the boy was known as the son of Ko Wet Gyi and Ma Ngwe; Ma Ngwe herself told him so, and asked him to teach her only son well; he saw him living at Ma Ngwe's house and going about together with her. This witness apparently did not know or hear of the adoption, and hence cannot (though as a Pleader he might) speak to the kind of adoption effected in this case. According to Maung Saw Maung, it was Ma Ngwe who placed the boy in Maung San Hpu's school.

Next comes the divorce between Maung Wet Gyi and Ma Ngwe. When this event took place Ma Ngwe left her house and went to live with her mother, Daw At, taking with her the boy (plaintiff), then about eight or nine years old, and Po Shwe Daung. In this connection Maung Saw Maung says: "Po Shwe Daung lived at the granary of Daw At when Ma Ngwe went and lived at Daw At's house. *Then the plaintiff lived with Po Shwe Daung at the granary.*" This is a damaging admission by one of the best witnesses on the plaintiff's side, and it is not explained why if the plaintiff was a *kittima* son, he was not, at that tender age, allowed to live with his alleged adoptive mother and grandmother. Counsel for the defence urges with considerable force that it was because the plaintiff had been taken merely with a view to making use of his services when he grew up or partly with that view, and partly as an act of charity. Maung Saw Maung in re-examination stated that he was not certain that the plaintiff slept, or lived, with Po Shwe Daung, but we have no reason to suppose that he was not speaking the truth

to the best of his knowledge and re-collection when he made the positive statements referred to above in cross-examination. The fact remains, therefore, that the plaintiff was not, in this instance at least, treated as if he had been on an equal footing with a natural-born son.

To make this absence of proper treatment more pronounced, we have it that, when Ma Ngwe married a second time and went to live in her husband's house she did not take the plaintiff with her; he continued to live with Po Shwe Daung. It is also in evidence for the defence that at the wedding, when enquiries were made *coram populo* as to whether either party had any issue of his or her previous marriage, "both being *Eindaung-gyis*," the bridegroom replied that he had two sons and Ma Ngwe said that she had none.

The next point relied on is that the plaintiff was made a *koyin* at Ma Ngwe's expense. Among Burman Buddhists, when a person undertakes to be the sponsor of a boy, who is going to enter the monkhood as a novice, he generally acts in *loco parentis* to that boy; but the fundamental idea in his doing so is that he is himself acquiring merit therefrom, and hence it is a universal custom for well-to-do persons to *shinbyu* not only their own sons, but also the sons of others whenever opportunity offers. Thus, though the act of performing the ceremony is, in some cases, *prima facie* evidence that the donor of the feast regarded the novice as his son, it is by no means a clear indication in every instance that anything more than a charitable intent, sometimes coupled with a love of display, was in the donor's mind. Where several boys are *shinbyued* at the same time, and none of them is a natural-born son, no presumption in favour of adoption can properly arise in the absence of a direct and public declaration of relationship at or about the time of the ceremony.

In the present case the plaintiff states that he was made a *koyin* no less than three times; first by Daw At; later on by Ma Ngwe along with six other boys, all strangers; and lastly by Maung Wet Gyi. Several witnesses speak to the second of these functions, but it is not at all clearly established that Ma Ngwe was the sole, or even the principal, donor, or that she gave the plaintiff any prominence on the occasion as distinct from the other boys. We are unable, therefore, to draw any presumption from the fact that Ma Ngwe participated in the plaintiff's *shinbyu* ceremony.

When the plaintiff left the monastery he was about fourteen years of age, and he then went to an English school in Rangoon; he was there for some years' and was then withdrawn, because, as he says, he used to run away from school. His case is that it was Ma Ngwe who placed him in this school, but he admits that the fees were paid sometimes by Maung Wet Gyi, sometimes by Daw At, sometimes by Ma Nyein Me, and also that Maung Ba, second defendant, Maung Po Shan, third defendant's husband, Daw At and Ma Nyein Me and Ma Dwe, sisters of Ma Ngwe, gave him pocket money. He has no school certificates; the school register has not been called for, and there is no evidence to show that he was placed in school as the son of Ma Ngwe. The evidence on this point is not inconsistent with the supposition that the plaintiff was merely a protege of the family and, as such, was given an opportunity to acquire a good education, an opportunity which he admits throwing away.

It is not clear where the plaintiff went to live after he left the Rangoon school. He himself says that he slept sometimes at the field hut, but mostly at Daw At's house; and that he had his meals mostly at her house. By that time Ma Ngwe had again been divorced and had returned once more to live with Daw At. Maung Saw Maung does not remember where the plaintiff lived permanently after leaving school. The other witnesses for the plaintiff, with one exception, were not apparently questioned on this point. Maung Po Mya (fifth P. W.), a village headman, says: "I used to see the plaintiff living at the field hut of Ma Ngwe. He was living and eating together with the labourers. I used to see him tending cattle and working in the same way as the labourers." This fits in with the evidence for the defence. The second defendant says: "After leaving school, he lived mostly in the paddy-fields. He did so to look after cattle along with other employes. Sometimes he came back to Daw At's house where Ma Ngwe was. Other employes also used to come to Daw At's house in a similar manner." Maung Po Shan, husband of the third defendant, says: "After leav-

ing it (the school) he tended cattle, worked as a cart driver, and loafed about the village. Ko Tun Zan, the head labourer, fed him because he was useful." Maung Tun Zan (twelfth D. W.), Ma Ngwe's head labourer, says: "After his *shinbyu* I did not see him for three or four years. After that he came back to the field hut. He was working together with the employes of Ma Ngwe He tended cattle and threshed paddy. I told him 'You work well. I will get for you good remuneration.' I did not settle any definite wages for him. He worked like that for four to seven years."

It is difficult to ignore all this testimony in the absence of any definite statement by the plaintiff himself, and, in any case, we find that there is no proof that the plaintiff was treated and looked after by Ma Ngwe as her son between the time of his leaving school and the date of his marriage.

This marriage took place in July 1910, when the plaintiff was about eighteen years old. He eloped with the daughter of one of Ma Ngwe's labourers and went to live with her at Ma Ngwe's field hut. His father-in-law is Maung Po Myit (ninth P. W.), and he describes what followed the elopement. He states that Ma Nyein Me and Ma Lay, two of Daw At's daughters, came to him and apologized for the plaintiff's conduct, and that he told them to take charge of the couple; Ma Ngwe apparently took no interest in the affair. The witness proceeds: "After elopement the plaintiff and my daughter stayed at the field hut. When my daughter was formally returned to me, she was in the field hut. They continued to stay there after the formal return to me. Only when my daughter was about to be confined she and plaintiff went and lived at the plaintiff's house in Ma-U quarter. That was the house built by Ma Ngwe. After giving birth to the first child the couple went out to the field hut. After that they built a hut of their own in Thayettaw quarter and went and lived there. They lived at that hut except when they went out to the field hut, until the death of Ma Ngwe." Hence, according to this witness, neither the plaintiff nor his wife ever went to live with Ma Ngwe from July 1910, till Ma Ngwe's death in October 1918. There is other evidence, however, that the plaintiff's wife was confined two or three times at a vacant house belonging to Ma Ngwe and situated diagonally opposite Daw At's house; but the plaintiff's permanent abode was elsewhere. According to the headman, Maung Po Mya, the plaintiff lived in his hut in Thayettaw quarter. He says: "This was after his marriage. He had had no child at all then. He continued to live in that hut up till about six months ago. I collected capitation-tax from him in that hut." The significance of this cannot be overrated. It is extremely unlikely that Ma Ngwe would have suffered her son to undergo so much trouble in the matter of a place of residence and, when it is further found that she never on any occasion visited her alleged daughter-in-law, nor even enquired after the latter's health at her successive child-births, we are led to the conclusion that here also the treatment of the plaintiff by Ma Ngwe was not such as would be expected if she had really adopted him as her son and heir.

The plaintiff does not state how he supported himself and his family between 1272 B. E. (the year of his marriage) and 1279. In the latter year, he says, he began to cultivate a portion of the land leased to Ma Ngwe by Daw At. He first stated that Ma Ngwe allowed him to work this portion without rent, but later admitted that he had to pay one hundred baskets of paddy as rent for 1279, and a similar quantity for 1280 (the year in which Ma Ngwe died). He admitted also that he had to take an advance of Rs. 12 from Daw At, paying therefor twenty-five baskets of paddy at the harvest. The fact that the plaintiff had to pay rent for the land worked by him does not militate against his case, because it is admitted that Daw At's own children had to do likewise. On the other hand, it does not help the plaintiff to any appreciable extent. Had he been the *kittima* son of Ma Ngwe, we should have expected that, at this period of his life, he would have taken a prominent position in the conduct of Ma Ngwe's affairs, assisting her in her work, directing her labourers and, generally, doing all that a natural-born son would do, all the while living in befitting style and comfort. The evidence, in our opinion, falls far short of establishing such a state of affairs.

We next have evidence of declarations made by Ma Ngwe, or Maung Wet Gyi, or both, to various persons. Her statements

to her brother-in-law, Maung Saw Maung, and to the school manager, Maung San Hpu, have already been referred to. There are also Maung Po Mya, the headman, Ma The Ngwe (seventh P. W.), sister of Maung Wet Gyi, and Saya Pe (fifteenth P. W.). All these persons speak to having been told that the plaintiff was an adopted son, *mwe-za-de-tha*. The same or a similar expression is used by a number of other witnesses, who testify to the general repute in the village concerning the relationship between the plaintiff and Ma Ngwe. But, as pointed out in *Shwe Kin* v. *Maung Sin* (1), the use of the word "*mwe-za-de*" by witnesses is not sufficient to establish a *kittima* adoption.

Great reliance is, however, placed on what might, in some circumstances, amount to a public declaration as to the high status enjoyed by an adopted son, namely, the inclusion of the plaintiff's name as the son of Ma Ngwe in lithic inscriptions recording the public acts of charity performed by her and her relatives. One of these is alleged to have been carved on the base of a marble image, dedicated by Ma Ngwe and installed in a *tazaung* erected at her expense for public adoration. The defence is that there never was any such inscription, and that the evidence concerning it is a pure fabrication. Maung Sein (fourteenth P. W.), a Revenue Surveyor, deposes that some time in November or December 1920 (while the suit was pending) he, accompanied by Maung Po Mya, visited the *tazaung*, saw the inscription, and wrote out a copy of it, filed as Ex. "C." This reads as follows:—"1274 B. E. Deed of merit of ( ), *dayaka*, and Ma Ngwe, *dayakama*, donors of the Sataungpyi image, daughter of U Shwe Min and Daw At, donors of the Lwan Zedi Pagoda and granddaughter of U Waing, Daw Khwe, U Hmon and Daw Pye of Dabein and her (Ma Ngwe's) sons, Maung Khwe and Maung Po Kan, for the attainment of Nirvana. May nats and men call '*Thadu*' (very well)."

Maung Khwe was the natural-born son of Ma Ngwe and Maung Po Kan is the plaintiff.

If it be proved that this legend was inscribed under instructions from Ma Ngwe, and that she authorized the inclusion of the plaintiff's name as one of her sons, we should have no hesitation in accepting this as cogent evidence of Ma Ngwe's intention as regards the plaintiff's status. When the donor of an image, or a religious or other charitable building, sets up a public record of a gift and in it mentions the names of his or her relatives, both dead and living, it can safely be assumed that the relationship between the donor and those whose names are thus included is definitely admitted and proclaimed. And where, as in this case, one of them is an adopted son, but is referred to simply as a son, it must be taken that a *kittima* adoption was intended.

That there was such an inscription we have no doubt. Maung Sein is supported by Maung Po Mya, the village headman. There are, it is true, discrepancies between his evidence and that of Maung Sein as to exactly how they happened to go together to the *tazaung* on the occasion when the copy was made, but we accept their testimony as to the facts that they saw the inscription and that one of them made a copy of it. It is extremely improbable that public servants of their position would have deliberately fabricated this story of a non-existent inscription in a place to which access is available and easy. Moreover, Saya Pe (fifteenth P. W.), a physician, fifty-five years old, and a disinterested witness, said that he had seen an inscription on the base of the marble image a little more than a year before he gave evidence; that would be about January or February 1920; and Maung Saw Maung, who bought the image for Ma Ngwe, saw an inscription after its installation. The second defendant denies that he ever saw any inscription on the base of the image; he admits that the *tazaung* used to be kept open, but states that since December 1920 (it is noteworthy that this is in all probability later than the date on which Surveyor Maung Sein made his copy), when lacquer gum was painted on the base and on the pedestal with a view to gilding them with gold-leaf, the *tazaung* has been kept closed When photographer Maung Sein (eleventh P. W.) went on the 20th December 1920 to take a photograph of the image, he found the base of the image and the pedestal besmeared with lacquer gum and hence the print (Ex. "E") shows no traces of any inscription. Accepting, as we do, the evidence that an inscription like Ex. "C" did exist till about the month of November 1920 we are led to the conclusion that someone, having learnt of the copy

(1) 87 Ind. Cas. 673; 10 L. B. R. 376 at pp. 381, 385.

taken by Maung Sein and Maung Po Mya, and with a view to defeating the plaintiff's case on this point, intentionally covered up the writing carved on the base of the image. For this reprehensible conduct the defendants must be held responsible, though it is impossible to determine who it was that actually instigated, or carried out, the idea.

However, it happens that this inscription does not materially assist the plaintiff's case, for there is an utter lack of testimony as to its origin. No one can say who ordered or authorized it, who executed the carving, or when it was carved. Thus, for want of this important and essential evidence, we are unable to hold that Ma Ngwe gave instructions for the inclusion of the plaintiff's name as her son, or even that Ma Ngwe was aware of the fact.

The other inscription is on four marble slabs which were intended to be the record of the building of the Lwan Zedi Pagoda by Daw At and her relatives. Exhibits "D-1" and "D-2" are photographs of two of these. They contain the words "Ma Ngwe and her son, Maung Po Kan." Apparently these slabs were never placed in the position intended for them, and the defendants' case is that the plaintiff's name had been inserted without proper authority and that they would not set up the stones until the error was rectified. Maung Ba says that he gave the sculptor, Saya Naung (thirteenth D. W.), at Mandalay a list of the names to be carved on five slabs; four for the Pagoda at Dabein, and one for a shrine at Kyaikto. Saya Naung says that he finished the Kyaikto stone at Mandalay and sent it away from there to Kyaikto, and that he then came to Dabein and started to work on the four stones at that place.

Now the photographs of the Kyaikto inscription (Exs. "2-A" and "2-B") show the words "Ma Ngwe and her son, Maung Po Kwe," that is the infant son who died. Saya Naung says that, after he had begun his work at Dabein, Maung Wet Gyi asked him to alter one name; that he did so; that he does not remember that name and cannot give particulars to identify it; that, after he had finished his work, he received payment from Daw At and returned to Mandalay; that no one came to look at the completed inscriptions; that about a year afterwards Maung Ba came to him at Mandalay and asked him to rectify a mistake in one name in the inscription; and that he promised to proceed to Dabein for the purpose but has not done so yet. All this took place in 1273 or 1274 B.E. We have no reason to disbelieve Saya Naung, who is not shown to be interested in any way, and we must hold that his evidence points to an interference on the part of Maung Wet Gyi who, no doubt, was anxious to have the plaintiff's status made definite and unmistakeable. At the very least, there is no evidence that Ma Ngwe herself allowed the plaintiff's name to be entered instead of that of her natural-born son.

Two other items remain. One relates to the admitted fact that a piece of land measuring about forty-seven acres was purchased jointly, and still stands in the joint names of Ma Ngwe, the plaintiff, Maung Po Shan, and Ma Lay. This, undoubtedly, lends support to the plaintiff's claim, and it is urged on his behalf that Ma Ngwe would not have permitted it if she had not regarded the plaintiff as her son. The plaintiff himself says nothing about this land, and none of his witnesses depose to the purchase, or to the reason for the inclusion of the plaintiff's name. Maung Po Shan, one of the joint owners, says that the name "was put in to give him a share in it, in lieu of the value of the work done by him." And "It was bought before the plaintiff got married in 1272. Ma Ngwe died in 1280. During that period no profit was enjoyed by the plaintiff. Ma Ngwe enjoyed half share of the profits. The land was bought with borrowed money, which was re-paid out of the profits. The borrowed money has not yet been re-paid in full."

In the absence of evidence for the plaintiff, it is not, we think, improbable that Ma Ngwe, in allowing the plaintiff's name to be inserted in this way, merely intended to promote the plaintiff's welfare in return for his services, though, had the other evidence on the record clearly indicated a higher intention, we might have accepted this as an additional reason for coming to a decision in the plaintiff's favour.

Finally, the plaintiff points to the fact that, on the death of Maung Wet Gyi, the latter's widow unquestioningly allowed him to share in the property left by him. Thus, having been acknowledged as the son and heir of Maung Wet Gyi, he wishes the Court to conclude that he was equally the son and heir of Ma Ngwe, since he had been adopted during the coverture of those two. But Maung Wet Gyi did not take his

second wife until after the present suit was filed; and neither his statement at his marriage that Maung Po Kan was his son, nor the fact that his widow admitted that that was so by giving the plaintiff a portion of his estate, can help the plaintiff's case, inasmuch as all these things happened after Ma Ngwe's death and after the question of the plaintiff's status had arisen.

This is practically all the evidence in support of the plaintiff's claim. The defence story that the plaintiff was really adopted by Po Shwe Daung may be entirely disregarded. It was not put forward in the defendants' written statement and appears to be the outcome of an after-thought arising from the fact that some of the plaintiff's witnesses admitted that Po Shwe Daung used to look after the child. When the plaintiff came on the scene Po Shwe Daung was about fifty years old, divorced from his wife earning Rs. 12 or Rs. 13 a month, add living alone in a granary. It is incredible that a middle-aged man, situated as he was, would take an infant in arms in adoption and, in spite of the evidence in support of the story, we must hold that it is not founded on fact.

We have then the following points established :—The plaintiff lost his mother while still an infant and his father was unable to rear him. Ma Ngwe with her husband's subsequent approval, gave the child a home, fed and clothed him, and took some interest in his education. While he was still a little boy, she made statements and allowed it to be known that she had adopted a son, and many people in the village looked upon the plaintiff as the adopted son of Ma Ngwe. When he grew to adolescence, she took part in his *shinbyu* along with six other boys, and, later, finding that he was not inclined to study, utilized his services in field work. She took no interest in his marriage, or in his wife and children, and, beyond permitting his wife to use a vacant house belonging to her as a maternity shelter, did not provide any place of residence for them. In return for his labour during many years, the plaintiff was allowed to work a small area of paddy land on payment of rent, and his name was included as joint owner of a piece of land bought by her and two others.

On the state of facts, we are unable to hold that a *kittima* adoption has been made out. There is sufficient material for holding that Maung Wet Gyi and Ma Ngwe, with charitable intent, did take the child in adoption ; Maung Wet Gyi's efforts on the plaintiff's behalf show that there was some foundation for the claim; but, in order to establish an adoption on the basis of one who will inherit to the entire exclusion of relatives by blood, much more is needed. The *Manukye Dhammathat* requires that a *kittima* son or daughter should have been adopted with the intention, publicly signified, of taking the adoptee as a son or daughter who will inherit. This intention may have been expressed at the time of the taking or later or may be inferred from a long course of conduct making such intention public. It may, and probably sometimes does, happen that a child is at first taken casually and without any intention that it should ultimately occupy the same legal position as that of a natural-born child, but later on, for a variety of reasons, the adoptive parents may come to look upon the son or daughter as their own and invest the child with privileges and duties which clearly show the subsequent formation of the required intention. But we are unable to hold that this has heen the case in the matter before us. Neither from the conduct of Ma Ngwe, nor from that of her mother, brother, and sisters, can we gather the fact that the plaintiff came to be regarded as a member of the family endowed with the rights and responsibilities of one who was born in it.

The conclusion arrived at by the Court below was, therefore, correct; its finding must be confirmed and this appeal dismissed. We cannot refrain, however, from marking our disapproval of the way in which the defendants have contested the case; in particular, the belated setting up of an alleged adoption by Po Shwe Daung, and the tampering with the inscription on the base of the image, are matters which cannot be passed over without comment. We, therefore, think that the defendants should not be allowed their costs, either in this or in the District Court. The decree appealed from is otherwise confirmed.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1535 OF 1922.

January 9, 1925.

Present:—Mr. Justice Chakravarti.

RAHIMUDDIN SARKAR AND OTHERS —DEFENDANTS—APPELLANTS

versus

UMESH CHANDRA KHASNABISH— PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 11—Estates Partition Act (V B. C. of 1897)—Batwara *papers, entries in, admissibility of, as against stranger to proceedings.*

Entries in *batwara* papers are in no way binding upon strangers to the proceedings under the Estates Partition Act. [p. 694, col. 2.]

Janki Dobey v. *Kirtarath Roy*, 4 Ind. Cas. 316; 13 C. W. N. 93, distinguished.

So far as a stranger is concerned the only way in which these papers can be treated as evidence would be under s. 11 of the Evidence Act. [p. 695 col. 1.]

Appeal against a decree of the Subordinate Judge, Dinajpur, dated the 15th February 1922, reversing that of the Munsif, Raigunj, dated the 28th June 1920.

Babu *Radhika Ranjan Guha*, for the Appellants.

Babus *Jitendra Kumar Sen Gupta* and *Profulla Chandra Nag*, for the Respondent.

JUDGMENT.—This is an appeal by the defendants and arises out of a suit for possession brought by the plaintiff under the following circumstances. The plaintiff's case was that the lands in dispute belonged to his *zemindari*, which after partition amongst his co-sharers fell to his exclusive share in the year 1325. The lands according to the plaintiff belonged to *Mouza* Lakshmipur and were held by a *Kotwal* as *chakran* lands and no rent was paid by him as he held them as service tenure. But the plaintiff further alleged that the *chakran* lands were resumed by an arrangement with the *Kotwal* who was to be paid his wages in cash and not by the profits of the lands as had been the arrangement before the lands were resumed. The defendants were according to the plaintiff trespassers on the land although the plaintiff added that the defendants were in possession under some Settlement from the *kotwal*. The defence of the defendants was that the lands were never held by the *kotwal* in lieu of services but that the defendants held the lands directly under the *zemindar* although the profits of the lands were ear-marked for the wages of the *kotwal*. The defendants also alleged that the rent payable by them for the lands was Rs. 1-4 a year. The learned Munsif held that the plaintiff failed to prove that the lands were *chowkidari chakran* lands and that the plaintiff's story of resumption of any such *chakran* lands was not true. The learned Munsif further found that the defendants who were proved to have been in long possession of the lands even upon the evidence adduced by the plaintiff were tenants holding directly under the landlord and not under the *kotwal*. In that view he dismissed the suit. On appeal by the plaintiff the learned Subordinate Judge has reversed the decree of the Munsif and has given the plaintiff a decree for *khas* possession. The learned Subordinate Judge in considering the question whether the lands were *chowkidari chakran* lands or not relied upon certain entries in the *batwara* papers showing that the lands were recorded there as *chowkidari chakran* lands and there was no mention of the defendants as tenants of these lands. It appears that the defendants objected to the admissibility of these papers as evidence against them. The learned Subordinate Judge held that those papers were admissible in evidence on the authority of the case of *Janki Dobey* v. *Kirtarath Roy* (1). These *batwara* papers were prepared by the Collector under Act V of 1897. In the case relied upon the question was as to the amount of rent payable by a tenant whose name appeared in the *baiwara* papers as a tenant and this Court held that as a partition under Act V of 1897 was made after a proceeding by the Revenue Officers in the way of Record of Rights after notice upon all concerned the partition papers and the entries therein would be some evidence against the parties concerned. The judgment of this Court is as follows:—"We have, therefore, no doubt that entries in partition papers as to the amount of rents payable by tenants are evidence in the same way as entries in the Record of Rights prepared under Ch. X of the Bengal Tenancy Act are admissible as evidence under s. 103B. *Prima facie* they are evidence against the tenants, though that evidence may not be very valuable." It was not laid down and it could not be that the presumption which arises as to the correctness of an entry in the Record of Rights under s. 103B of the Bengal Tenancy Act would also attach to an entry in the *batwara* papers. Now, in the present case the defendants

(1) 4 Ind. Cas. 316; 13 C. W. N. 93.

were not recorded as tenants. They were strangers to the proceedings. I do not think, therefore, the reasons upon which the *batware* papers were treated as admissible in evidence against a tenant in the case cited above apply to the case of a stranger to those proceedings. It appears to me that the finding that the lands were *chowkidari chakran* lands is based wholly upon the record in those proceedings. So far as a stranger is concerned the only way in which those papers can be treated as evidence would be under s. 11 of the Evidence Act on the ground that in the partition proceedings the lands were claimed as *chowkidari chakran* lands. The entries in those papers could not be in any way binding upon a stranger to those proceedings. The evidentiary value of those papers it appears to me has been considered from a wrong point of view altogether. I think, therefore, the lower Appellate Court ought to before setting aside the positive finding of the Munsif, find whether the evidence in proof of the plaintiff's claim as to the lands in suit being *chowkidari chakran* lands is sufficient when re-considered in view of the observations made above.

Then it appears that the lower Appellate Court finds that the defendants have not made out that they are tenants holding directly under the *zemindar*. It appears to me that so long as the finding of the First Court stands—the finding that the plaintiff's story of resumption is a false one the plaintiff cannot eject the defendants who according to him were holding the land under the *kotwal*. Until the alleged resumption is established the right of the *kotwal* according to the allegation in the plaint would be subsisting.

A plea of limitation was also raised in the Courts below. The Court of first instance held that in the view that he took of the case the question of limitation did not arise. But the moment it is held that the defendants are trespassers, the plaintiff will have to prove his possession of the land within 12 years of the suit. He may succeed in doing so by showing that the defendants held under the *kotwal* and that the *kotwal's* right to hold the lands as service tenure has come to an end. In that case the possession of the defendants would be adverse from the time when the *chakran* right ceases on account of the resumption of the *howkidari* lands by the plaintiff. But as have pointed out above the lower Appellate Court has come to no finding upon the question as to whether or not the lands were *chowkidari chakran* lands and such were resumed by the plaintiff.

In this view of the case the judgment and decree of the lower Appellate Court are set aside. The appeal should be re-heard by that Court in the light of the observations which I have made in this judgment.

Costs of this appeal and of the lower Courts will abide the result.

Z. K. *Case remanded.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 119 OF 1923.

February 2, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Wallace.

KOPPA ANKI—DEFENDANT—PETITIONER

versus

PONNAPPALLI VENKATA SUBBAYYA—PLAINTIFF—RESPONDENT

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Legal representative of tenant holding over Suit for damages for use and occupation, whether cognizable by Small Cause Court.

The legal representative of a tenant holding over is a mere trespasser. [p. 696, col. 1.]

Vadapalli Narasimham v. *Dronamraju Seetharamamurthy*, 31 M. 163; 18 M. L. J 26; 3 M. L. T. 256, followed.

A suit for damages for use and occupation against such a person when the title of the plaintiff is in dispute falls within the purview of Art. 31 of Sch. II to the Provincial Small Cause Courts Act and is not cognizable by a Court of Small Causes. [p. 696, cols. 1 & 2.]

Savarimuthu v. *Aitharusu Rowthar*, 25 M. 103; 11 M. L. J. 428, relied on.

Petition, under s 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Repalli at Tenali, dated the 21st August 1922, in S. C. S. No. 175 of 1922.

Mr. *P. Satyanarayana Rao*, for the Petitioner.

Mr. *K. Kameswara Rao*, for the Respondent.

JUDGMENT.—The chief point in this Civil Revision Petition is whether the lower Court had jurisdiction to try the suit as a Small Cause Suit. The suit was by the plaintiff to recover damages for use and occupation of his land from the defendant,

Defendant's son was let into occupation of the land as plaintiff's tenant for 5 years under Ex. A. After expiry of Ex. A, he continued a tenant holding over. He died and his mother the defendant continued to cultivate without any notice to quit or protest from the plaintiff for six *faslies*. Plaintiff sues for damages for such use and occupation for three *faslies*, the rest of the claim being time-barred.

The plaint is clearly on the footing that the claim is for such damages and not for rent on the footing of the *kabuliyat* Ex. A. Defendant argues that this is a suit which is prohibited by Art. 31 of the Second Schedule of the Provincial Small Cause Courts Act from being tried by a Small Cause Court. Plaintiff urges that this objection was not taken before the District Munsif. It is certainly taken in the defendant's written statement, and as the District Munsif has not put down in his judgment the points for determination, we are unable to conclude that the point was abandoned by the defendant.

This is not a suit in which the defendant came into possession by permission of the plaintiff or admits the plaintiff's title or is estopped from denying the plaintiff's title. The legal representative of a tenant holding over is a mere trespasser: see *Vadapalli Narasimham* v. *Dronamraju Seetharamamurthy* (1) and in her written statement the defendant definitely challenges the plaintiff's title and sets up title in herself. There is, therefore, no contractual relationship between the plaintiff and the defendant on the footing of which, the suit is based, and the question of title cannot be avoided. Plaintiff has first of all to establish that he is the lawful owner of the land before he can sue for damages for use and occupation. It is true that the defendant pleades in the alternative payment of *maktha cist* to the plaintiff yearly but it is not the plaintiff's case that there was any *kabuliyat* between himself and defendant on which such *maktha* became payable. Hence this is not a case similar to those in *Vira Pillai* v. *Rangasami Pillai* (2) and *Subba Rao* v. *Sitharamayya* (3) in which the defendant had in the first instance entered on the land with the permission of the plaintiff or the plaintiff's predecessors-in-title and, therefore, the question of title was not in issue.

(1) 31 M. 163; 18 M. L. J. 26; 3 M. L. T. 256.
(2) 22 M. 149; 8 Ind. Dec. (N. S.) 106.
(3) 24 M. 118; 11 M. L. J. 26.

The present case, therefore, is one in which the defendant has received mesne profits under a claim of title and one who claims to be the rightful owner in seeking to recover the same after having an account taken of the mesne profits. This appears to us to be a case covered by the Full Bench decision in *Savarimuthu* v. *Aitharusu Rowthar* (4) and not cognizable by the Court of Small Causes. The lower Court, therefore, had no jurisdiction to try the case.

It is argued by the plaintiff that this is not a case in which we should interfere in revision because the defendant has not been prejudiced. To this we cannot agree. The lower Court has ignored the issue of title and we cannot find that it was abandoned by the defendant. Plaintiff is not absolved from the duty of proving his title and defendant is prejudiced by the Court having so absolved him. We must, therefore, interfere and set aside the lower Court's decree and remand the case for disposal on the Original Side of the Court. Costs up-to-date will abide the result.

V. N. V. *Decree set aside;*
Z. K. *Case remanded.*

(4) 25 M. 103; 11 M. L. J. 528.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 814 OF 1923.
January 14, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

TUKARAM DHONDI TAKAMARE—
DEFENDANT—APPELLANT
versus
BALABAI NAIGU TAKAMARE—
PLAINTIFF—RESPONDENT.

Injunction, suit for—Possession—Title, proof of—Burden of proof.

A plaintiff who proves a *prima facie* title coupled with possession is entitled to be protected against disturbance by an outsider unless such an outsider proves that he has a better title than the plaintiff.

Hanmantrav v. *Secretary of State for India*, 25 B. 287; 2 Bom. L. R. 111, followed.

Second appeal from the decision of the District Judge, Balgaum, in Appeal No. 180 of 1922, confirming the decree of the Subordinate Judge at Chikodi, in Civil Suit No. 471 of 1920.

Mr. *Nilkanth Atmaram*, for the Appellant.

Mr. *A. G. Desai*, for Respondent No. 1.

JUDGMENT.—The plaintiffs sued for an injunction against defendants restraining them from obstructing the plaintiffs or their men in the enjoyment of the plaint land. It was alleged that the plaint land belonged to plaintiff No. 1, and was in her *vahivat*, that her husband held and enjoyed the land as remuneration for his services as *sanadi*; that defendant No. 1 had no right to it; that the services were recently stopped and the land shown in attached *sanadi* land; that the *khata* was changed to the name of plaintiff No. 1; and that full assessment was collected from her.

Defendants Nos. 1 and 2 by their written statement contended that the plaint land was assigned for *sanadi* services and was in the possession of defendant No. 1; that defendant No. 1 had worked therein that the plaintiffs were not in possession of it; that the land was the ancestral land of the family; that Lingoo and his brothers, Sakharam and defendant No. 1 divided the land; that Lingoo was being paid Rs. 20 for his services as *Sanadi* by his brothers; that on his death in 1906 defendant No. 1's son Kallappa was appointed a *sanadi* by Government and was given the whole land for his remuneration by Government; that Kallappa got no money for his remuneration; that the services were stopped in 1911; that full assessment was being collected from Kallappa after the land was attached; that Kallappa performed the services whenever necessary till his death in 1914; that since then defendant No. 1 performed the services whenever necessary; that as the land was *sanadi* whoever performed the services was the owner of the land; that the land became Kallappa's as the services were stopped when he was performing them; that thereafter defendant No. 1 was the owner as he performed the services that after Sakharam and Lingoo died in 1907, Sakharam's son, Rama, and Lingoo's widow Balabai (plaintiff) began to reside in defendant No. 1's house; that plaintiff began to manage the affairs of the family and took care of Rama; and that as she was the elderly person in the family and was managing the affairs defendant No. 1 consented to the change of *khata* to her name.

The first issue was: "Does plaintiff prove that she has possession of the suit land?" That was found in the affirmative. It is unfortunate that a further issue was not raised, whether defendants proved that they had title to the land, because it would be open to the defendants in a suit of this character to resist an injunction being passed against them if they could show that the plaintiff in possession asking for an injunction had no title.

In *Hanmantrav* v. *Secretary of State for India* (1), it was held that the plaintiff being in possession (not shown to have wrongfully originated), such possession was good against the whole world except the person who could show better title, and that the burden of proving such title lay on the defendant. Mr. Justice Ranade said:—

"When a person in possession of land has been dispossessed and sues to recover it, the fact of his previous possession will not entitle him to a decree unless he sues under s. 9 of the Specific Relief Act... within six months of the date of dispossession: If he sues after the six months have expired, he must prove *prima facie* title. In such a case he is entitled to a decree unless a superior title is proved on the other side."

In this case the plaintiff is not suing for possession after dispossession, but she has proved a *prima facie* title coupled with possession. Therefore, she is entitled to be protected against disturbance by an outsider unless such outsider proves that he has a better title than the plaintiff. If this decree were to stand the defendants would be debarred from proving that they had a good title against the plaintiff to the land in dispute. We do not think that is consonant with justice. Consequently we must set aside the decree and remand the case to the lower Court so that the defendants may have an opportunity of proving that they have a superior title to the land in suit. As, however, they are responsible for this issue not having been raised in the Trial Court, the appellants must pay the costs of the suit in this Court and in the Court below. Costs in the Trial Court will be costs in the cause. Liberty to both parties to adduce additional evidence on that issue.

Z. K. *Decree set aside.*

(1) 25 B. 287; 2 Bom. L. R. 1111.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 886 OF 1923.

January 16, 1925.

Present:—Mr. Justice Sulaiman.

DUNGAR—DEFENDANT—
—APPELLANT
versus
JAHANGIR AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 10 (1)—Gift of sir land—Ex-proprietary rights, whether created—Ejectment of sub-tenant, suit for—Co-sharers in mahal, *whether necessary parties—Hindu Law—Joint family between daughter's son and maternal grandfather, whether possible.*

Under s. 10 (1) of the Agra Tenancy Act no ex-proprietary rights are created where there is an alienation by gift and it is immaterial whether the gift is between co-sharers or in favour of a stranger. In the case of a gift the *sir* must retain its character in the hands of the donee [p. 698, col. 2.]

Elahi Bux v. *Nand Kishore*, 31 Ind. Cas. 906, followed.

Where certain plots of land have been the exclusive *sir* and *khud kasht* of a co-sharer from more than twelve years and are let out to a sub-tenant who is the exclusive tenant of such co-sharer, the latter is by himself entitled to eject the sub-tenant and it is not necessary for him in a suit for ejectment to implead persons who though co-sharers in the *khewat* or the *mahal* have no interest in the particular plots of land to which the suit relates. [*ibid.*]

There is no rule of Hindu Law under which a daughter's son and his maternal grandfather can be deemed members of a joint Hindu family. [p. 699, col. 1.]

Second appeal against a decree of the Additional District Judge, Meerut, dated the 17th February 1923.

Messrs. *A. Sanyal*, *P. L. Banerji* and *G. S. Apte*, for the Appellant.

Dr. *N. C. Vaish*, for the Respondents.

JUDGMENT.—This is a defendant's appeal arising out of a suit for ejectment. The Courts below have decreed the claim.

The lower Appellate Court has found that the plots in suit were *sir* and *khudkasht* of more than 12 years standing belonging to Man Singh exclusively, and that the defendant who is a daughter's son of Man Singh was recorded in the papers as a sub-tenant and has actually been paying rent *as such* to Man Singh. Man Singh *gifted* these plots to the plaintiffs-respondents who according to the Judge obtained mutation of names in their favour on the 3rd of August 1921.

The first point raised is that after the transfer in 1921 Man Singh became ex-proprietary tenant and that, therefore, the plaintiffs have no right to eject the defendant, a sub-tenant, but that the only person who can eject would be the ex-proprietary tenant. This point was never raised in either of the Courts below at all. The reason obviously is that the point is altogether futile. The transfer in question was by way of a gift to the plaintiffs. Under s. 10, sub-cl. (1) no ex-proprietary rights are created when there is an alienation by gift. It has been contended before me that that exemption is confined to cases where the gift is between co-sharers in the *mahal*. I am unable to accept this contention. Gift is not confined to that between co-sharers, but it is only exchange which is so confined. This was the view expressed by the Board of Revenue in the case of *Elahi Bux* v. *Nand Kishore* (1). I fully agree with the view expressed in that case. If the transfer is by gift the *sir* must retain its character in the hands of the donee.

The next point taken is that the plaintiffs have no *locus standi* to sue alone. It is urged that under s. 194 of the Tenancy Act the other co-sharers in the village ought to have been impleaded. There is absolutely no force in this contention. The learned Judge has pointed out that these specific plots belonged to Man Singh and that the plaintiffs-respondents have acquired these specific plots from the person who had exclusive possession of them as his *sir* and *khudkasht* for more than 12 years, and that the plaintiffs-respondents are the owners of these plots. The mere fact that there are other co-sharers in the same *mahal* does not give them any right or interest in these specific plots. The defendant is the exclusive tenant of the persons to whom these specific plots belong and these latter persons by themselves are entitled to eject him. It is wholly unnecessary to implead persons who though co-sharers in *khewat* or the *mahal*, have no interest in these specific plots. There was, therefore, no defect of non-joinder in the suit.

The third point raised is that the learned Judge was wrong in finding that the defendant and Man Singh were not members of a joint Hindu family. I am unable to appreciate the significance of this plea. Dungar is the son of a daughter of Man Singh. The daughter of Man Singh cannot in law be deemed to belong to Man Singh's joint family after she has been married away to another family. Her

(1) 31 Ind. Cas. 906.

son does not belong to Man Singh's joint family. There is no rule of Hindu Law under which a daughter's son and his maternal grandfather are deemed to be members of a joint Hindu family.

Lastly it is urged that there is no evidence to support the finding of the learned Judge that these specific plots were transferred by Man Singh to the plaintiffs. There was no plea taken in the grounds of appeal that there is no such evidence on the record Had such a plea been taken it would have been the duty of the Counsel for the appellant to examine the record before hand and certify that such a plea was well-founded. The respondents' Counsel cannot be taken by surprise at a late stage when the appeal is called on for hearing. I cannot allow this plea to be taken. I may also mention that Mr. Sanyal is not even at this moment prepared to certify that such a ground is well-founded. What he really asks is that he may be given half an hour's time to inspect the record to enable him to certify the plea. I cannot allow this.

The result is that this appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No 29 OF 1923.

January 8, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

INDURAI BHAURAI DESAI—PLAINTIFF—APPELLANT

versus

SHIVLAL NABHUBHAI—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1871), ss. 1, 29, Sch. II, Art. 148—Mortgage—Redemption—Acknowledgment made after expiry of period of limitation, whether extends limitation.

Plaintiff instituted a suit to redeem certain property situated in the Panch Mahals District said to have been mortgaged on 8th June 1761. The plaintiff relied upon an acknowledgment said to have been made by the descendants of the mortgagee in 1858. The Panch Mahals District became a part of British India in 1861 and the first Act of Limitation which applied to that District was Act IX of 1871:

Held, (1) that the suit not having been brought within two years of the coming into force of Act IX of 1871, the period of limitation applicable to it was that provided by Art. 148 of Sch. II to that Act; [p. 699, col. 2.]

(2) that limitation under Art. 148 of Sch. II to the Limitation Act of 1871 began to run from the date of the mortgage and that the suit was, therefore, barred by time; [p. 700, col. 1.]

(3) that the alleged acknowledgment made in 1858 having been made more than sixty years after the date of the mortgage did not operate to extend limitation. [p. 699, col. 2.]

Second appeal from the decision of the Assistant Judge, Ahmedabad, in Appeal No. 217 of 1919, confirming the decree of the Subordinate Judge at Godhra, in Civil Suit No. 249 of 1916.

Mr. *G. N. Thakor* (with him Mr. *M. H. Mehta*), for the Appellant.

Mr. *H. C. Coyajee* (with him Mr. *H. V. Divatia*), for Respondent No. 1.

JUDGMENT.

Macleod, C. J.—This action was instituted by the plaintiff to redeem and recover possession of property said to have been mortgaged by a mortgage-deed of June 8, 1761. The lower Courts have held the mortgage proved, though there may be considerable doubts whether the original document, of which Ex. 84 purported to be a copy, was really a mortgage within the terms of s. 58 of the Transfer of Property Act. However, we may assume, for the purposes of this appeal, that the property was mortgaged in 1761.

The next question is whether the suit is within time. The plaintiff relied upon an acknowledgment said to have been made by the descendants of the mortgagee in 1858. Assuming again that there was such an acknowledgment, which I am not prepared to accept without doubts, would that be an acknowledgment sufficient to save the time bar? It is conceded that the Indian Limitation Act IX of 1871 applied to this mortgage, and consequently a suit to redeem would have to be brought within two years of the Indian Limitation Act coming into force, as the mortgage had been executed more than sixty years before that date, and if a suit was brought thereafter the plaintiff would have to rely on an acknowledgment of his title to redeem, given in writing and signed by the mortgagee or some one claiming under him within sixty years of suit. But the acknowledgment, assuming there was one in 1858, having been given more than sixty years after the date of the mortgage, will not avail the plaintiff, as it seems, in spite of the ingenious argument of the appellant's Counsel, that it comes within the decision of the Privy Council

in *Fatimatulnissa Begum* v. *Sunder Das* (1). In that case the mortgage was dated October 17, 1788. The suit would have been barred in the absence of any acknowledgment made within sixty years from the date of the mortgage on October 17, 1848, by the effect of Act XIV of 1859, s. 1, cl. (15) which barred the suit after January 1, 1862. Act IX of 1871, by s. 29, provided that at the expiration of the period granted to any person for instituting a suit for the possession of land his right to such land should be extinguished. Their Lordships dealing with the contention that there had been a written acknowledgment prior to October 17, 1848, held that it had not been proved, with the result, that as from October 17, 1848, the right of the mortgagors to sue was barred by force of the Act of 1859 and their right to the land was extinguished by force of the Act of 1871.

In this case, therefore, not only was the right to sue barred by the force of the Act of 1871, the first Act of Limitation applicable to the case, but the mortgagor's right to the land was also extinguished, for it is impossible to distinguish the case I have cited on the question of principle from the case before us. There are many other grounds on which the plaintiff's suit could be dismissed, but it is sufficient for our purpose to hold that the suit for redemption is barred.

I should like before concluding this judgment to make special reference to the really admirable judgment of the Subordinate Judge in the Trial Court. The appeal is dismissed with costs.

Crump, J.—I agree that this suit is barred by limitation. The land is situated in the Panch Mahals District, which up to 1861 was not part of British India. At the time of the cession of that District to the British Government, the Act governing limitation was Act XIV of 1859, but that Act had no application to non-regulation or scheduled districts unless specially extended, and it is not disputed that before the enactment of Act IX of 1871 there was no Statute providing a period of limitations or suits in the Panch Mahals District. The position, therefore, was that prior to the enactment of 1871 there was no limitation to a suit of this nature. But assuming that before the Act of 1871 came into force any person was subject to the provisions of that Act, such a person had the option of filing the suit before April 1, 1873. But if he did not do so, then the period of limitation will be that provided in the Schedule to the Act of 1871.

The question which we have to determine is whether any such suit, as I have indicated, not having been filed, a suit of the nature now before us would be barred under the Act of 1871. For that purpose reference must be made to Art. 148 of the Second Schedule. The period allowed by Art. 148 is sixty years, and in the third column it is said that the time will be extended where an acknowledgment of the title of the mortgagor or of his right of redemption has been made within the prescribed period. Now assuming that we have here such an acknowledgment, then the question is whether that acknowledgment is within the prescribed period. For the purpose of Art. 148 I take it that the Indian Limitation Act of 1871 should be construed as having a retrospective operation. "Prescribed period" really means a period of sixty years from the date of the mortgage, and it is conceded that if the document, on which reliance is placed, can be read as disclosing an acknowledgment, that acknowledgment was made more than sixty years from the date of the mortgage. It seems to me, therefore, clear that had the Act of 1871 been applicable to a suit filed for redemption that suit would have been barred, and it is also perfectly clear that the right to sue cannot have been revived by any subsequent enactment.

Z. K. *Appeal dismissed.*

(1) 27 C. 1004; 27 I. A. 103; 4 C. W. N. 565; 7 Sar. P. C. J. 718; 14 Ind. Dec. (N. S.) 657 (P.C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 146 OF 1923.

January 8, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Ryves.

NATHU AND ANOTHER—DEFENDANTS APPELLANTS

versus

Lala RAM SARUP AND OTHERS—PLAINTIFFS RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Mortgage by adult members of joint Hindu family, suit on—Minor member of family, not made party, effect of—Suit, whether maintainable.

In the case of a mortgage executed by the adult

members of a joint Hindu family it is open to the mortgagee, in a suit for sale on foot of the mortgage, to ask the Court to grant him a decree against the persons who borrowed the money from him and who had executed the mortgage, for they cannot be allowed to plead want of authority to make the mortgage. Such a suit is not liable to dismissal merely on the ground that a minor member of the joint family of the mortgagors has not been impleaded as a party to the suit. The decree, however, passed in such a suit would not affect the interests of the minor who has not been made a party to the suit.

Shiam Sunder Lal v. *Budhu Lal*, 24 Ind. Cas 252; 12 A. L. J. 794 and *Hori Lal* v. *Nimman Kunwar*, 15 Ind. Cas. 126; 34 A. 549; 9 A. L. J. 819, referred to.

Chetan Singh v. *Sartaj Singh*, 79 Ind. Cas. 1001; 46 A. 709; 22 A. L. J. 702; (1924) A. I. R. (A.) 908, distinguished.

Second appeal from a decree of the Additional Judge, Saharanpur, dated the 26th October 1922.

Dr. *M. L. Agarwala*, for the Appellants.

Mr. *Nehal Chand*, for the Respondents.

JUDGMENT.—This is a defendants' appeal arising out of a suit for the sale on the basis of a mortgage-deed executed on the 4th of July 1911 by two brothers, Nathu and Faqira, the defendants.

The defendants, *inter alia* pleaded that Nathu's son Chhajju who is a minor and a member of a joint Hindu family had not been impleaded. The plaintiffs did not choose to implead him in this case and it is unfortunate that the Court of first instance also perhaps to avoid complications did not think it worthwhile to bring him on the record and thus dispose of all possible disputes.

The Court of first instance, however, dismissed the claim on the ground that Chhajju, the minor member of the family had not been impleaded and the suit, therefore, was defective on the ground of non-joinder. In this, reliance was placed on the case of *Shiam Sunder Lal* v. *Budhu Lal* (1).

The lower Appellate Court has allowed the appeal and held that the suit could not fail on the ground of non-joinder but that the major members of the family actually represented the minor member also and that thus the suit was not defective It has relied on the case of *Hori Lal* v. *Nimman Kunwar* (2).

We are of opinion that the decree of the lower Appellate Court must be upheld but we intentionally refrain from upholding it on the ground that the minor member is represented by the major members.

Our attention has been invited on behalf of the respondents to the case of *Chetan Singh* v. *Sartaj Singh* (3) and it is urged that it supports the view of the lower Appellate Court.

We would like to point out one circumstance which has sometimes been overlooked and which clearly explains the rule of law laid down in the Full Bench case of *Hori Lal* v. *Nimman Kunwar* (2). In that case the mortgagees were not suing the mortgagor, namely, the executant himself, but were trying to follow mortgaged property in the hands of the heirs of the transferee from the mortgagor. Some minor members of the family of the transferee from the mortgagor had not been impleaded. In that case it was obvious that no question of the right of a Hindu minor son to challenge an alienation by the major members for want of legal necessity at all arose. The only question was whether the suit as against the then defendant was maintainable. The Full Bench held that, although the property had been acquired from the mortgagor by the defendant's father it had been acquired by the entire joint family but nevertheless as the major members were impleaded they had represented all the other members. In the same way it may perhaps be pointed out that in the case of *Chetan Singh* v. *Sartaj Singh* (3), the suit was against the heirs of the original mortgagor and not the mortgagor himself.

In the present case we have already noted that the plaintiffs are suing the actual parties to the mortgage-deed, namely, Nathu and Faqira. It is open to the plaintiffs to ask the Court to grant them a decree against the persons who borrowed the money from them and who had made the mortgage as executants, for they cannot be allowed to plead want of authority to make the mortgage. It is difficult to see how in these circumstances the defendants can be said to represent the minor son in the true sense of the word. It is on that ground that we refrain from saying that the suit is a good one because the major members represented the minor. We would like to make it clear that even after this decree it would remain open to Chhajju Singh to sue in a Civil Court to avoid the alienation on grounds which are ordinarily open to Hindu minor members. With this remark we dis-

(1) 24 Ind. Cas. 252; 12 A. L. J. 794.

(2) 50 Ind. Cas. 126; 33 A. 349; 9 A. L. J. 819.

(3) 79 Ind. Cas. 1001; 46 A. 709; 22 A. L. J. 702; (1924) A. I. R. (A.) 908.

miss the appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 277 OF 1923.

January 13, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

SAIBAI GOVIND LAVLEKAR—PLAINTIFF—APPELLANT

versus

BALKRISHNA PANDURANG BANE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVI, r. 1—Summoning of witnesses—Application for summonses, whether can be refused on ground of delay.

Under O. XVI, r. 1 of the C. P. C., a party to a suit is entitled as of right to obtain summonses at any time before the date fixed for the disposal of the suit, and on an application being made for the issue of summonses the Court is bound to issue the summonses and cannot refuse to do so on the ground that the application is made at too late a stage in the suit and that it would not be possible to get the summonses served upon the witnesses in time. If owing to the delay in the making of the application the witnesses are not served and an adjournment is asked for at the hearing it would then be open to the Court to consider whether an adjournment should or should not be granted.

Baikali v. *Alarakh Pirbhai*, 15 B. 86; 8 Ind. Dec. (N. S.) 58, followed.

Second appeal from the decision of the Joint Judge, Poona, in Appeal No. 195 of 1921, confirming the decree of the Subordinate Judge at Vadgaon, in Civil Suit No. 125 of 1917.

Mr. *A. G. Desai*, for the Appellants.

Mr. *A. G. Sathaye*, for Respondent No. 2.

JUDGMENT.—This suit was filed so far back as April 2, 1917. For one reason or another the hearing of the suit was not fixed until April 13, 1921. On April 2, 1921, the plaintiff applied that summonses should be issued to the persons mentioned in the list of witnesses filed in the Court. The learned Judge said :—

"The application is made at too late a stage in this suit. It is not possible to get the summonses served in time as the date fixed is only April 13, 1921. No satisfactory reason is given for calling for the original record of Government. The application is rejected with costs on the plaintiff."

Thereafter the suit was heard and dismissed with costs. The appeal met the same fate.

Unfortunately the attention of neither of the learned Judges was called to the decision of this Court in *Baikali* v. *Alarakh Pirbhai* (1), where it was held that "under s. 159 of the C. P. C., (XIV of 1882) a party to a suit was entitled, as of right, to obtain summonses any time before the date fixed for the disposal of the suit." Section 159 of the old Code is now O. XVI, r. 1, of the Code of 1908, and consequently the Judge was bound to issue summonses to the witnesses according to the application of the plaintiff. If then an adjournment had been asked for at the hearing because the witnesses mentioned in the list, filed on April 2, 1921, did not attend, the Court would have considered whether it should be granted. We must, therefore, set aside the decree of the lower Appellate Court and remand the suit to the Trial Court for a re-trial.

All costs to be costs in the cause.

Z. K. *Order set aside.*

(1) 15 B. 86; 8 Ind. Dec. (N. S.) 58.

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

November 18, 1924.

Present:—Lord Sumner, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

Mirza FIDA RASUL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Mirza YAKUB BEG AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Wakf—*Coercion*—*Undue influence.*

A childless Muhammadan of about 67 years of age executed a deed of *wakf*, comprising the greater portion of his property, by which he appointed himself the *mutwalli* of the *wakf* during his lifetime and appointed one of his nephews as *mutwalli* after his death. Another nephew was appointed supervisor and provision was made for the emolument and expenses of both of them. It was found that the settlor was of sound disposing mind at the time of the execution of the deed. He reserved a substantial portion of the property for the maintenance of himself and his wife. He continued to live for seven years after the execution of the deed and gave effect to it in the character of *mutwalli*:

Held, that it could not be said that the provision in favour of the nephews was at all unreasonable or

that the settlor had been dominated or coerced by his nephews into executing the deed.

Appeal against the judgment and decree of the Court of the Judicial Commissioner, Oudh (Mr. Daniels, A. J. C. and Mr. Dalal, A. J. C.), dated the 10th November 1922, in First Civil Appeal No. 55 of 1920, reported as 74 Ind. Cas. 517.

Messrs. *A. M. Dunne* and *B. Dube*, for the Appellants.

Messrs. *DeGruyther* and *S. Hyam*, for the Respondents.

JUDGMENT.

Lord Sumner.—In July of 1911 Mirza Habibullah Beg executed a deed of *wakf*. He was at that time a man of about 67 years age. He lived for some seven years afterwards. In substance this appeal raises, and raises only, the question whether that deed of *wakf* ought to be set aside upon the ground that Mirza Habibullah Beg's mind was so dominated by two nephews, who managed his business, that the transaction ought not to stand. The Trial Judge misled, as their Lordships think, by some misappprehension as to the onus of proof and also by some confusion between setting aside the whole deed and merely avoiding a particular provision in a deed which benefits a person under a fiduciary relation to the maker of it, came to the conclusion that he should set aside the entire deed of *wakf*. This judgment was reversed on appeal. There are concurrent findings of fact that Mirza Habibullah Beg when he executed this deed was *compos mentis*, was of a sound disposing mind, and, as far as is known, was in no way disqualified by his infirmities from understanding what he was doing. During the rest of his life he not only never challenged this deed of *wakf*, but there is evidence that he recognised it, spoke of it as being in existence, and gave effect to it, he himself having been named in it as the *mutwalli* during his lifetime. He did not denude himself of the whole of his property, for he reserved a substantial portion for the maintenance of himself and his wife. He was himself childless and when the deed comes to be examined it is in no respect unconscionable. Though not very skilfully prepared, it is quite clear and is entirely such as a reasonable and piously disposed Muhammadan might have chosen to enter into. The only thing that can be said against it, or that has been said against it, in substance is that it conferred certain benefits upon these two nephews because one was appointed *mutwalli* after Mirza Habibullah Beg himself, and the other was appointed supervisor, and provision was made for their emoluments and expenses. The Court of the Judicial Commissioner formed the opinion, with which their Lordships entirely agree, that such provision was not at all unreasonable in amount or in character, and under these circumstances they came to the conclusion, which their Lordships think is the right conclusion, that, as a matter of fact, the deed was the disposition of Mirza Habibullah Beg himself, made with an understanding mind, free from domination or coercion or undue influence by others. They also found, and their Lordships agree in the finding, that he was not coerced or dominated in any way from that time to the day of his death, a finding which in itself would dispose of the matter, because unless the contrary can be made out, the suit is barred by limitation. The Court of the Judicial Commissioner went elaborately into the authorities, and their Lordships think it unnecessary to discuss them now. They show that there is no question here which is not disposed of by the findings of fact. The Court of the Judicial Commissioner further expressed an opinion upon the question whether, according to the Mussulman Law, a *wakf* of cash is valid. This has not been discussed before their Lordships, and without indicating any dissent from the opinion of the Court of the Judicial Commissioner, their Lordships think it unnecessary to express any opinion upon this point of their own. In the result the appeal fails and should be dismissed with costs and their Lordships will humbly advise His Majesty to that effect.

K. Z. *Appeal dismissed.*

Solicitor for the Appellant:—Mr. *Holak*.

Solicitors for the Respondents:—Messrs. *Barrow, Rogers* and *Nevill*.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No 245 OF 1921.

February 18, 1924

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

GANGABISAN JEEVANRAM MARWADI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VALLABHDAS SHANKARLAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Sale by co-parcener—

Possession obtained by purchaser, whether wrongful—Mesne profits, liability for.

Although the purchaser of a particular portion of joint family property or of the interest of one of the members of the family in any particular item of joint property may not be entitled to possession, yet if he gets possession his possession cannot be considered as wrongful against the other members of the family and he is not liable to account for the mesne profits. All that the law allows is that a co-parcener is entitled to recover possession from an outsider of the joint family property or any portion of it. But if he stands by and allows an outsider to remain in possession, then although his share in that property or interest in that property is not thereby affected, he is not entitled to demand an account for the past profits.

First appeal from the decision of the First Class Subordinate Judge at Dhulia, in Suit No. 188 of 1918.

Sir *Chimanlal Setalvad* (with him Mr. *R. W. Desai*), for the Appellants.

Mr. *H. C. Coyajee* (with him Mr. *M. V. Bhat*), for Respondent No.1.

JUDGMENT.—[His Lordship, after stating the facts proceeded:—] With regard to the mesne profits, we do not think that the auction-purchasers were bound to account to Vallabh for mesne profits before proceedings were taken for partition of the properties. The learned Judge has allowed mesne profits on the ground that the auction-purchasers were in possession wrongfully. But although the purchaser of a particular portion of joint family property, or the purchaser of the interest of one of the members of the family in any particular item of joint property may not be entitled to possession, it follows, if he gets possession, that his possession cannot be considered as wrongful possession against the other members and he cannot be liable to account for the mesne profits. All that the law allows, as we understand it, is that a co-parcener is entitled to recover possession from an outsider of the joint family property or any portion of it. But if he stands by and allows an outsider to remain in possession, then although his share in that property or interest in that property is not thereby affected, he is not entitled to demand an account for the past profits. We think that although the decree in Suit No. 212 of 1915 was confirmed by the High Court, it was intended that if the plaintiff filed his suit for partition, the question with regard to mesne profits would remain open. That is the only possible interpretation that can be put on that order, because we do not think that it was intended that the question of mesne profits should be excluded from the purview of any suit that the plaintiff might file under the direction of the High Court order dated March 1, 1918. We think, therefore, that in this case defendant Vallabh is only entitled to mesne profits from the date of suit at the rate at which they have been calculated, namely, Rs. 300 a year, in the previous suit. That will be the amount which the plaintiffs will be responsible for, and they must be given credit for the amount which was already paid by them in execution proceeding in Suit No. 212 of 1915. The order of the lower Court will, therefore, stand with this addition that the defendant No. 2 shall be held to be entitled to the mesne profits from the date of suit at Rs. 300 a year with interest until he gets possession of his father's share, or until partition, and that credit must be given for the amount of Rs. 1,735 paid in execution of the decree in Suit No. 212 of 1915.

Out of the other twelve suits in which decrees were passed for partition and payment of mesne profits to Vallabh, only two of the defendants auction-purchasers have filed appeals. These are Appeals Nos. 262 and 263 of 1921. The order in each suit awarding past mesne profits to the plaintiff Vallabh must be deleted so that only the inquiry as to future profits from the date of suit till recovery of possession of partition will stand.

In all the other suits in which orders have been passed for mesne profits, the question of mesne profits should be restricted to mesne profits from the date of suit. Credit must be given with regard to any past mesne profits which have been paid. All the parties are before us in the partition suit either as appellants or as respondents so that if any appeals have been filed in the lower Court they can be transferred *pro forma* to this Court.

Each party to bear his own costs of the appeal.

Cross-objections are dismissed. No order as to costs.

Z. K. *Decree varied.*

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL No. 27 OF 1922.
March 19, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

KALLAPA MALLAPPA HOSMANI—DEFENDANT—APPELLANT

versus

KALAPPA NINGAPPA—PLAINTIFF—RESPONDENT.

Adverse possession—Death of owner—Brother of deceased managing property—Adoption by widow of deceased—Appeal, second—New point of law.

The High Court will, in second appeal, allow a point of law, which arises on the issues as framed and on the evidence led in the Trial Court, to be taken for the first time. But if the point sought to be taken is such that it cannot be decided without remanding the case for further evidence the High Court will not allow it to be raised.

On the death of a Hindu his widow continued to live with his brother, who also obtained possession of the property of the deceased. The widow subsequently made an adoption, and the adopted son sued to recover the property from the brother of the deceased:

Held, that under the circumstances it must be presumed that the defendant managed the property on behalf of his brother's widow intending merely to help her and that his possession was not adverse either to the widow or to the plaintiff.

Letters Patent Appeal against the decision of Mr. Kincaid, J., in Appeal No. 246 of 1922, summarily dismissing an appeal from the decision of the Assistant Judge, Belgaum, in Appeal No. 277 of 1920, reversing a decree passed by the Subordinate Judge, Bail-Hongal, in Civil Suit No. 351 of 1919.

Mr. *G. N. Thakor* (with him Mr. *H. B. Gumaste*), for the Appellant.

Mr. *H. C. Coyajee*, (with him Mr. *A. G. Desai*), for the Respondent.

JUDGMENT.

Macleod, C. J.—[His Lordship after setting out facts said:—] It is now argued that even assuming that certain property was assigned by Mallappa to Nigappa and Basvantappa, they would not hold it as joint tenants but as tenants-in-common, so that when Basvantappa died and his widow re-married his share of the property would go to his heirs. Now it is quite clear that no attempt was made to raise this question in either of the lower Courts. If it was a point of law arising on the issues as framed and on the evidence as led in the Trial Court, there is no doubt that in second appeal we could have entertained that point. But it is quite clear that we could not decide this point of law without remanding the case for further evidence, and that being so the point of law is no longer competent. Moreover, it may safely be assumed that under the arrangement by which Mallappa divided his property between his children by his two wives it was intended that Nigappa and Basvantappa should take the property assigned to them together with their mother, and that when Basvantappa died Ningappa should remain in possession as survivor. However that may be, the point was never taken in the lower Courts and cannot be taken now.

Then the only question remaining is whether defendant, Kalappa, can be said to have acquired a title by adverse possession to the suit property. No doubt, as found by the Trial Court, there are certain facts proved to show the manner in which Kallappa dealt with the property after Ningappa died when Ningappa's widow Irava was living with him. It is a question whether on these facts the proper inference is that Kallappa was holding adversely to the reversioners who would succeed to the property on the death of Irava. If Kallappa had been an outsider the inference to be drawn from his conduct would have been entirely different. Taking into consideration the relationship of the parties, and the fact that Irava had no other male member in the family to manage her property, it was not an impossible inference to draw that Kallappa, so far from asserting a right to hold the property against the reversioners, was intending only to help his brother's widow. That being the case when Irava adopted the plaintiff he would be entitled to recover the property which had belonged to the adoptive father. Therefore, the judgment of the Court below was right, and the appeal must be dismissed with costs.

Shah, J.—I agree.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1005 OF 1924.
December 1, 1924.

Present:—Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

In re AYISHA BIBI AMMAL—PLAINTIFF No. 2—APPELLANT.

Civil Procedure Code (Act V of 1908 ss. 11—Res judicata—Competency of Court.

Competency in s. 11, C. P. C., has reference to the value of the suit and not to territorial jurisdiction.

Second appeal against a decree of the District Court, Coimbatore, in A. S. No. 206 of 1923, preferred against that of the Court of the Second Additional Subordinate Judge, Coimbatore, in O. S. No. 27 of 1922 (O. S. No. 101 of 1919, Principal Sub-Court, Coimbatore).

Mr. *W. Subrahmanya Iyer*, for the Appellant.

JUDGMENT.—We think the judgment of Innes, J., in O. S. No. 5 of 1877 makes the present suit *res judicata*. The Original Side of the High Court was certainly competent to take cognizance of the present suit with reference to the value of the suit. We are of opinion that competency in s. 11, C. P. C., has reference to the value of suit and not to the territorial jurisdiction. No authority has been cited against this view by the learned Vakil for the appellant. The property which is now the subject of this suit was also the subject of the former suit. The plaintiff has not pleaded that, in spite of the Settlement of 1876 and the decree in O. S. No. 5 of 1877, she was in possession of the suit properties adversely to those who are entitled to them under the settlement and decree and acquired a title by adverse possession. Even if the allegation of possession in the plaint put was meant to raise this no issue was taken.

The second appeal is dismissed.

V. N. V.

Appeal dismissed.

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 19 OF 1924.

January 16, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

COMMISSIONER OF INCOME-TAX—APPELLANT

versus

SIR PURSHOTTAMDAS THAKURDAS—RESPONDENT.

Income Tax Act (XI of 1922), s. 4 (3) (vii)—Income arising from business—Extraordinary transaction—Exemption from assessment.

In order to take a case out of the exemption provided for by s. 4 (3) (*vii*) of the Income Tax Act it is not necessary that the receipts should arise from a business continuously carried on during the year. Even if they arose from a single adventure in business they would be liable to be taxed. The mere fact that the receipts arise from an extraordinary transaction although connected with the business of the assessee, which has only occurred owing to exceptional circumstances, and which would not be likely to occur again for many years, would not place the receipts in the same category as receipts entirely disconnected with the business or the profession or vocation or occupation of the assessee which might be considered of a casual and a non-recurring nature and, therefore, exempt from assessment under s. 4 (3) (*vii*). [p. 707, col. 2.]

The assessee, a cotton merchant was appointed under a power-of-attorney to dispose of a certain quantity of cotton for and on behalf of a firm after deducting his remuneration and to distribute the sale-proceeds in a certain manner. The transaction was of an extraordinary nature and was brought about by a crisis in the cotton market:

Held, that the remuneration earned by the assessee from the transaction was income arising from "business" within the meaning of s. 4 (3) (*vii*) of the Income Tax Act and was consequently not exempt from assessment. [*ibid.*]

Civil reference made by the Commissioner of Income Tax, Bombay Presidency, under s. 66 (2) of the Indian Income Tax Act of 1922.

Mr. *Kanga*, Advocate-General, (with him Sir *John Bowen*, Government Solicitor), for the Referor.

Sir *Chimanlal Setalvad* for Messrs. *Captain* and *Vaidya*, for the Assessee.

JUDGMENT.—This is a reference under s. 66 (2) of the Indian Income Tax Act XI of 1922 by the Commissioner of Income Tax, Bombay Presidency, in the matter of the assessment of the income of Sir Purshottamdas Thakordas, hereafter called the assessee. In his return of income for the purposes of assessment for the year 1923-24, the assessee, while declaring his income from all sources, had made a note as under:—

"Besides this, I received during *Sumvat* year 1978 Rs. 1,88,750 as remuneration for winding up the estate of Umar Sobani which being an extraordinary source of income is not liable to taxation."

The Income Tax Officer, however, did not exempt this item from assessment. Thereupon an appeal was lodged before the Assistant Commissioner of Income Tax who held that this item was rightly taxed. Thereupon the assessee applied for a reference, and the Commissioner of Income Tax has made this reference on the question raised with his opinion thereon.

It seems strange that in a reference of

this kind, the Commissioner has not stated what was the professisn, vocation or occupation of the assessee. But it has been admitted during the course of the argument that the assessee is a cotton merchant.

In 1922 there was a crisis in the cotton market owing to endeavours made by the firm of Umar Sobani to corner the market. He had been compelled to keep on making very extensive purchases of cotton in order to maintain prices, but his resources failing it became known to the creditors of the firm, and the market in general, that the firm was not in a position to finance further the huge purchases which had been made so that its failure had become imminent. As a crisis would necessarily result if all its purchases were thrown upon the market, the firm and its creditors looked out for some one who would command the confidence of themselves and of all concerned to hold the cotton already purchased and sell it to the best advantage. The assessee consented to be appointed under a power-of-attorney to dispose of all the cotton bales for and on behalf of the firm, to pay what was due to the several Muccadams and Banks, and after deducting out of the net sale-proceeds of the cotton bales all his costs, charges and expenses in respect thereof and his remuneration to distribute the balance amongst the several persons and firms whose names had already been submitted by the firm of Umar Sobani to the assessee. Under that power-of-attorney the assessee sold over 1,00,000 bales which realized about Rs. 1,63,00,000, and received as his remuneration Rs. 1,88,750. It will be noted that in his return of income when claiming exemption for this sum, the assessee refers to it as an extraordinary source of income. He does not refer to it as being income not arising from business or the exercise of his profession, vocation or occupation, which was of a casual and non-recurring nature. However we may take it that the question now before us is whether the receipts in question can be exempted under s. 4 (3) (*vii*) of the Act, which says: "Any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee."

It has been argued for the assessee that these receipts did not arise from business; that "business" connotes continuity; and that only the receipts arising from a business which is carried on continuously can be assessed But the section refers to receipts arising from "business" and not to receipts arising from "a business." The definition of "business" in s. 2 (4) is as follows:—"Business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, and consequently it is not necessary that the receipts should arise from a business continuously carried on during the year to make them liable to assessment. Even if they arose from a single adventure in business they would be liable to be taxed.

Now it seems clear that the profession or occupation of the assessee being that of a cotton merchant, any receipts arising from the buying and selling of cotton would be considered as arising from trade or commerce, and the argument that receipts from an extraordinary transaction connected with business, such as the one in this case, which has only occurred owing to exceptional circumstances, and which would not be likely to occur again for many years, can be placed in the same category as receipts entirely disconnected with business or the profession or vocation or occupation of the assessee which might be considered of a casual and non-recurring nature, cannot be accepted.

We are clearly of opinion, therefore, that the remuneration earned by the assessee owing to his having been appointed under a power-of-attorney by Umar Sobani to realise the cotton which he had purchased, must be considered as receipts arising from business, and, therefore, liable to taxation.

There is no need consequently to consider the argument of the Commissioner with regard to the meaning of the word "business" or the word "casual," or the English Authorities which have been cited before us.

The answer to the reference will be that, in our opinion, the receipts in question are not entitled to be exempted from taxation.

The assessee to pay the costs on the Original Side scale.

Z. K. *Answer accordingly.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No 1378 OF 1922.
January 9, 1925.

Present:—Mr. Justice Suhrawardy
and Mr. Justice Cuming.

HON'BLE SIR BEJOY CHAND MAHATAB, MAHARAJADHIRAJ BAHADUR OF BURDWAN—PLAINTIFF—APPELLANT

versus

KALI PRASANNA SEAL AND OTHERS —DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 106—Notice to quit, service of—Joint tenants—Notice to each tenant, whether necessary.

A notice to quit under s. 106 of the Transfer of Property Act must be addressed to and served on the persons intended to be bound by it in any one of the modes suggested in the section. The section does not make any exception or lay down any special or peculiar procedure in the case of joint tenants. [p. 709, cols. 1 & 2.]

It is necessary, in order to bind even a joint tenant, that the notice must be addressed to and served on him in one of the ways mentioned in the second clause of the section. It should be addressed to him and may be served either on him personally or on one of the family or servants or affixed to a conspicuous part of the property. [p. 710, col. 1.]

Harihar Banerjee v. *Ramshashi Roy*, 48 Ind. Cas. 277; 45 I. A. 222; 46 C. 458; 23 C. W. N. 77; 16 A. L. J. 969; 35 M. L. J. 707; 29 C. L. J. 117; 9 L. W. 148; 25 M. L. T. 159; 21 Bom. L. R. 522; (1919) M. W. N. 471; 1 U. P. L. R. (P. C.) 56 (P. C.), *Doe d. Macartney* v. *Crick*, (1805) 5 Esp. 196; 8 R. R. 848, *Doe d. Bedford* v. *Watkins*, (1806) 7 East 551; 103 E. R. 213; 3 Smith 517; 8 R. R. 670 and *Rajoni Bibi* v. *Hafisonnissa Bibi*, 4 C. W. N. 572, referred to.

A person whose tenancy or existence is ignored and not recognised, cannot be regarded as a "party to be intended to be bound" by the notice under s. 106 of the Transfer of Property Act. [*ibid.*]

Appeal against a decree of the Additional Subordinate Judge, Burdwan, dated the 31st of March 1922, affirming that of the Acting Munsif, Additional Court at Kalna, dated the 25th of May 1920.

Dr. *Dwarka Nath Mitter* and Babu *Sarat Kumar Mitter*, for the Appellant.

Babu *Harendra Nath Mukherjee*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—The suit out of which this appeal arises was one for ejectment after service of notice to quit on the defendants. The Court of first instance found that the defendants were permanent tenure-holders and in that view dismissed the plaintiff's suit. The plaintiff appealed and the lower Appellate Court was invited by both the parties to try the propriety and legality of the service of notice before going into the question of the status of the defendants. The learned Subordinate Judge found that the notices were not duly served and dismissed the suit on that ground.

The plaintiff has appealed to this Court and the only ground taken before us is that in the circumstances of this case it should have been held that the notices were legally served. On this point three grounds were taken before the lower Appellate Court. The first is that defendant No. 1 was the *karta* of the joint family and the service of notice on him was sufficient in respect of all the members of the family including the defendant No. 9 on whom notice was not proved to have been served. The second ground is that defendant No. 1 being the registered tenant service on him alone was sufficient; and the third is that the defendants being all tenants-in-common service of notice on one of them should be taken as service on all. The first two grounds have been finally disposed of by the learned Subordinate Judge by coming to certain findings of fact which cannot be challenged in second appeal. The learned Judge has found that defendant No. 1 was not the *karta* of the family and that he was not the sole registered tenant in the plaintiff's *sherista*. The ground which is pressed before us is the third ground, namely, that all the defendants being tenants-in-common or more properly, joint tenants, service of notice on any one of them is good in law. The learned Subordinate Judge observes that it was virtually admitted and was proved, that no notice to quit was ever served on defendant No. 9 who was all along ignored though his brothers were treated as tenants and that he was subsequently added as a defendant in the suit. In support of the view urged by the appellant reliance has been placed on the decision of the Judicial Committee in the case of *Harihar Banerjee* v. *Ramshashi Roy* (1). The facts of that case are that the plaintiff's *gomastha* had sent to each of the defendants by registered letters addressed to them at their addresses duplicates of the notices signed by all the plaintiffs. For this he received receipts of registration. The peon of the Post Office knew all their houses and got from all of them receipts for the letters delivered. The Munsif, however, held upon

(1) 48 Ind. Cas. 277; 45 I. A. 222; 46 C. 458; 23 C. W. N. 77; 16 A. L. J. 969; 35 M. L. J. 707; 29 C. L. J. 117; 9 L. W. 148; 25 M. L. T. 159; 21 Bom. L. R. 522; (1919) M. W. N. 471; 1 U. P. L. R. (P. C.) 56 (P. C.).

the evidence that there was no proof of service of notice to quit on any of the defendants other than defendants Nos. 1, 4 and 5. Their Lordships of the Judicial Committee examined the evidence on the point on the record and in their Lordships' view the evidence of delivery of notice to quit on all the principal defendants was adequately proved and constituted good service on them within the meaning of s. 106, Transfer of Property Act. In the course of their judgment their Lordships observe that "a notice under s. 106, Transfer of Property Act, may be served either personally or to one of the family or servants of the person intended to be bound by it at his residence, or if such tender or delivery be not practicable affixed to a conspicuous part of the property. The personal tender or delivery may take place anywhere; the vicarious tender or delivery must take place at the residence of the person intended to be bound by the notice. The procedure in the case of joint tenants is that each is intended to be bound, and it has long ago been decided that service of a notice to quit upon one joint tenant is *prima facie* evidence that it has reached the other joint tenant". Their Lordships relied upon some of the English cases which will be considered later on. In this case it has been found by the learned Subordinate Judge that the place of residence of defendant No. 9 was in Calcutta and not at the place where the notice was served. The only question, therefore, for consideration is whether service of notice upon defendant No. 1 or any other defendant can be taken in law as good service on defendant No. 9. Section 106, Transfer of Property Act, requires that every notice under that section must be in writing and tendered or delivered over personally to the party who is *intended to be bound by it*, or to one of the family or servants at the residence or if such tender or delivery is not practicable it can be affixed to a conspicuous part of the property. Reading the section as it stands without any help of the comments upon it by decided cases, it is manifest that it was the intention of the Legislature that the notice must be served on the person who is intended to be bound by it. The notice must be addressed to and served on the person intended to be bound by it in any one of the modes suggested by the section. The section does not make any exception or lay down any special or peculiar procedure in the case of joint tenants. The law as to notice to quit is contained in s. 106, Transfer of Property Act, and it is not necessary to travel beyond it. Great stress has been laid upon the observation of the Judicial Committee in *Harihar's case* (1) and on the cases referred to therein for the view that in the case of joint tenants it is sufficient to serve the notice to quit on one of them alone and the service of notice on one of them is binding on the other tenants. We do not think that this contention can be sustained in view of the law laid down in those cases. In the Privy Council case, as we have observed, the notices were addressed to all the defendants and their Lordships found that it was served on all of them. In the case of *Doe d. Macartney* v. *Crick* (2), one of the cases referred to by the Judicial Committee, an oral notice to quit was given by the landlord to one of the two brothers who were joint tenants. This was followed by a written notice dated the 8th April served on both the tenants. The suit in ejectment was resisted by the defendants on the ground that the time allowed by law was not observed and that parol notice was not binding on the other. Lord Ellenborough held that the written notice was not necessary; and, with regard to the oral notice, as the two defendants appeared to hold the lands jointly, service of notice to quit on one was sufficient and that the notice given on the 8th April was within the statutory period. This case proceeds upon the English Law then in force according to which oral notice was sufficient, but the law under the Transfer of Property Act is different. That case is, therefore, no authority for the view that if no notice is addressed to one of the joint tenants, the mere service of notice upon the other joint tenant is a sufficient notice according to law. The next case to which reference is made in the judgment of the Judicial Committee in the case of *Harihar Banerjee* v. *Ramshashee Roy* (1) is the case of *Doe d. Bedford* v. *Watkins* (3). In that case also it appears that the notices to quit were addressed to both the defendants who were joint tenants and partners of the business. The notices, however, were served through one of the tenants living on the

(2) (1805) 5 Esp. 196; 8 R. R. 848.
(3) (1806) 7 East 551; 103 E. R. 213; 3 Smith 517; 8 R. R. 670.

premises. On these facts it was held that the notice to quit served on one of the two joint tenants on the premises, who held under a joint demise, is evidence that the notice reached the other who lived elsewhere. That case also is no authority for the view that it is not necessary to address a notice to a joint tenant and that service on any one of them is sufficient in law. The case of *Doe d. Bedford* v. *Watkins* (3), is interesting in that it has been held that the question whether service of notice on one of the joint tenants was sufficient notice on the other tenant who was not served is a question of fact and must be left to the Jury. In the present case the learned Subordinate Judge has come to a finding of fact on evidence that there was no service or tender of notice to defendant No. 9, nor was any notice addressed to him. The view we take is not supported by any reported authority in a direct form; but it is indirectly supported by the decision in the case of *Rajoni Bibi* v. *Hafisonnissa Bibi* (4). In that case a notice containing the names of all the joint tenants was delivered to one of the defendants and the objection taken was that there ought to have been as many copies of the notice as there were tenants. This objection was overruled in the view that the notice was addressed to and contained the names of all the tenants though it was served on one of them. On a plain reading of s. 106, Transfer of Property Act, and on the consideration of the authorities on this point, we are of opinion that it is necessary in order to bind even a joint tenant that the notice must be addressed to and served on him in one of the ways mentioned in the second clause of that section. It should be addresssd to him and may be served either on him personally or on one of the family or servants or affixed to a conspicuous part of the property. It is difficult to hold that a person whose tenancy or existence is ignored and not recognised, as was defendant No. 9 in the present case, is a "party to be intended to be bound" by the notice under s 106, Transfer of Property Act. The notice in this case on defendant No. 9 not having been thus served, the lower Appellate Court was justified in holding that the service of the notice was not good and sufficient in law to determine the tenancy.

(4) 4 C. W. N. 572.

In this view of the law the appeal fails and is dismissed with costs.

Cuming, J.—I agree.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 101 OF 1924.

January 15, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

BASAYYA AYAPPA SARGHNACHAYAR —PLAINTIFF—APPELLANT

versus

ALLAYYA MAHARUDRAYYA GANACHARI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, rr. 8, 9, O. XVII, rr. 2, 3—Adjourned date of hearing—Default of plaintiff—Procedure.

On the date fixed for the hearing of a suit the plaintiff's Pleader asked for an adjournment undertaking to produce his witnesses without summonses. The adjournment was granted but on the adjourned date of hearing the plaintiff was absent. The Court proceeded under O. XVII, r. 3 of the C. P. C., to decide the suit and rejected the plaintiff's claim:

Held, that the procedure adopted by the Trial Court was wrong and that it should have proceeded under O. XVII, r. 2 of the Code and that the plaintiff was entitled to be heard on the question of his non-appearance at the adjourned date of hearing by the Trial Court.

Second appeal from the decision of the District Judge, at Bijapur, in Appeal No. 8 of 1923, confirming a decree of the Subordinate Judge at Bagalkot, in Suit No. 689 of 1921.

Mr. *Nilkanth Atmaram*, for the Appellant.

Mr. *H. B. Gumaste*, for Respondent No. 1.

JUDGMENT.—This suit was originally fixed before the Trial Court for hearing on November 2, 1922. On that date the plaintiff's Pleader asked for an adjournment undertaking to produce his witnesses without summonses. The Court granted an adjournment till November 30, 1922. On November 30, the case was called on but the plaintiff was absent. The Court instead of making an order under O. XVII, r. 2, proceeded under r. 3 to decide the suit and rejected the plaintiff's claim with costs.

On appeal the District Judge was of opinion that that order was wrong, but he considered the appeal before him on its merits holding that the plaintiff had not

shown sufficient cause for his non-attendance on November 30. But if the proper order had been made by the Trial Judge under O. XVII, r. 2, it would be the Trial Judge who would have to decide on the application to restore the suit to the Board, whether the plaintiff had sufficient cause for his non-attendance; so we do not think that the decision of the District Jndge on that question is one which was competent. As the initial order was wrong, the appellant was entitled to be heard on the question of his non-appearance by the Trial Court. We think, therefore, that the suit should be restored to the Board on the appellant's first paying all costs which have been incurred by the 1st defendant up-to-date.

These costs should be paid within one month after the proceedings have been returned to the Trial Court.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1175 OF 1921.

October 20, 1924.

Present:—Mr. Justice Devadoss.

UTTARAVELLI PEDA APPALANAIDU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

UTTARAVELLI APPALANAIDU AND OTHERS—DEFENDANTS NOS. 1, 2 AND 4 TO 12—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, cl. (4)—Mortgage—Redemption suit—Properties not included in mortgage included in suit—Delivery of possession—Suit to recover possession of properties wrongly delivered, maintainability of—Res judicata.

Where in a suit for redemption, the mortgagor includes certain properties as comprised in the mortgage and obtains delivery thereof in execution of the redemption decree, it is not competent to the mortgagee to bring a subsequent suit on the ground that some of the properties so delivered were not comprised in the mortgage and were wrongly delivered. Such a suit is barred by s. 11, cl. (4), C. P. C.

Ram Chander v. *Kondo*, 22 A. 442; A. W. N. (1900) 155; 9 Ind. Dec. (N. S.) 1332, not followed.

Second appeal against a decree of the Court of the Subordinate Judge, Vizagapatam, in A. S. No. 206 of 1920, (A. S. No. 90 of 1919, on the file of the District Court, Vizagapatam), preferred against that of the District Munsif, Razam, in O. S. No. 673 of 1917.

Mr. *Y. Suryanarayana*, for the Appellants.

JUDGMENT.—The only point argued in this second appeal is that the plaint property was not included in the mortgage-deed executed by the 7th defendant in favour of the father of the plaintiffs. The plaint property, according to the evidence of the 2nd plaintiff, was taken delivery of by the 7th defendant. Evidently, the plaint property was included in the schedule attached to the plaint filed by the 7th defendant for redemption, *i. e.*, O. S. No. 296 of 1913. The plaintiffs did not raise any objection as to the items not included in the mortgage. They should have objected to the correctness of the plaint schedule and should have contended that some of the items included in the schedule were not mortgaged to the 7th defendant. The plaintiffs owing to some reason or other did not do so, and the plaint property was treated as one of the properties covered by the mortgage and 7th defendant got possession of it under the redemption decree. The plaintiff now sues for the recovery of the plaint property which according to him was not included in the mortgage-deed. The Subordinate Judge has dismissed the plaintiff's appeal on the ground that it is barred by *res judicata* and if the plaint property was not included in the suit property in O. S. No. 296 of 1913, it is barred by reason of s. 47, C. P. C. Mr. Suryanarayana relies upon the decision in *Ram Chander* v. *Kondo* (1) in which the learned Judges held that if property was wrongly included in the mortgage suit and brought to sale, a separate suit will lie for a declaration that such property was not sold in execution of the mortgage-decree. With all respect to the learned Judges, I am unable to agree with the reasoning in that case. The question ought to have been raised by the plaintiffs whether the plaint properties were or were not being included in the mortgage in favour of the 7th defendant. They failed to do so, and the redemption decree was passed in respect of these very items which are now claimed by the plaintiffs as not having been included in the mortgage. The point ought to have been raised in the other case and

(1) 22 A. 442; A. W. N. (1900) 55; 9 Ind. Dec. (N. S.) 1332.

not having been raised it cannot be raised now. I think s. 11, cl. 4 is certainly a bar to the plaintiffs suit. The second appeal fails and is dismissed without costs as the respondent does not appear.

V. N. V. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 102 OF 1924.

January 16, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

NARSINGACHARYA GOPALACHARYA SHURPALI—PLAINTIFF—APPELLANT

versus

TULSABAI RAMBHAT DANDAVATI—DEFENDANT—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 30—Sale of minor's property by guardian—Sanction of Court, absence of, effect of—Subsequent sale in execution of decree—Priority.

The certificated guardian of a minor sold certain property which the minor had inherited from her father without obtaining the permission of the Court for the sale. Subsequently a person who held a decree against the father of the minor attached and sold the property in execution of his decree and the auction-purchaser obtained possession of the property. The successor-in-interest of the purchaser from the guardian thereupon brought a suit to recover possession of the property from the auction-purchaser:

Held, (1) that the sale by the guardian without the permission of the Court was voidable at the instance of the minor who would be entitled on coming of age to file a suit to get the unauthorised sale set aside, but that as long as such a suit was not brought and as long as no one obtained a better title to the property, the sale by the guardian in favour of the plaintiff would continue to be a valid sale;

(2) that at the time of the auction sale the property could not be treated as the property of the minor which she had inherited from her father as it had already been sold and that, therefore, the auction-purchaser obtained no title under his sale;

(3) that the right of the minor to sue to get the unauthorized sale set aside could neither be attached nor sold and that consequently the purchaser at the auction-sale could not resist the suit of the purchaser from the guardian or of his successor-in-interest, although the sale by the guardian was not sanctioned by the Court.

Second appeal from the decision of the Assistant Judge at Dharwar, in Appeal No. 108 of 1921, reversing a decree of the Subordinate Judge at Dharwar, in Suit No. 97 of 1920.

Mr. *A. G. Desai*, for the Appellant.

Mr. *H. B. Gumaste*, for Respondents Nos. 3 to 6.

JUDGMENT.—The property in dispute in this suit was a shop at Dharwar belonging to one Narsappa, who died leaving a daughter, the present defendant No. 1, then a minor. A guardian was appointed of her person and property by the District Court in 1904. On April 9, 1913, the guardian sold the shop in suit to the second defendant for Rs. 200, without obtaining permission from the District Court for the sale. In 1915 one Sharadabai, who had obtained a decree for maintenance against Narsappa, got the shop attached and sold in execution, and one Dyavappa purchased it at the auction sale. Defendant No. 3 later purchased it from Dyavappa. Plaintiff purchased the property from the second defendant in 1919 and brought the suit to recover possession. The Trial Court decreed the claim.

The lower Appellate Court has dismissed the plaintiff's suit. The learned Judge has misconstrued s. 30 of the Guardians and Wards Act VIII of 1890. The sale by Raghunath in 1913 to the second defendant without the permission of the District Court was voidable at the instance of any other person effected thereby. The only person effected at the time of the unauthorised sale was the minor, and when she came of age, she would be entitled to file a suit to get the unauthorised sale set aside, and as long as she did not do that, and as long as no one obtained a better title to the property, then the sale by the guardian continued to be a valid sale. There was nothing left, therefore, at the time of the execution sale of the property which the minor had inherited from her father, which could be conveyed to the auction-purchaser. The right of the minor to sue to get the unauthorised sale set aside could neither be attached nor sold, and consequently the purchaser at the auction-sale could not oust the purchaser from Raghunath, even although the sale was not sanctioned by the District Court. That was really the only issue in the case, and the issue whether the sale was made for any legal necessity or for the benefit of defendant No. 1's estate was irrelevant. It would only be relevant in a suit by the minor herself.

The appeal will be allowed and the decree of the Trial Court restored with costs throughout.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1500 OF 1924.
December 23, 1924.
Present:—Mr. Justice Mukerji.
Lala BIRJ LAL—DEFENDANT—APPELLANT
versus
Chaudhri MUHAMMAD IBRAHIM—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 193 (g)—Rent, suit for—Decree against landlord paid off by tenant, whether can be pleaded as set-off.

Under cl. (*g*) of s. 193 of the Agra Tenancy Act it is only a decree held by the defendant himself that can be pleaded as a set-off.

Where a sub-tenant under an ex-proprietary tenant pays off a decree for rent obtained by the *zemindar* against the ex-proprietary tenant, he is not entitled to plead the payment as a set-off in answer to a suit for rent brought against him by the ex-proprietary tenant.

Second appeal against a decree of the District Judge, Budaun, dated the 30th May 1924.

Mr. *Harnandan Prasad*, for the Appellant.

JUDGMENT.—The appellant in this case has my full sympathy, but I am unable to help him.

It appears that the respondent's father who was an ex-proprietary tenant, sub-let the holding to the appellant. The respondent brought the suit, out of which this appeal has arisen, for recovery of arrears of rent for three years. The defendant pleaded payment of five items and his plea of payment succeeded in the Court of first instance. On appeal the learned District Judge has allowed only one item and has disallowed the remaining four. So far as the question of fact is involved, *viz.*, whether the appellant has succeeded in proving payment, this Court cannot entertain it. The only question before this Court is whether the two sums of Rs. 75 and Rs. 144-5 which were admittedly expended by the appellant should have been given credit for.

The above mentioned two items were paid in this way. The *zemindar* held decrees for rent against the ex-proprietary tenant. The non-payment of the decrees would have involved the ejectment not only of the ex-proprietary tenant, but also of the appellant. The appellant says that he, having paid these two items in order to satisfy the decree held by the *zemindar*, was entitled to claim a set-off against the rent payable by himself. This would be so but for the provision of s. 193, cl. (*g*) of the Tenancy Act. Under that provision of law only an unsatisfied decree held by a defendant can be pleaded by way of a set-off. It has been urged that having satisfied the decree held by the *zemindar* the defendant was placed in the same position as the *zemindar* himself and was thereby entitled to claim a set-off. In my opinion it was with the idea of simplifying procedure in rent cases that the enactment *viz.*, cl. (*g*), s. 193 of the Tenancy Act was drafted. Whatever be the reason for the rule, the rule itself is clear and it is only a decree held by the defendant himself that can be pleaded and not a payment made under the circumstances of this case.

The appeal fails and it is hereby dismissed under O. XLI, r. 11, C. P. C.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 48 OF 1924.
January 21, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.
HIRABHAI DAHYABHAI—PLAINTIFF—APPELLANT
versus
MANEKLAL RANCHHOD—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 144—Payment into Court—Decree set aside—Restitution—Interest, whether can be claimed.

In a suit for specific performance of a contract of sale plaintiff having got a decree for the return of the earnest-money and damages for breach of contract proceeded to appeal on the ground that he was entitled to specific performance of the contract. Pending the appeal the defendant paid into Court the amount which had been awarded to the plaintiff. The plaintiff was successful in appeal and defendant applied for return of the money paid by him into Court and also claimed interest on it:

Held, that the plaintiff having retained the benefit of the payment into Court made by the defendant during the whole time when his appeal was pending and having failed to give notice to the defendant to take his money out, could not be allowed to say that he had derived no benefit from the payment and that consequently he was liable to pay interest on the deposit. [p. 714, col. 2.]

First appeal from the decision of the First Class Subordinate Judge, Ahmedabad, in Darkhast No. 283 of 1923.

Messrs. *Ratanlal Ranchhoddas* and *H. V. Divatia*, for the Appellant.

Mr. *G. N. Thakor* (with him Mr. *R. J. Thakor*), for Respondent No. 1.

JUDGMENT.—The facts are correctly stated in the judgment of the lower Court. The plaintiff having got a decree against the 1st and the 2nd defendants in the suit for the return of the earnest-money and damages for breach of contract proceeded to appeal on the ground that he was entitled to specific performance of the contract against the defendant No. 3. Pending the appeal the 1st defendant paid into Court, as he was entitled to do, the amount which had been awarded against defendants Nos. 1 and 2. The plaintiff continued the appeal and was successful. Consequently these defendants were entitled to get their money back.

So defendants Nos. 1 and 2 filed Darkhast No. 283 of 1922 for restitution, claiming interest on the money which remained in Court until the plaintiff's Darkhast No. 172 of 1923. The plaintiff says that he acquired no benefit from the money which had been paid into Court, and, therefore, he was not liable to pay interest demanded by the defendant No. 1. The learned Trial Judge said:—

"Then, it is said that no benefit was derived by the plaintiff by the deposit of the decretal money in Court. The answer to this lies on its very surface. For the principle of the doctrine of restitution is that on the reversal of the judgment, the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost. *Dorasami Ayyar* v. *Annasami Ayyar* (1).

"It was the pleasure of the plaintiff not to take the available money in pursuance of the decree of the Trial Court, but this act has caused loss to defendant, and when the Hon'ble High Court set aside the claim for damages, the parties need to be relegated to their original positions.

"Under the circumstances, I think that it was incumbent on the plaintiff, when informed, to take the money, otherwise the amount was laying in Court at his risk, entailing all the natural consequences in the event of a refund or restitution, as provided for under s. 141, for the wrongful loss thus caused by him to the defendant. In any case by filing Darkhast No. 172 of 1923 on 10th March 1923, which is dismissed this day, he caused the detention of Rs. 3,831-4-0 in order to secure satisfaction of his Darkhast claim."

(1) 23 M. 306; 10 M. L. J. 307; 8 Ind. Dec. (N. S.) 616.

We think the case for the defendants might have been put rather stronger, because the plaintiff retained the benefit of the payment into Court made by the defendants during the whole time when the appeal was pending, and even when the appeal had been heard he sought to take advantage in the Darkhast referred to of the payment into Court. He cannot, therefore, now be allowed to say that he derived no benefit from that payment. But if even he derived no benefit, still, the onus lay upon him, if he wanted to be relieved of the risk of any such application as has now been made, to give notice to the defendant to take his money out. He has had the advantage of the money lying in Court until the appeal was heard, and that would be a sufficient advantage to enable defendant No. 1 to succeed. The appeal, therefore, is dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 7 OF 1924.

November 24, 1924.

Present:—Mr. Justice Krishnan.

MARINA AMMAYI—COUNTER-PETITIONER No. 1—APPELLANT

versus

CHAGANTI SITARAMAYYA—PETITIONER—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 52—Lis pendens, *doctrine of, applicability of—Mortgage-decree—Property sold in execution of money-decree—Subsequent sale in execution of mortgage-decree—Priority between purchasers.*

In a mortgage suit the applicability of the doctrine of *lis pendens* continues upto the date when either foreclosure takes place or the property is sold and the mortgage-decree is satisfied. [p. 715, col. 2.]

Madheshwar Singh v. *Mohamaya Prasad Singh*, 9 Ind. Cas. 1027; 15 C. W. N. 672; 13 C. L. J. 487 and *Kunhi Umah* v. *Amed*, 14 M. 491; 1 M. L. J. 476; 5 Ind. Dec. (N. S.) 343, relied on.

Where a person purchases in execution of a simple money-decree property in respect of which a mortgage-decree has already been passed, the purchase is affected by the doctrine of *lis pendens* and must be regarded as subject to the rights of the auction-purchaser in execution of the mortgage-decree. The purchaser in execution of the simple money-decree in such a case is the representative of the mortgagor judgment-debtor and is bound by the execution proceedings against the mortgaged property. [p. 716, cols. 1 & 2.]

Appeal against an order of the Court

of the Additional Subordinate Judge, Cocanada, dated the 24th September 1923, in Appeal No. 99 of 1922, preferred against the order dated the 28th Sepember 1922, in E. A. No. 1449 of 1922 in Original Suit No. 801 of 1919, on the file of the Court of the District Munsif, Ramachandrapur.

Mr. *G. Lakshmana*, for the Appellant.

Mr. *V. Subramanyam*, for the Respondent.

JUDGMENT.—This is an appeal against an appellate order of the Additional Subordinate Judge of Cocanada. The appellant before me is a person who purchased in execution of a mortgage-decree the property which is the subject-matter of this application. Her purchase was subsequent to the purchase by the respondent who purchased in execution of a money-decree. The mortgage suit had been brought previously and a final decree had been obtained by the mortgagee for sale of the property. It was in that state of circumstances that the property was subsequently attached by the money-decree-holder and brought to sale, and it was in that execution proceeding that the respondent purchased the property. The respondent seems to have obtained possession of the property in execution. Subsequently the mortgage-decree was executed and the property was brought to sale and purchased by the appellant before me. She applied for possession and was put in possession of the property. Application was then made under r. 100 of O. XXI, C. P. C., by the respondent before me to the District Munsif praying that he may be put back into possession of the property and contending that he was not bound by the proceedings in execution of the mortgage-decree or by the sale. The District Munsif rightly held that the respondent was bound by the proceedings in the mortgage-decree, and that the purchase by the appellant prevailed against him and, therefore, dismissed his petition. On appeal, however, the Subordinate Judge has come to the conclusion on the view that *lis pendens* does not continue after the final decree is passed that, as there was no execution proceeding actually going on under the mortgage-decree at the time when the sale in execution of the money-decree took place and as the final decree had already been passed, the later purchase by the purchaser in the mortgage suit did not prevail against the purchaser under the money-decree and he, therefore, reversed the order of the District Munsif and directed the respondent to be put back into possession.

It seems to me that the order of the Subordinate Judge cannot be supported. There can be no doubt that in a mortgage suit *lis pendens* continues up to the date when either foreclosure takes place or the property is sold and the mortgage-decree is satisfied. A clear authority was cited before the Subordinate Judge in support of this, namely, the ruling in *Madheshwar Singh* v. *Mohamaya Prasad Singh* (1), where the learned Judges Mookerjee and Teunon, JJ., say at page 674*: "In fact it is well-settled that for the purposes of the application of the dectrine of *lis pendens*, a mortgage suit continues after the decree till the sale has become final," and for this position the learned Judges cite several authorities. But the Subordinate Judge by a curious process of reasoning came to the conclusion that the word 'sale' in the above observation was a mistake for the word 'same'. It does not seem to be anything of the sort. The word 'sale' is the correct word as is quite apparent from the observations of the learned Judges following the one above referred to. The Calcutta view is in accordance with the view of our own High Court. *Kunhi Umah* v. *Amed* (2), and the cases cited there. The Subordinate Judge has referred to *Bhoje Mahadev Parab* v. *Gangabai Vithal Naik* (3), as justifying his view that the *lis pendens* comes to an end in a mortgage suit when the final decree is passed. No doubt the Bombay High Court seems to have held that view in that case. That, however, was a case in which a charge for maintenance on certain properties was declared; and Batchelor, J., one of the Judges who decided the case seems to indicate that in his opinion there is a difference between a decree like the one before him declaring a charge for maintenance and a decree for sale of the property mortgaged. However this may be, the view taken by the Bombay High Court seems to be that in mortgage suits *lis pendens* will come to an end on the passing of the final decree. There are, no doubt, observations to that effect in the judgment. That case, however, has not been accepted as good law in this High

(1) 9 Ind. Cas. 1027; 15 C. W. N. 672; 13 C. L. J. 487.

(2) 14 M. 491; 1 M. L. J. 476; 5 Ind. Dec. (N. S.) 343.

(3) 21 Ind. Cas. 54; 37 B. 621; 15 Bom. L. R. 809.

*Page of 15 C. W. N. *[Ed.]*

Court. The question was discussed at some length by Seshagiri Iyer, J., in the case reported as *Ramasami Aiyangar* v. *Govinda Iyer* (4). See the observations at page 514*. The learned Judge has collected the authorities on the question and has shown that the correct view is that the *lis* continues up to the end of the sale. This view is in accordance with the view of the Calcutta High Court and also of the Allahabad High Court. The view taken by the Bombay High Court was not followed in that case and, as the reasons are fully stated there for the dissent, it is not necessary for me to go into the reasons once again. Although the case in *Ramasami Aiyangar* v. *Govinda Iyer* (4) was a case of lease granted after the mortgage-decree had been passed, the principles stated therein will apply equally well to a case where there is a subsequent sale in auction by a Court of the mortgagor's interest under the mortgage-decree. If we do not hold that the *lis* continues till the decree is executed it would lead to the extraordinary result that, after decree the mortgagor would be able to alienate the property mortgaged and prevent the effective execution of the mortgage-decree by sale of the property. The authority relied on by the Subordinate Judge not having been followed in this Court cannot be taken as a proper authority to support his view.

The case may be put on another footing as well and perhaps more accurately. The mortgage-decree having been passed in this case, perhaps it is unnecessary to rely upon the doctrine of *lis pendens* to make the proceedings in execution of the decree binding upon the respondent who subsequently purchased the judgment-debtor's rights. There can hardly be any doubt, as the Subordinate Judge has held, that the respondent as the purchaser of the judgment-debtor's right in execution of the money-decree is the representative-in-interest of the judgment-debtor. As his purchase was subsequent to the mortgage-decree he must be held to be bound by that decree. The execution proceedings carried on against the mortgaged property, therefore, will be binding upon him; and any rights that he may have acquired by his purchase will be affected by the subsequent sale in execution of the mortgage-decree. In fact, as the learned Vakil who appeared for the respondent argued, it would have been open to his client to have exercised all the rights of the mortgagor-judgment-debtor; that is, if he was so minded, he could have paid the amount to save the property from being sold, or after the sale of the property itself if he found the money necessary to set aside the sale, he might have got the sale set aside. Unfortunately he did not take any of the these steps and the sale was confirmed and sale certificate was issued to the appellant. In these circumstances, it is quite clear whether we apply the doctrine of *lis pendens* or whether we hold that he was bound by the proceedings taken in execution of the mortgage-decree, the right which the respondent has obtained by his purchase is now gone. He cannot now be allowed, as the Subordinate Judge has allowed him to pay off the mortgage-decree, or to recover possession.

In the view I take, the appeal must be allowed, the order of the Subordinate Judge set aside and that of the District Munsif restored with costs in this and the lower Appellate Court.

V. N. V.
Z. K.

Appeal allowed.

(4) 38 Ind. Cas. 1; 20 M. L. T. 512; 31 M. L. J. 839; 5 L. W. 443.

*Page of 20 M. L. T. *[Ed.]*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 43 OF 1924.

January 22, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

MAHADEV NARAYAN JOSHI AND OTHERS —PLAINTIFFS—APPELLANTS,

versus

SHRIDHARBHAT GOPALBHAT JOSHI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15D—Mortgages, several—Suit for account on one mortgage—Plea by mortgagee that account should be taken on all mortgages—Subsequent suit to enforce other mortgages, whether maintainable—Res judicata.

Where a mortgagor executes several mortgages on the same property and asks for an account on one of those mortgages under s. 15D of the Dekkhan Agriculturists' Relief Act, although the mortgagee can ask that an account should be taken of all the mortgages existing on the property, so that the mortgagor would not be entitled to redeem except on paying what is due on all the mortgages, yet, if the Court takes an account of the one mortgage in which it decides nothing with regard to the validity or the existence of other mortgages at the time when the account is taken, the mortgagee would be entitled

to enforce the other mortgages against the mortgagor. The decision in the suit under the Dekkhan Agriculturists' Relief Act will not operate to bar a subsequent suit by the mortgagee to enforce the other mortgages, on the ground of *res judicata*. [p. 718, col. 2.]

Second appeal from the decision of the District Judge, Belguam, in Appeal No. 79 of 1923, confirming the decree of the Subordinate Judge at Chikodi, in Civil Suit No. 232 of 1922.

Mr. *Nilkanth Atmaram*, for the Appellants.

Mr. *A. G. Desai*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiffs sued to recover on a mortgage bond for Rs. 200, dated August 28, 1912, passed by the defendant to one Krishnaji Govind Joshi, the grandfather of the plaintiffs. The defendant contended that the plaintiffs had no right to file the suit; that the debt had not come to plaintiffs' share; that the land in suit had been mortgaged with possession in 1882 to the great-grandfather of the plaintiffs; that it had been decided in Suit No. 325 of 1917, that this mortgage had been paid off; that the suit debt having not been claimed in that suit the present suit was barred by *res judicata*; and that the suit debt had been paid off by the income of the land from the date of the suit mortgage.

The Trial Judge held that the claim was barred as *res judicata* on account of the decree in Suit No. 325 of 1917.

The facts are that the land in suit, Survey No. 44, and another Survey number were mortgaged by the defendant's father to the plaintiffs' grandfather in 1882. The defendant filed Suit No. 325 of 1917, under s. 15D of the Dekkhan Agriculturists' Relief Act for accounts to be taken of what was due under that mortgage. The present plaintiffs, who were defendants in that suit pleaded that there was a simple mortgage for Rs. 200 passed in 1912 still outstanding, and that the then plaintiff would have to redeem that mortgage also in the suit. No issue was raised on the question. The Court took an account of the mortgage of 1882 and decided that nothing was due on the mortgage-deed in the suit. Section 15D of the Dekkhan Agriculturists' Relief Act provides that at any time before the decree in the suit is signed the plaintiff may apply to the Court to pass a decree for the redemption of the mortgage. Accordingly, as the plaintiff prayed for redemption and possession, and as the suit could be so converted at any time before the decree in the suit was signed, the Court made the following order:—"It is declared that the mortgage charge on the plaint properties held under the mortgage-deed dated September 20, 1882, is fully satisfied, and that nothing remains due to defendants on that account. The plaintiff to recover immediate possession of plaint lands from defendants free of the above said mortgage charge."

On these facts the learned Subordinate Judge said:—

"Explanation V of s. 11 of the C. P. C. does not also apply as it refers only to the relief claimed in the plaint. But the provisions of s. 11 are not exhaustive as laid down in *Sayam Ramamoorthi Dhora* v. *Secretary of State for India* (1) and *Hukum Chand Boid* v. *Kamalanand Singh* (2). The matter can be *res judicata* even between co-defendants as suggested in *Hari Annaji* v. *Vasudev Janardhan* (3). Reading this decision with Explanation V of the section, I think it can be held that the relief claimed by the defendants in Suit No. 325 was refused by the Court. I find that the suit is barred by *res judicata*."

In appeal the learned appellate Judge said (referring to Suit No. 325 of 1917):—

"In that suit the present plaintiffs pleaded that the mortgage-bond (Ex. 22) now in suit must be redeemed as well as the 1882 mortgage. As, however, they failed to produce any evidence, the Trying Court held that nothing was due to them and directed the return of both Survey numbers to Shridhar 'free of the above said mortgage charge.'"

That is not a correct exposition of what took place in the previous suit as appears from the judgment and the decree passed. The Court raised no issue on the question whether the mortgage of 1912 was outstanding, and could be redeemed in the suit, but took an account only of the mortgage of 1882, and directed the return of both Survey numbers free of that mortgage charge, without making any reference to the mortgage of 1912. The appellate Judge went on to say:—

"The wording of the decree would seem to favour appellant's contention that the latter mortgage of 1912, the one now in

(1) 19 Ind. Cas. 656; 36 M. 141; 24 M. L. J. 469.
(2) 33 C. 927 at p. 932; 3 C. L. J. 67.
(3) 23 Ind. Cas. 944; 38 B. 438; 16 Bom. L. R. 283.

suit, was not dealt with in Suit No. 325 of 1917. It has, however, been laid down in *Babaji* v. *Hari* (4) that in case of there being several mortgage-bonds the account (taken under s. 15D, Dekkhan Agriculturists' Relief Act) must be taken of all of them in the same suit. Appellant himself drew the Court's attention to the existence of the 1912 mortgage but did not attempt to prove it, in Suit No. 325 of 1917. As he failed to prove it in that suit he cannot be allowed another opportunity of doing so now. His claim was advanced in Suit No. 325 of 1917. It was not proved by him and it must be held to have been rejected by the Court. I agree with the lower Court that the present suit it barred as *res judicata*."

The suit referred to by the learned Judge in *Babaji* v. *Hari* (4) was brought by the mortgagors of certain land against the mortgagee under s. 15D of the Dekkhan Agriculturists' Relief Act for an account of the amount due. There were six mortgages in all and, the aggregate amount secured was Rs. 5,750. In the course of the suit the plaintiff's Pleader being doubtful as to the jurisdiction of the Court of the Second Class Subordinate Judge, the pecuniary limit of which was Rs. 5,000, was allowed to amend the plaint and to withdraw the claim with regard to one of the mortgages for Rs. 900, thus reducing the aggregate amount to Rs. 4,850. On a reference made to the High Court for its opinion, the Court said (p. 352):—

"We think that s. 15D of Act XVII of 1879, which provides for a suit of an exceptional character, was intended to give the mortgagor the power of obtaining an account of what was due on mortgage of his property, and, therefore, in case of there being several mortgage-bonds, the account must be taken of all of them in the same suit, and if the total amount, as in the present case, exceeds Rs. 500, the case does not fall under Ch. II of the Act. If it exceeds Rs. 5,000 the First Class Subordinate Judge alone has jurisdiction."

It will be seen that that case does not touch the question of *res judicata*. The only way in which the principle of *res judicata* can be made applicable would be if Explanation IV to s. 11 was in point. It provides that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

Now the defendant in the previous suit pleaded on the question whether an account should be taken of the mortgage of 1832, that an account should also be taken of the mortgage of 1912. The question in issue would have been whether the plaintiff was entitled to an account of the mortgage of 1882 only. That would not touch the question whether the plaintiff, the then defendant, was entitled to sue on the mortgage of 1912. It is difficult then to see how the principle of *res judicata* can apply to the present case. We do not know the circumstances which surrounded the trial of Suit No. 325 of 1917, or why no issue was raised on the defendant's plea. It may very well have been that the plaintiff did not wish the accounts to be taken on the basis suggested by the defendant. However that may be, we cannot know what the actual facts of the case were. We can only refer to the record before us.

In my opinion if a mortgagor executes several mortgages on the same property, and asks for an account on one mortgage under s. 15D of the Dekkhan Agriculturists' Relief Act, although the mortgagee could ask that an account should be taken of of all the mortgages existing on the property, so that the mortgagor would not be entitled to redeem except on paying what is due on all the mortgages, still, if the Court takes an account of the one mortgage only, it decides nothing with regard to the validity or the existence of other mortgages at the time when the account is taken. In my opinion, therefore, the decision of the lower Court was wrong and the appeal must be allowed. The case must go back to the Trial Court for decision on the merits. The plaintiffs are entitled to their costs in this Court and in the Court below. All costs in the Trial Court will be costs in the case.

Coyajee, J.—I agree.

Z. K. *Appeal allowed; Case sent back.*

(4) 16 B. 351; 8 Ind. Dec. (N. S.) 712.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1537 of 1924.

January 2, 1925.

Present:—Mr. Justice Daniels.

TEJ SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MITTER SEN—DEFENDANT—RESPONDENT.

U. P. Land Revenue Act (III of 1901), ss. 111, 233 (k)—Partition, perfect and imperfect, difference between—Section 233 (k), applicability of, to imperfect partition.

The substantial difference between a perfect and an imperfect partition is that in an imperfect partition the joint responsibility for payment of land revenue is not done away with, but subject to this joint responsibility the shares are just as much allotted in separate ownership in the one kind of partition as in the other. Section 233 (*k*) of the U. P. Land Revenue Act applies just as much to the case of an imperfect partition as to the case of a perfect partition.

The policy of the law is that all disputes as to ownership of a *mahal* or *patti* to be partitioned should be finally disposed of in the partition proceedings.

Second appeal against the decree of the Subordinate Judge, Budaun, dated the 4th July 1924.

Dr. *K. N. Katju*, for the Appellants.

JUDGMENT.—The two points pressed in this appeal are both points of law but as, in my opinion, the view of the Court below is correct I propose to dismiss the appeal.

The suit has been dismissed on the ground that it offends against s. 233 (*k*) of the Land Revenue Act. The plaintiff claimed a fifth share of a grove in *patti* Tara Singh. He is a recorded co-sharer in that *patti* but the share which he now claims is not recorded in his name. An application was made by the respondent for imperfect partition of that *patti*. Notice was issued to the plaintiff and he applied to have his own share separated off. In that partition the share in dispute was allotted to the defendant. On the face of it this is a clear case for the application of the s. 233 (*k*). The pleas urged are:—

(1) That s. 233 (*k*) does not apply to an imperfect partition.

(2) That though the plaintiff is a recorded co-sharer in the *patti* he is not recorded in respect of the particular property which he claims.

On the first point no authority has been shown to me nor has any substantial reason been advanced why the section should not apply. The section is perfectly general in its terms. Both kinds of partition are dealt with in the same Chapter of the Land Revenue Act and the same provisions of law apply to both. I can see no reason why the bar of s. 233 (*k*) should apply to one and not to the other. The substantial difference between the two kinds of partition is that in an imperfect partition the joint responsibility for payment of land revenue is not done away with, but subject to this joint responsibility the shares are just as much allotted in separate ownership in the one kind of partition as in the other.

The second objection is obviously futile. The policy of the law is that all disputes as to ownership of the *mahal* or *patti* to be partitioned should be finally disposed of in the partition proceedings. In practically every case in which objection is taken under s. 111, the objector's case is that he is not but ought to be recorded as proprietor of the land which he claims.

Agreeing with the Court below I dismiss the appeal under O. XLI, r. 11.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 172 OF 1923.

January 22, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

ACHYUT NARAYAN KHARE—PLAINTIFF—APPELLANT

versus

RAMCHANDRA KESHAV UKIDVE—DEFENDANT—RESPONDENT.

Mortgage-suit—Interest pendente lite*—Discretion of Court—Appellate Court, interference by—Hindu Law*—Damdupat, *rule of, applicability of.*

In a mortgage-suit there is a discretion vested in the Court to decide whether interest should be allowed on the redemption money from the date of the suit. Where the Trial Court does not deal with the question of interest *pendente lite* at all, the Appellate Court is entitled to consider whether such interest should or should not be allowed.

It cannot be said that a person who has invested his money in a mortgage and has succeeded in doubling his capital in less than ten years has any particular claim on the Court to award him any further amount as interest.

Semble:—The rule of *damdupat* has no application in calculating interest in a mortgage-suit from the date of the suit to the date fixed for redemption. The matter is entirely in the discretion of the Court.

First appeal from the decision of the First Class Subordinate Judge, Thana, in Suit No. 135 of 1922.

Mr. *A. G. Sathaye*, for the Appellant.

Mr. *M. V. Bhat*, for the Respondent.

JUDGMENT.—The plaintiff sued to recover Rs. 9,782-8-0 as the balance still due on a mortgage-bond, dated June 17, 1914, with costs and future interest. The lower Court found that the principal was Rs. 4,999, that the amount of interest due up to the date of suit was Rs. 4,783-8-0 but only allowed further interest after the date of suit so as to make the total of interest awarded equal to the amount of the principal. A preliminary decree was passed directing that the defendants should pay Rs. 9,998 with costs on or before July 15, 1923. Interest after July 15, 1923, was to run on the whole of the above amount at six per cent. until realization.

The plaintiff has appealed on the following grounds:—(1) The lower Court was wrong in holding that the rule of *damdupat* applied in calculating interest in a mortgage-suit from the date of the suit to the date fixed for redemption. (2) The lower Court should have at least allowed interest on Rs. 9,782-8-0 at the agreed rate from March 26, 1922, till which date interest was calculated as stated in the plaint, up to July 15, 1923, the date fixed by the decree for redemption, after taking into consideration the payment of Rs. 8,100 made on or about April 30, 1923.

In *Hirala Ichhalal* v. *Narsilal Chaturbhujdas* (1), the suit was brought for redemption of a mortgage. The plaintiff claimed to be allowed interest on the redemption money for the period between the date of the suit and the actual date of redemption. It was held by the District Judge that the rule of *damdupat* applied, and, therefore, the amount of arrears of interest to be allowed was limted to an amount equal to the capital sum, but awarded no interest from the date of suit. It was contended that the omission to give interest was due to an oversight as no reference was made in the judgment to the question whether such interest could be allowed. The High Court treated the matter as if the District Judge had in the exercise of his discretion declined to allow interest, and it thought that there had not been an unreasonable exercise of his discretion. Their Lordships of the Privy Council agreed with his decision and the grounds on which it rested. There is, therefore, a discretion vested in the Court to decide whether interest should be allowed on the redemption money from the date of the suit. There is nothing in the judgment of the lower Court in this case from which we can deduce that the Judge dealt with this particular question. He has allowed interest after the date of the suit so as to make the total sum decreed for interest equal to the amount of the principal. We are entitled, therefore, to consider whether in appeal we should allow any further interest from the date of the suit. The plaintiff has succeeded in getting a decree for double the amount of his capital which was invested on June 17, 1914. It cannot be said that a person who has invested his money in a mortgage and has succeeded in doubling his capital in less than ten years, has any particular claim on the Court to award him any further amount. The Court has awarded interest from July 15, 1923, on the total redemption money, and consequently if the defendants failed to redeem, the plaintiff would recover interest not only on the capital but also on a similar amount of interest. We think, therefore, that the appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 18 Ind. Cas. 909; 37 B. 326; 15 Bom. L. R. 483; 17 C. W. N. 573; 13 M. L. T. 415; (1913) M. W. N. 428; 11 A. L. J. 432; 17 C. L. J. 474; 25 M. L. J. 101; 40 I. A. 68 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 422 OF 1923.

December 1, 1924.

Present:—Mr. Justice Krishnan.

M. CHIDAMBARAM CHETTIAR —PETITIONER

versus

S. K. KOTHER MYTHEEN ROWTHER AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 8, O. XXXIII, r. 5—Application for leave to sue as pauper—Insolvency of petitioner, effect of—Procedure—Cause of action, meaning of.

The grounds on which an application for leave to sue as a pauper can be rejected are stated in O. XXXIII, r. 5 of the C. P. C., and the subsequent insolvency of the petitioner is not one of such grounds. Where it appears that after making an application for leave to sue as a pauper the petitioner has become insolvent, the proper procedure is for the Court to

enquire whether the petitioner is or is not a pauper and if he is and his allegations show a cause of action, leave should be granted. When the leave is granted the application would be numbered as a suit, and the provisions of O. XXII, r. 8 of the C. P. C. can then be applied and the Official Receiver can make himself a party to the suit.

Clause (*d*) of r. 5 of O. XXXIII of the C. P. C. only requires that the allegations contained in a petition for leave to sue as a pauper must show a cause of action, the clause has no reference to subsequent events, for instance the insolvency of the petitioner.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Subordinate Judge, Tinnevelly, in O. P. No. 3 of 1922.

Mr. *P. V. Krishnaswamy Iyer*, for the Petitioner.

Messrs. *K. Rajah Iyer* and *R. Ganapathi Iyer*, for the Respondents.

JUDGMENT.—The order dismissing the pauper application on the sole ground that sometime subsequent to the application and before the Court passed its orders the petitioner became an insolvent, cannot be supported. The grounds on which a pauper application can be rejected are stated in O. XXXIII, r. 5, C. P. C. Subsequent insolvency is not one of the grounds. It is suggested that, on his becoming an insolvent, the petitioner ceased to have a cause of action under cl. (*d*); but cl. (*d*) only provides that his allegations should show a cause of action. That refers to his allegations in his plaint and not to subsequent events. The proper procedure would have been to enquire whether the petitioner was a pauper and if he was and his allegations showed a cause of action to give him leave when his application would be numbered as a suit. If he has become insolvent the provisions of O. XXII, r. 8, can then be applied. It is clear that the Official Receiver cannot make himself a party to the pauper application but only to the suit after it is allowed.

The petition is, therefore, allowed and the lower Court's order is set aside and the case remanded to that Court for a fresh disposal according to law. Costs to abide and follow the result.

V. N. V. *Petition allowed.*
Z. K.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 766 OF 1923.
January 29, 1925.
Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

DNYANU YESU JAGDARE—
APPELLANT
versus
VISHNU PARSHARAM CHITNIS—
RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 44, 144—Hindu Law—Joint family—Alienation by eldest brother—Suit to challenge alienation—Limitation.

Where several brothers constitute a joint Hindu family, though undoubtedly the elder brother is the manager of the family yet he is not the guardian either *de facto* or *de jure* of his minor brothers. Even assuming that he might be styled the *de facto* guardian of his younger brothers that would not make him a guardian within the meaning of Art. 44 of Sch. I to the Limitation Act. A suit, therefore, by one of the younger brothers to challenge an alienation of family property by the eldest brother would not be governed by Art. 44 of Sch. I to the Limitation Act.

Fakirappa v. *Lumanna*, 58 Ind. Cas. 257; 22 Bom. L. R. 680; 44 B. 742, distinguished.

Mata Din v. *Amhad Ali*, 13 Ind. Cas. 976; 34 A. 213; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183: 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49 (P. C.), followed.

Second appeal from the decision of the District Judge, Satara, in Appeal No. 307 of 1922, reversing a decree of the Subordinate Judge at Vita, in Civil Suit No. 25 of 1920.

Mr. *K. H. Kelkar*, for the Appellant.

Mr. *G. N. Thakor* (with him Mr. *G. K. Gadgil*), for Respondent No. 1.

JUDGMENT.—The plaintiff's father died leaving a widow and three minor sons. The plaintiff was the second son. His elder brother at the age of nineteen took charge of the family estate of the Hindu co-parcenary. On July 7, 1908, he passed a certain sale-deed which the plaintiff seeks to avoid in the present suit. Subsequently the elder brother died and also the younger brother leaving the plaintiff and his mother the sole representatives of the family. The plaintiff sued to recover possession of the property specified in the plaint and for a declaration that the transaction entered into by the deceased Ganesh Parashram was void and without consideration and illegal and that if it was held binding to the extent of the one-fourth share of Ganesh a declaration to that effect might be given to him. The suit was dismissed on the plea of limitation, the

lower Court holding that the suit had not been instituted within the time prescribed under Art. 44 of the Indian Limitation Act.

In appeal the Judge said :—

"In my opinion although Ganesh styled himself in the sale-deeds as guardian of his minor brothers, he did not enter into this transaction as a guardian but as the manager of the Hindu co-parcenary. The distinguishing feature of the co-parcenary under the Mitakshara Law is unity of ownership. The whole body of the co-parceners are the owners of the property, and no co-parcener can say that he owns any definite share. As regards property of this kind, there can be no guardianship. Article 44 applies in specific terms to guardians and wards. As it restricts the ordinary period of limitation it should be construed strictly."

Accordingly he reversed the decree of the Trial Court and ordered the plaintiff to recover the possession of the property in suit and gave the defendants a declaration that they were entitled to sue for partition of a one-fourth share.

The Trial Judge in finding that Art. 44 applied to the plaintiff's suit appears to have relied on a Full Bench decision of this Court in *Fakirappa* v. *Lumanna* (1), where it was held "that the minor, not having sued to set aside his mother's alienation within three years of his attaining majority, was not competent to dispute the alienation ever afterwards; and that much less could the plaintiff do so." On reading the judgment in that case, it is difficult to find any foundation for the Judge's conclusion that it applied to the facts in the present case, where several brothers constituted a joint Hindu family, and though undoubtedly the elder brother was the manager of the family he was not the guardian either *de facto* or *de jure* of his minor brothers. But even assuming for the purpose of the argument that he might be styled the *de facto* guardian that would not make him a guardian within the meaning of the words in Art. 44 of the Indian Limitation Act. For that the authority is *Mata Din* v. *Ahmad Ali* (2). Consequently Art. 44 was not applicable to the transactions in this case, and the plaintiff was entitled to succeed. The appeal, therefore, must be dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 58 Ind. Cas. 257; 22 Bom. L. R. 680; 44 B. 742.

(2) 13 Ind. Cas. 976; 34 A. 213; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 182 OF 1924.

January 6, 1925.

Present:—Mr. Dalal, J. C.

RAM AUTAR—JUDGMENT-DEBTOR—APPLICANT

versus

SHEO PIAREY LAL PANDEY AND ANOTHER—DECREE-HOLDERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Limitation Act (IX of 1908), s. 5, Sch. I, Art. 166—Execution of decree—Sale—Deposit—Application to set aside sale, absence of, effect of—Limitation—Extension of time.

An application either written or oral is necessary for the setting aside of a sale under O. XXI, r. 89 of the C. P. C. and such an application must be made within the period of 30 days laid down by Art. 166 of Sch. I to the Limitation Act. Where no application to set aside the sale is made, the deposit of the necessary amount required under O. XXI, r. 89, even if rightly made in the Civil Court, will be of no avail.

Raoji Baburao v. *Bansilal Narayan Marwari*, 53 Ind. Cas. 135; 43 B. 735; 21 Bom. L. R. 835, relied on.

Semble:—The provisions of s. 5 of the Limitation Act do not apply to an application under O. XXI, r. 89 of the C. P. C.

Application against an order of the First Additional District Judge, Lucknow at Bara Banki, dated the 30th August 1924, upholding that of the Munsif, Fatehpur, dated the 5th July 1924.

Mr. *Ali Zaheer*, for the Applicant.

Mr. *M. Wasim*, for the Opposite Party.

JUDGMENT.—After the sale ordered by the Civil Court in execution of a decree was completed the judgment-debtor Ram Autar deposited the money due in accordance with O. XXI, r. 89, of the C. P. C. in the Treasury. The sale took place on 20th February 1924, and the deposit was made on 20th March 1924. No application was made to the Civil Court as required by that rule.

When the decree-holder applied for confirmation of sale the judgment-debtor's Pleader made the following statement:—

"I would orally apply for the setting aside of sale under O. XXI, r. 89. I have paid the decretal amount." This application was made on 5th July 1924. The Executing Court of the Munsif dismissed it on the ground that it was time-barred. He accepted the oral application in place of a written one.

On appeal by the judgment-debtor the District Judge came to the same finding. It was argued here that the period may be extended. This cannot be done in revision. Both the Subordinate Courts have refused to exercise such discretion, if they had any. In this view it need not be mentioned that the provisions of s. 5 of the Limitation Act do not apply to an application under O. XXI, r. 89, which is governed by Art. 166 of the Limitation Act.

There is no necessity to enquire as to whether the deposit was rightly made at the Treasury or not. Even where a deposit is rightly made in the Civil Court itself and no application is made the sale would not be set aside. See *Raoji Baburao* v. *Bansilal Narayan Marwari* (1). An application, either written or oral, is necessary for the setting aside of a sale under O. XXI, r. 89, and such an application must be made within the period of limitation of 30 days. When there is no such application the deposit, even if rightly made in the Civil Court, will be of no avail.

I dismiss this application with costs.

Z. K. *Application rejected.*

(1) 53 Ind. Cas. 135; 43 B. 735; 21 Bom. L. R. 835.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 120 OF 1924.

January 29, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

SUNDRABAI VITHAL DESHPANDE —DEFENDANT—APPELLANT

versus

LAKSHMAN RAMCHANDRA DESHPANDE—PLAINTIFF—RESPONDENT.

Watan *property—Mortgage by* watandar—*Death of mortgagor—Mortgagee, liability of, to pay mesne profits to successor of* watandar.

A mortgagee of *watan* land from a *watandar* is liable to pay mesne profits to the successor of the original mortgagor after the latter's death for the period between the death of the mortgagor and the time when his successor to the *watan* obtains possession. [p. 724, col. 1.]

Krishnaji Sakharam v. *Kashim Mohiddin Saheb*, 57 Ind. Cas. 76; 44 B. 500; 22 Bom. L. R. 385 and *Padapa* v. *Swamirao*, 24 B. 556; 2 Bom. L. R. 548; 4 C. W. N. 517; 27 I. A. 86; 7 Sar. P. C. J. 710; 12 Ind. Dec. (N. S.) 901 (P. C.), referred to.

Second appeal from the decision of the District Judge, Belgaum, in Appeal No. 120 of 1924, varying the decree of the Joint Subordinate Judge at Belgaum, in Civil Suit No. 16 of 1922.

Mr. *A. G. Desai*, for the Appellant.

Mr. *D. R. Manerikar*, for the Respondent.

JUDGMENT.—This action was instituted by the plaintiff to recover mesne profits of certain *watan* land for three years 1918-1920, with interest from October 21, 1918, the date of the death of plaintiff's father, who had mortgaged that *watan* property in 1908. The land was restored to the plaintiff by the Revenue Authorities in 1921, on the ground that plaintiff's father was not competent to alienate *watan* land beyond the terms of his life. The Trial Court dismissed the plaintiff's suit on the ground that the possession of the mortgagee, after the death of the original *watandar* mortgagor, was not wrongful; and that although under s. 5 of the Bombay Hereditary Offices Act, 1874, the mortgage itself did not subsist, the personal remedy did not cease.

In appeal the plaintiff's claim was decreed for two years 1919-1920. The District Judge relied upon the decision in *Krishnaji Sakharam* v. *Kashim Mohiddin Saheb* (1), where it was held that the mortgage of the *watan* property came to an end on the death of the mortgagor. Thereafter the possession of the mortgagee became that of a trespasser. In that case the mortgagee sued to recover the mortgage amount with interest relying on a personal covenant in the deed. It was held that the covenant in the mortgage only meant that the mortgagor was personally liable to pay the amount without any hindrance in his life time. The covenant did not refer in terms to his heirs and successors. The receipt of rent after 1901 could not be deemed to be payment for the purposes of s. 20 of the Indian Limitation Act,

(1) 57 Ind. Cas. 76; 44 B. 500; 22 Bom. L. R. 385.

1908, and, therefore, the claim was barred by limitation. The question, however, whether the mortgagee from a *watandar* is liable to pay the mesne profits after the original mortgagor's death for the period between the death of the mortgagor and the time when his successor to the *watan* obtains possession, does not seem to have been clearly decided in any case to which we have been referred.

In *Padapa* v. *Swamirao* (2) it was held that an alienation by way of mortgage of *watan* property, or any part of it, executed when Regulation XVI of 1827 was yet in force, had no operation beyond the life of the *watandar* who mortgaged. The mortgage was in its inception void against the heir of the *watandar*, and had not become validated against the heir by reason of the repeal of the section in Regulation XVI of 1827, relating to this subject, by Bombay Act III of 1874. The Subordinate Judge passed a decree that the plaintiff should recover possession and that the investigation of the mesne profits should be reserved. That decision was eventually confirmed by their Lordships of the Privy Council. The only question argued before their Lordships was whether the mortgage itself was void, and there does not appear to have been any argument on the question whether the successor to the *watan* could recover the mesne profits from the date of the death of the mortgagor. It may be taken, however, that the order of the Subordinate Judge with regard to mesne profits was approved. The question whether the successor to the *watan* can be sued on the personal covenant in the mortgage of his predecessor is an entirely different one. The Trial Judge appears to have been led away by the argument which has been again renewed in this Court that because his father, the mortgagor, was liable to be sued on his personal covenant, the plaintiff was also liable to be sued, so that he could not seek to recover the mesne profits. That question is irrelevant to the present suit. We think that it is clear that the plaintiff was entitled to succeed, and consequently the appeal will be dismissed with costs.

Z K. *Appeal dismissed.*

(2) 24 B. 556; 2 Bom. L. R. 548; 4 C. W. N. 517; 27 I. A. 86; 7 Sar. P. C. J. 710; 12 Ind. Dec. (N. S.) 961 (P. C.).

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 443 OF 1921.
CONNECTED WITH FIRST APPEAL No. 485 OF 1921.
January 7, 1925.
Present:—Mr. Justice Lindsay and Mr. Justice Mukerji.

MITAR SAIN AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
DATTA RAM—DEFENDANT—RESPONDENT.

Hindu Law—Jains—Adoption by widow—Agreement between widow and adopted son, validity of—Direction to pay certain sum of money to widow's relative, whether can be enforced—Family arrangement, what amounts to—Specific Relief Act (I of 1877), s. 23—Persons not parties to agreement, whether can enforce agreement.

Per *Mukerji, J.*—A deed of adoption is more often than not executed after the ceremony of adoption has taken place. The law does not require that an adoption should be evidenced by a registered deed. But as a precautionary measure, people do execute such deeds. In such a case any agreement that may have taken place before and as a consideration for the adoption between the adoptor and the adoptee would find place in the deed of adoption and in any deed that the adoptee may himself execute. [p 726, col. 2.]

Among Jains adoption is more a matter of custom than of spiritual necessity. Even a married man may be adopted among them. [p. 728, col 1.]

Section 23 of the Specific Relief Act does not purport to be and is not exhaustive of the cases in which specific performance of a contract may be granted in favour of a person. The section itself simply says that specific performance of a contract may be obtained by the persons mentioned therein. It does not say that specific performance of a contract cannot be obtained by any person other than those mentioned in the section. [*ibid.*]

Per *Lindsay, J.*—There is no rule of general application in India which enables persons to bring suits upon contracts to which they are no parties. There could be no right of suit by a stranger to an agreement unless it can be shown that there has been a charge created in his favour or that under the agreement he is entitled to some beneficial interest as a *cestui que trust.* [p. 730, col. 2.]

A Hindu widow about to make an adoption to her husband cannot stipulate for gifts of her husband's estate to be made to her relations and to strangers by the adopted son after he is taken in adoption. An arrangement which makes the adoption conditional upon the adopted son agreeing to carry out the adoptor's directions to make such gifts cannot be recognised as valid. To allow an arrangement of this nature to be carried out would be to allow a Hindu widow to do indirectly what the law forbids her to do directly and such an arrangement cannot, therefore, be enforced. Any attempt to bind the adopted son by such conditions must fail; the conditions are void and the son takes the estate free from them. [p. 731, col. 2.]

In the United Provinces the consent of the husband is essential in order to enable a widow to make an adoption and while it might be conceded that consent so given would justify the widow in imposing reasonable conditions upon the adopted son for the protection of herself and the estate from which she is entitled to draw maintenance, it would not be assumed that the husband consented to arrangements made by

the widow at the time of the adoption whereby extensive portions of his estate can be transferred by way of gift to members of his wife's family. The invalidity of such conditions cannot be cured by showing that the adopted son, a person of full age, assented to them. The invalidity arises out of the inherent disability of the widow under the Hindu Law to give away portions of her husband's estate and an attempt to impose conditions which would lead indirectly to such alienations being made is absolutely void as being *ultra vires*. [p. 732, col. 2; p. 733, col. 1.]

Even if it can be assumed in such a case that the assent of the adopted son to such conditions creates a trust, the purpose of the trust being unlawful the trust cannot be enforced. [p. 733, col. 2.]

A family arrangement is an arrangement arrived at by members of the same family in settlement of doubtful claims, where there being uncertainty as to the rights of the various claimants, the dispute is composed by a settlement based upon acknowledgment of pre-existing title in the parties concerned. There must be a dispute, the parties must belong to the same family and the property which constitutes the subject-matter of the dispute must be the property of the family to which the parties belong. [p. 734, col. 1.]

A *Jain* widow adopted the defendant and shortly afterwards executed a deed of adoption wherein she directed the defendant to pay a certain sum of money to the plaintiffs, who were the brothers of the widow. The deed further provided that in case the defendant refused to pay the sum directed by the widow the money might be realized from her estate if necessary by the auction-sale of her property. Two days later the defendant himself executed a document in which he recited that he had been adopted in pursuance of instructions from the widow's deceased husband and that the widow had made certain arrangements concerning her property according to the directions of her husband. He declared that he would abide by all the conditions laid down in the deed executed by the widow and that his adoption was conditional on his acceptance of the stipulation contained in the deed. He bound himself to carry out the terms of the deed and declared that in case of his failure the conditions might be enforced in Court. In a suit by the plaintiffs to recover from the defendant the sum mentioned in the deed of adoption as being payable to them :

Held, Per *Mukerji, J.* (1)—that the agreement entered into by the defendant with the widow was supported by consideration and that the consideration was good and enforceable in a Court of Law ; [p. 728, col. 1.]

(2) that the arrangement between the widow and the defendant might be regarded as a family arrangement and that the plaintiffs were, therefore, entitled under s. 23 of the Specific Relief Act to sue to enforce the arrangement as being beneficially entitled thereunder ; [*ibid.*]

(3) that even if s. 23 of the Specific Relief Act was not applicable the plaintiffs were entitled to sue to enforce the arrangement inasumch as the defendant had bound himself to carry out the arrangement and a trust had been created in favour of the plaintiffs ; [*ibid.*]

(4) that the sum which was directed to be paid to the plaintiffs had been made a charge on the estate and that the plaintiffs were, therefore, entitled to a declaration that the estate in the hands of the defendant was charged with such payment. [*ibid.*]

Per *Lindsay, J.*—(1) that the arrangement between the widow and the defendant did not amount to a family arrangement; [p. 734, col. 1.]

(2) that the plaintiffs not being parties to the arrangement were not entitled to sue to enforce the arrangement ; [*ibid.*]

(3) that the arrangement was void and *ultra vires* having regard to the provisions of the Hindu Law with regard to the power of a widow to make alienations of her husband's estate. [p. 734, col. 2.]

Case-law referred to.

First appeal from the decision of the Subordinate Judge, Muzaffarnagar at Meerut, dated the 8th July 1921.

JUDGMENT.

Mukerji, J.—These two appeals arise out of the same suit instituted by two persons Mitter Sen and Gurusaran Das against one Data Ram.

It appears that one Dalip Singh deceased a Jain Agarwal, died some years ago and was succeeded by his wife *Musammat* Manohri. *Musammat* Manohri, shortly before her death, adopted Data Ram. The adoption took place on the 27th of October 1918. The plaintiffs are Manohri's brothers. On the 12th of December 1918 *Musammat* Manohri executed a document which is described in the document itself as a Will and a deed of adoption. By this document she declared that she had taken Data Ram a near relation of hers, as her adopted son and that on her death he would be the absolute owner of her entire property. She however, directed by this document Data Ram to make certain payments. Among these directions one was to the effect that Data Ram was to pay a sum of Rs. 15,000 to the plaintiffs, her brothers, within a period of 15 years. At about the end of the document, *Musammat* Manohri declared that in case Data Ram refused to pay the various sums directed by her to be paid, the money might be realized from her estate, if necessary, by auction sale of the property. Two days later, *viz.*, on the 14th of December 1918 Data Ram himself executed a document which is described as an agreement. He recited that he had been adopted in pursuance of instructions from Dalip Singh and that *Musammat* Manohri had made certain arrangements of her property according to the directions of the said Dalip Singh. By this document, Data Ram declared that he would abide by all the conditions laid down in two documents executed by *Musammat* Manohri (one dated 12th December 1918 and the other said to be dated 13th December 1918 but not forthcoming) and he further declared that his adoption was conditional on his acceptance of the stipu-

lations contained in the said documents. He bound himself to carry out those terms and added that in the case of his failure the conditions might be enforced in Court.

The plaintiffs brought the suit with the allegation that in spite of the execution of the documents Data Ram had denied the plaintiffs' right to receive the sum of Rs. 15,000 and accordingly they had asked for a declaration that they were entitled to that sum of money and they further prayed that a charge might be declared to exist over the entire property of *Musammat* Manohri in the hands of Data Ram.

Data Ram's defence was that he had executed the document dated the 14th of December 1918 while he was yet a minor, that it was void for want of consideration, that it was executed under undue pressure, that the suit was premature and that the plaintiffs had no right of action.

The learned Subordinate Judge found in favour of the plaintiffs except in this that he found that there was no charge on the property. The learned Subordinate Judge accordingly decreed the suit for a declaration of Data Ram's liability only.

In this Court both the parties have appealed. The contention of Mitter Sen and Gurusaran Das is that a charge ought to have been declared over the entire property in the hands of Data Ram. The contentions of Data Ram are several, but only the following have been urged before us:—

(1) The documents dated the 12th and 14th of December 1918 were executed after the adoption and were, therefore, not binding on the defendant.

(2) The conditions laid down in the documents are void in law.

(3) The plaintiffs have no right to sue.

The question of defendant's minority was raised, but was not argued upon.

When the appeals came for hearing before this Court two issues were remanded. They were directed towards the nature of the estate held by *Musammat* Manohri. The findings of the learned Subordinate Judge on those issues are to the effect that *Musammat* Manohri held only a life-interest in the property of her husband which was ancestral in the latter's hand and that she was not competent to make any Will with respect to the said property. The learned Counsel for the parties have accepted the correctness of these findings, although the plaintiffs filed objections to the findings. We have now to take it that the property was inalienable in the hands of *Musammat* Manohri.

The questions for determination in these two appeals, therefore, are:—

(1) Whether it was agreed at the time of the adoption and as a condition precedent to the adoption that Data Ram would make the several payments he was directed to make by *Musammat* Manohri's document dated the 12th of December 1918?

(2) Whether if such was not the case the agreement of Data Ram is void for want of consideration?

(3) Whether the plaintiffs are competent to maintain the suit although they were no parties to the documents of the 12th and 14th of December 1918?

(4) Whether the plaintiffs have any charge over the property in Data Ram's possession?

On the first point. It is expressly stated in the deed executed by Data Ram that his adoption was made conditional on his acceptance of the terms enunciated in the deed of the 12th of December 1918 and another deed of the 13th of December 1918 which is not forthcoming. It is common ground that the adoption was effected on the 27th of October 1918 and not exactly $2\frac{1}{2}$ months before the 12th of December 1918 as stated in the document executed by *Musammat* Manohri on that date. A deed of adoption is more often than not executed after the ceremony of adoption has taken place. The law does not require that an adoption should be evidenced by a registered deed. But as a precautionary measure, people do execute such deeds. In the circumstances any agreement that may have taken place before and as a consideration of the adoption of Data Ram would find place in the deed of adoption and in any deed that the adopted son may himself execute. There can be no doubt that the two documents of the 12th and 14th of December 1918 together form one document and are complementary of each other. Although *Musammat* Manohri's document purports to have been executed on the 12th of December it was not registered till after the deed executed by Data Ram had been registered. The two documents were registered on one and the same date, *viz.*, on the 14th of December 1918. But the deed executed by Data Ram was registered at the Sub-Registrar's Office between 4 and 5 P. M., while the deed executed by *Musammat*

Manohri was registered at her house between 6 and 7 P. M. on the 14th of December. Thus, we find that in a written agreement between the two parties, *viz.*, *Musammat* Manohri and Data Ram certain terms were recorded. Under the circumstances, the burden of proving that the agreement does not recite true state of things must lie heavily on the party who so alleges.

The small amount of oral evidence that has been adduced does not satisfy me that it is untrue that before the adoption, the defendant, who was an adult at the date of adoption, had not agreed that he would make certain payments desired by *Musammat* Manohri, as a condition precedent to his adoption. I hold, therefore, that it was agreed at the time of adoption and as a condition precedent to the adoption that Data Ram would make the several payments he was directed to make by the deed of the 12th of December 1918.

Point No. 2—From my finding on point No. 1, it follows that the agreement executed by Data Ram is supported by consideration. But it has been urged that the consideration is void and repugnant to law. In support of this argument two cases have been relied upon by the learned Counsel for Data Ram. These cases are *Bhaiya Rabidat Singh* v. *Indar Kunwar* (1) and *Balkrishna Motiram Gujar* v. *Shri Uttar Narayandev* (2).

These cases and several other cases [see for example *Vyascharya* v. *Venkubai* (3), *Visalakshi Ammal* v. *Sivaramien* (4) and *Ravji* v. *Lakshmibai* (5)] deal with cases in which the agreements for the Court's consideration were those made by the natural guardian of a minor who was adopted by the widow. The *ratio decidendi* of these cases is that where the condition imposed by the natural guardian of the minor was to his entire disadvantage and to the advantage of the widow or a third party, the condition was *ultra vires* of the natural guardian and could not be enforced in a Court of Law. It was held that a widow could stipulate that she should be in possession of the property of her husband during her lifetime. But it was held that if she wanted that a portion of her husband's property should go to her daughter who has no right to inherit, the adopted son could repudiate the arrangement. This last mentioned proposition was laid down in the case of *Vyasacharya* v. *Venkubai* (3). None of these cases deal with the circumstances in which an adult person is adopted and he agrees to a loss of a portion of the property that would go to him except for the agreement. Such a case arose in *Kashibai Ramchandra Ghatge* v. *Tatya Genu Pawar* (6). In this case the last owner of the property left him surviving a widow and a pre-deceased son's daughter. The widow made an adoption and executed a deed of adoption and also a Will. By this Will she gave a portion of the property to her deceased son's daughter. It was held that the deed of adoption and the Will were to be read together and so read they constituted a single family arrangement. It was further held that the adopted son, being of full age and having deliberately accepted the family arrangement and its advantages must be held to it. It was further held that the disposition in favour of the granddaughter was good, not because it was a bequest by the widow, but because it was a part of the single family arrangement which all parties accepted. This case in *Kashibai Ramchandra Ghatge* v. *Tatya Genu Pawar* (6) is on all fours with the case before me. Accordingly to the arrangement arrived at by means of the two documents dated respectively the 12th and the 14th of December 1918, as a condition precedent to his adoption, Data Ram agreed that he would make certain payments to certain persons. By executing the agreement Data Ram took the advantage of obtaining property which has been valued, by himself, at something between two and three lakhs of rupees and laid himself under an obligation to pay a sum of a little over Rs. 20,000 to different persons. Even this comparatively small sum was not to be paid at once but gradually and in the course of a long number of years The question under the circumstances is whether Data Ram can now resile from the agreement into which he deliberately entered and the full advantage of which he has taken. He has admitted in his deposition that his father and brother are insolvents and that he does not possess

(1) 16 C. 556; 16 I. A. 53; 5 Sar. P. C. J. 505; Rafique and Jackson's P. C. No. 110; 8 Ind. Dec. (N. S.) 367 (P. C.).
(2) 50 Ind. Cas. 912; 43 B. 542; 21 Bom. L. R. 225.
(3) 17 Ind. Cas. 741; 37 B. 251; 14 Bom. L. R. 1109.
(4) 27 M. 577; 14 M. L. J. 310.
(5) 11 B. 381; 6 Ind. Dec. (N. S.) 250.
(6) 36 Ind. Cas. 546; 10 B. 668; 18 Bom. L. R. 740.

any property on the face of the earth beyond what he got as the adopted son of *Musammat* Manohri. The plea taken of undue influence and pressure have been abandoned and for the simple and sure reason that there was no evidence to substantiate it. In my opinion it would be highly improper on the part of Data Ram to repudiate the transaction altogether, he having had the full advantage of it. It must be remembered that the parties are Jains and adoption among them is more a matter of custom that of spiritual necessity. Even a married man may be adopted among them. I hold, therefore, that the agreement is not void for want of consideration and the consideration is good and enforcible in a Court of Law.

Coming to the third point. The argument on this point is that if there was an agreement it was between *Musammat* Manohri and Data Ram, that the plaintiffs were no parties to the agreement and that therefore, they were not entitled to sue for the specific performance of the same. If we regard the case as a family arrangement, as the transactions before their Lordships in the Bombay case [*Kashibai Ramchandra Ghatge* v. *Tatya Genu Pawar* (6)] were regarded, the case would come directly within s. 23 of the Specific Relief Act and the plaintiffs would be entitled to sue as being beneficially entitled under the arrangement. If, however, the case cannot be brought within cl. (c) of s. 23 of the Specific Relief Act, it appears to me that s. 23 of the Specific Relief Act does not purport to be and is not exhaustive of the cases in which specific performance of a contract may be granted in favour of a person. The section itself simply says that specific performance of a contract may be obtained by the persons mentioned therein. It does not say that specific performance of a contract *cannot* be obtained by any person other than those mentioned in the section. The law laid down in *Tweddle* v. *Atkinson* (7) has not been followed as the lawfully applicable to India, in the case of *Khwaja Muhammad Khan* v. *Husaini Begum*. (8). The case before their Lordships of the Privy Council might possibly be brought within cl. (c) of s. 23 of the Specific Relief Act as being the case of a contract in settlement on marriage. But it is significant that their Lordships did not refer to this provision of the Indian law. The lead of the Privy Council which established in effect that the list of parties who are entitled to sue for a specific performance of a contract as given in s. 23 of the Specific Relief Act was not exhaustive, was followed in Calcutta in the case of *Debi Narain Dutt* v. *Ram Sadhan Mandal* (9) which again was followed in this High Court in *Nehal Singh* v. *Fateh Chand* (10). In the last two mentioned cases the persons who sued to enforce the contract were no parties to them. The case of *Shuppu Ammal* v *Subramaniam* (11) may also be cited. No doubt a contrary opinion was expressed in *Iswaram Pillai* v. *Taregan* (12), but there it was laid down (at page 761) that in certain cases a stranger could sue. Some of these cases were enumerated as creation of a trust in favour of the plaintiff, the creation of a charge on immoveable property in favour of the plaintiff, where the promisor is estopped owing to transactions between the plaintiff and the promisor and where there is a settlement on marriage in which the plaintiff is beneficially entitled.

Assuming that the present case is one in which the plaintiffs are not directly entitled to sue to enforce the specific performance of the contract executed by Data Ram, I should think that the present case easily falls within the first two conditions laid down in the case of *Iswaram Pillai* v. *Taregan* (12) just quoted, I will now show how such is the case.

Data Ram by the document executed by him said: "As regards the said documents I *declare* that I shall abide by all the conditions laid down therein..... .....I, therefore, covenant and bind myself that should I deviate from fulfilling any of the terms then the *person in whose favour* the said condition might be deemed may have it enforced by the Court" The conditions are recorded in *Musammat* Manohri's document dated the

(7) (1861) 1 B. & S. 393; 30 L. J. Q. B. 265; 8 Jur. (N. S.) 332; 4 L. T. 468; 9 W. R. 781; 124 R. R. 610; 121 E. R. 762.

(8) 7 Ind. Cas. 237; 32 A. 411; 14 C. W. N. 865; 7 A. L. J. 871; (1910) M. W. N. 313; 8 M. L. T. 147; 12 C. L. J. 205; 12 Bom. L. R. 638; 20 M. L. J. 614; 37 I. A. 152 (P. C.).

(9) 20 Ind. Cas. 630; 41 C. 137; 17 C. W. N. 1143; 18 C. L. J. 603.

(10) 68 Ind. Cas. 778; 44 A. 702; 20 A. L. J. 708; (1922) A. I. R. (A.) 426.

(11) 4 Ind. Cas. 1083; 33 M. 238; 19 M. L. J. 739; 8 M. L. T. 249.

(12) 23 Ind. Cas. 961; 38 M. 753; 26 M. L. J. 127.

12th of December 1918 and one of the conditions is that a sum of Rs. 15,000 would be paid to the plaintiffs in the course of 15 years. Under s. 3 of the Indian Trusts Act (Act II of 1882): "A trust is an obligation annexed to the ownership of property... .....declared and accepted by him (owner) for the benefit of another or of another and the owner." The declaration that Data Ram expressly made was to the effect that his adoption was conditional on his accepting the stipulations mentioned in *Musammat* Manohri's deed and further that he would abide by the conditions. There is, therefore, a declaration of an obligation in favour of certain persons and that obligation is annexed to the ownership of Data Ram's property. The document executed by Data Ram being a registered one all the requirements of law are fulfilled and the document would operate as a deed of trust binding on Data Ram. It will be noticed that Data Ram expressly gives to the persons mentioned in the document executed by *Musammat* Manohri an authority to sue him in a Court of Law in case of any deviation by him from the terms of it. Even if Data Ram had not granted such authority to enforce the obligation against him, the obligation could be enforced against him under s. 56 of the Indian Trusts Act. There can, therefore, be no doubt that even if we accept the statement of law as made in the case of *Iswaram Pillai* v. *Taregan* (12), the present case fully falls within the scope of it. Further, it appears to me that the plaintiffs are entitled to have a charge on Data Ram's property. This point will be discussed under Issue No. 4. If this be the case the plaintiffs will have an additional title to maintain the suit.

Point No. 4. I have already stated as my opinion that the two documents of the 12th and 14th of December 1918 should be treated as one transaction entered into by two persons. *Musammat* Manohri expressly declared that the monies which Data Ram was to pay on her death would be recovered from her estate in case of non payment. This would evidence an intention to create a charge over the estate of *Musammat* Manohri. Data Ram in the deed executed by himself accepts these terms and says that the terms could be enforced against him in a Court of Law. It is true he does not say that the monies payable by him could be recovered from the estate in his possession, but the intention is clear. It is to be noted that the main document is the one executed by *Musammat* Manohri and it alone contains all the stipulations entered into between the mother and the son. The deed executed by Data Ram is a short one and it was found unnecessary to repeat all the conditions already put into the deed executed by *Musammat* Manohri. I am of opinion that Data Ram did charge the entire estate in his hands with the payment of the several items enumerated in *Musammat* Manohri's deed. The plaintiffs are, therefore, entitled to a declaration of the charge they ask for.

The result is that I would dismiss the defendant's appeal with costs including Counsel's fees in this Court on the higher scale and would allow the plaintiffs' appeal with costs granting them a declaration that they have a charge for the sum of Rs. 15,000 over the entire property owned by Data Ram as the adopted son of Dalip Singh. The costs due to the plaintiffs-appellants would include Counsel's fees in this Court on the higher scale.

Lindsay, J.—I regret that I am unable to concur in the judgment of my learned brother. In my opinion the plaintiffs are not entitled to any relief and I hold that their suit should have been dismissed by the Court below.

The main facts of the case have been set out in the judgment of my learned colleague and need not be recapitulated here. I proceed at once to an examination of the case disclosed in the plaint. It is alleged in the first place that *Musammat* Manohri was the own sister of the plaintiffs and that at the time of her death she was full owner and in possession of considerable property both moveable and immoveable.

It was next asserted that by means of a document executed on the 12th December 1918 and which is described as a combination of a Will and a deed of adoption, *Musammat* Manohri bequeathed her estate to the defendant Data Ram, her adopted son, subject to certain conditions and provisions one of which was that a sum of Rs. 15,000 was to be paid to the plaintiffs out of the estate.

It was then stated that by a deed executed on the 14th December 1918 the defendant Data Ram accepted all the conditions and provisions referred to above and that he was bound to discharge them.

It was pleaded that the defendant had

come into possession of the property on the death of *Musammat* Manohri which took place on the 15th of December 1918, and that on various dates subsequent he had repudiated his liability to pay the sum of Rs 15,000 to the plaintiffs.

The reliefs which the plaintiffs claimed on these allegations were:

(1) a declaration of the defendant's liability to pay them Rs. 15,000, and

(2) a declaration that the entire property of *Musammat* Manohri in the hands of the defendant or his transferees was subject to a charge to the extent indicated.

It is clear then that the case for the plaintiffs was that *Musammat* Manohri being full owner of the property had bequeathed it to the defendant subject to a charge in their favour and that by reason of the agreement between *Musammat* Manohri and the defendant constituted by the deeds executed on the 12th and 14th December 1918 respectively the plaintiffs were entitled to enforce the charge.

It is to be observed here that the plaintiffs were no parties to the agreement just mentioned—nor is it pleaded, nor could it be pleaded that any consideration for the agreement moved from them. They are strangers alike to the consideration and the contract and have no right of suit unless they can establish that there was over and above a mere contract a conveyance of some interest in their favour which they are entitled to enforce either in law or equity.

While it is true that the doctrine in *Tweddle* v. *Atkinson* (7) has been held not to apply in India, it is not to be inferred from the judgment in which this principle was laid down that there is any rule of general application in India which enables persons to bring suits upon contracts to which they are no parties. That this is so is apparent from the judgment of Lord Macnaghten in the case of *Jamna Das* v. *Ram Autar Pande* (13). The earlier case decided by their Lordships of the Privy Council in which the *dictum* regarding the rule in *Tweddle* v. *Atkinson* (7) occurs is *Khwaja Muhammad Khan* v. *Husaini Begum* (8) and a reference to the judgment shows that the right of suit recorded to a third party in that case was granted on the ground that a charge upon specific immoveable property had been by the agreement created in her favour. It was held in the circumstances that the plaintiff was entitled to proceed in equity to enforce her claim.

The whole law on this subject has been discussed by a Bench of the Madras High Court in *Iswaram Pillai* v. *Taregan* (12) and I agree with the view which is there taken.

There can, in my opinion, be no right of suit by a stranger to the agreement unless it can be shown that there has been a charge created in his favour or that under the agreement he is entitled to some beneficial interest as a *cestui que trust*.

To return now to the case set out in the plaint, it has been pointed out by my learned brother that when these appeals first came up for hearing it was found necessary to remit two issues to the Court below in order to have it ascertained (1) whether the property which was in *Musammat* Manohri's possession when she died, or any portion of it, belonged to her absolutely or whether it was in part or in whole the ancestral property of her husband Dalip Singh, and (2) whether *Musammat* Manohri was competent to make a Will so as to bind the defendant by its terms. The Court below has found that the entire property which was in *Musammat* Manohri's possession was ancestral property in the hands of her husband and that accordingly she had under the Hindu Law no power to dispose of it by Will so as to bind the defendant. She had nothing more than the limited estate of a Hindu female which determined as soon as the adoption was made, and the whole of the property vested in Data Ram by reason of his adoption.

The plaintiffs, as my learned colleague has pointed out, have not been able to controvert the finding that the property was the ancestral property of Dalip Singh and in these circumstances it is obvious that the case set up in the plaint has collapsed entirely. The document executed by *Musammat* Manohri on the 12th December 1918 in so far as it purports to be a Will is altogether void for the purpose of creating any interest to take effect subsequent to her death and the plaintiffs can derive no benefit from it. Data Ram the defendant has not come into the estate of Dalip Singh under this document. He is in by adoption as the heir of Dalip Singh.

(13) 13 Ind. Cas. 304; 34 A. 63; 16 C. W. N 97; 11 M. L. T. 6; 9 A. L. J. 37; (1912) M. W. N. 32; 15 C. L. J. 68; 14 Bom. L. R. 1; 21 M. L. J .1158; 39 I. A. 7 (P. C.).

In this state of things the plaintiffs have been driven to advance a case different from that with which they started in the Court below and it is now argued that as the adoption of Data Ram was made subject to certain conditions which he, being a person of full age (as he is found to be) accepted by the declarations contained in the document executed by him on the 14th December 1918, he is bound to fulfil the conditions one of which was the payment of Rs. 15,000 to the plaintiffs.

In the 5th paragraph of the additional pleas set out in the defendant's written statement it was pleaded that the conditions referred to were unlawful as being contrary to the Hindu Law, and that the defendant was not bound by them. In my opinion the defendant had the right to raise this defence as against the plaintiffs who, as I have already pointed out, are strangers to the agreement and from whom no consideration has proceeded. They are not the "promisees" under the agreement evidenced by the two documents. Nor has it been pleaded, nor was it possible for the plaintiffs to plead an estoppel against Data Ram. Their position has not in any way been altered by any declaration or conduct on the part of the defendant.

We have then to examine the validity of these conditions sought to be imposed upon Data Ram in connection with his adoption. Pausing here it may be noted that the conditions first appear in these two documents which on the finding of the Court below were executed about 1½ months after Data Ram was taken in adoption. It is to be noted that in the plaint nothing was said as to these conditions having been imposed or accepted before or at the time of the adoption. But on the 14th June 1921 the plaintiffs' Pleader put in an application to be found at page 17 of our printed record in which it was stated that it was the plaintiffs' case that the conditions had been settled before the adoption took place. The defendant in para. 10 of the further pleas in the written statement had denied that the adoption had been made subject to any conditions and in para. 11 it was further set out that the so-called conditions had been put forward about 2½ months after adoption had taken place.

The plaintiffs by their petition just mentioned asked for amendment of the issues in order to have the date of the conditions settled but the Subordinate Judge refused this prayer being of opinion that the issues had been adequately drawn. He did not shut out any evidence regarding this point in controversy, and the defendant himself and three witnesses (two of whom were not cross-examined) deposed that no conditions had been put forward and accepted prior to or at the time of adoption. The plaintiffs were allowed to call evidence in rebuttal but their Pleader informed the Court (see page 27 of the printed record) that he would not call any evidence to show that the conditions had been accepted at or before the time of adoption, and the only evidence in favour of the plaintiffs on this point is to be found in a declaration contained in the deed executed by Data Ram on the 14th December 1918 in which he says that *Musammat* Manohri had made "some arrangments of the property at that time, *i. e.*, the time of the adoption."

In the document executed by *Musammat* Manohri herself on the 12th December 1918 there is no mention of any conditions having been put forward when the adoption took place 2½ months before (as she says).

My learned colleague is, apparently satisfied that the conditions were offered and accepted at or before the time of the adoption. The matter is not so clear to me as it is to him: but there is, at any rate, the admission contained in the defendant's own deed and I am not, therefore, prepared to differ as regards this matter. To return to the question of the validity of these conditions, can a Hindu widow, about to make an adoption to her husband, stipulate for gifts of her husband's estate to be made to her relations and to strangers by the adopted son after he is taken in adoption? Can she make the adoption conditional upon the adopted sons agreeing to carry out her directions to make such gifts? In my opinion she cannot. To allow an arrangement of this nature to be carried out would be to allow the Hindu widow to do indirectly what the Hindu Law forbids her to do directly and I hold that no such arrangement can be enforced. Any attempt to bind the adopted son by such conditions must fail: the conditions are void and the son takes the estate free from them.

It is undoubtedly true that conditional

adoptions are not unknown to the Hindu Law as administered in our Courts, and there are numerous instances of adoptions in which conditions laid down by the adoptive father or adoptive mother have been enforced.

As regards conditions made by the adoptive father there is no need to consider them for if an adoptive father can dispose of his property before adoption as he chooses, he can at the time of adopting a son impose such conditions as he thinks fit upon the enjoyment of his property by the adopted son. A widow, however, stands in a very different position.

Most if not all of the cases relating to conditional adoptions made by widows have arisen in connection with agreements made at the time of adoption between the adoptive mother and one or other of the natural parents of the child who, save in exceptional cases like the present where the parties are Jains, is a minor.

It has been held legitimate for a widow on such occasions to impose conditions for her own benefit provided they are reasonably designed for her own protection. The widow although the estate is divested from her by the act of adoption is nevertheless entitled to maintenance and may for that purpose make provision for the protection of the estate in her own interest.

The law on this subject has been discussed in a number of rulings of the Bombay and Madras High Courts and I may refer here to a judgment of the former Court reported as *Ravji* v. *Lakhshmibai* (5). In the course of the judgment the learned Judge referring to West & Buhler remarks that agreements depriving an adopted son of his immediate right of inheritance are inadmissible in accordance with strict Hindu Law, but are not uncommon in practice and have been upheld by the Courts, custom and practice have moulded the law and fair arrangements for the protection of the widow's interest during her life are allowed. The question in all cases is whether the stipulations are reasonable. If they are unreasonable such as giving the widow absolute powers of disposition over the property they should be rejected.

As an instance in which a condition imposed by the widow was rejected as unreasonable, I may refer to the case of *Venkappa* v. *Fakir Gowda* (14). There the agreement made by the adoptive mother with the natural parent was one by which she took power to give away a portion of her husband's estate to her own brother. It was held that the condition was unreasonable and the gift void and the adopted son was held entitled to recover the property.

There are not many cases of this description to be found in the reports of the Courts of these Provinces. There is one in *Kali Das* v. *Bijai Shankar* (15) in which an arrangement by the widow that she should remain as manager of the estate for her life was upheld.

The question of the validity of conditions made by a widow at the time of adoption was raised in another case which went up from Oudh to the Privy Council [*Bhaiya Rabidat Singh* v. *Indar Kunwar* (1)]. The question was not actually decided for it was held that, as a matter of fact, no conditions had been attached to the adoption. But it was remarked in the concluding portion of the judgment that had it been otherwise the analogy, such as it is, presented by the doctrines of Courts of Equity in England relating to the execution of powers of appointment would rather suggest that, even in that case the adoption would have been valid and the condition void. The learned Judge was here no doubt referring to the rule by which a corrupt bargain made by the donee of a special power to appoint to a certain person or class with such person or a person of such class is deemed to be void and the doctrine would, I take it, extend to a case where the bargain was made not for the benefit of the holder of the power but for the benefit of his relations and friends.

I would here observe with reference to the decisions of the Bombay Courts that the powers of the widow in Western India to take in adoption are more extensive than those which a widow possesses in these territories. In Bombay the widow can adopt without any consent from her husband. In these Provinces the consent of the husband is essential and while it might be conceded that consent so given would justify the widow in imposing reasonable conditions for the protection of herself and the estate from which she is entitled to draw maintenance it would not be readily assumed that the husband consented to

(14) 8 Bom. L. R. 346.

(15) 13 A. 391; A. W. N. (1891) 141; 7 Ind. Dec. (N. s.) 250.

arrangements made by the widow at the time of adoption whereby extensive portions of his estate could be transferred by way of gift to the members of his wife's family.

In the document executed by *Musammat* Manohri on the 12th December 1915 it is nowhere stated that the gift which she was purporting to make had been sanctioned by her husband. There is indeed a statement to that effect made in the subsequent deed executed by the defendant on the 14th December 1918, but it would require better evidence than this to convince me that the widow had been authorized by her husband to make these gifts and no such evidence is forthcoming.

In my opinion *Musammat* Manohri had under the Hindu Law no authority to make these gifts or to impose upon the defendant Data Ram any condition that he should make them after adoption. The invalidity of such conditions cannot, in my opinion, be cured by showing that the adopted son, a person of full age, assented to them. The invalidity arises out of the inherent disability of the widow under the Hindu Law to give away portions of her husband's estate and an attempt to impose conditions which would lead indirectly to such alienations being made is, in my opinion, absolutely void as being *ultra vires*. I hold, therefore, that the defendant being entitled as against the plaintiffs to raise the plea that the conditions are invalid is also entitled to a judgment that they are invalid and are not binding upon him.

I cannot agree that as the result of the two documents under consideration the defendant has constituted himself a trustee for the plaintiffs and is bound in that capacity to pay them this sum of Rs. 15,000.

It is clear for the reasons given above that *Musammat* Manohri was not competent to create any trust over the estate of her husband nor has she transferred any property to the defendant with a trust attached. The defendant has taken the property as the result of his adoption he has not taken it under the so-called Will executed by *Musammat* Manohri. Nor am I able to spell out of the language of the document which the defendant executed on the 14th December 1914 any such declaration of confidence as would place him in the position of a trustee for the plaintiffs. He has expressed his assent to certain conditions offered him by the widow and those conditions are, according to my opinion, void in law. He stands free of them, and is under no legal obligation to carry them out as effecting the property in his possession.

Further even if it can be deduced from the language of these two deeds that all the formalities necessary to the execution of a deed of trust had been carried out, I should still be of opinion that the purpose of the trust being unlawful the trust could not be enforced. I have touched upon this matter already. There can be no doubt what the purpose intended by these two documents was. *Musammat* Manohri had either by herself or with the assistance of members of her own family made up her mind that her relations and other friends were to be handsomely provided for out of her husband's estate and as that end could not be achieved by direct action on her part forbidden by the Hindu Law it was considered that the same end might be attained indirectly by having these deeds executed. The purpose being, in my opinion, unlawful as in contravention of the Hindu Law the trust, if there is one cannot be enforced.

There remains only one other matter for discussion. My learned brother following the judgment in the case reported as *Kashibai Ramchandra Ghatge* v. *Tatya Genu Pawar* (6) is of opinion that the transaction evidenced by the two deeds of the 12th and 14th December 1918 should be enforced as a family settlement. He also refers in this connection to s. 23 of the Specific Relief Act, with this I cannot agree.

The facts of the Bombay case to which he refers are, in my judgment, very different from those with which we are concerned here.

A Hindu, Bapurao, died leaving a widow, his son's widow and his son's minor daughter. Before his death he recommended his wife to adopt the defendant Anna who was his own brother's son. This she did by executing a deed of adoption on the 10th June 1895, and by a second deed of even date which purported to be a Will she made a bequest in favour of her deceased son's minor daughter. This Will was attested by the adopted son (who was of full age) and by his father and his brother the latter being a qualified Pleader.

The daughter sued for possession of the property bequeathed to her. It was held that although the disposition by Will in

the plaintiffs' favour was bad she was entitled to succeed on the ground that there had been a family arrangement to which the adopted son was a party and which he deliberately accepted.

One thing, at least, is apparent from this statement of the facts and that is that all the persons concerned were members of the same family, *i. e.*, the family to which Bapurao belonged and in that sense it may be said that the transactions entered into were between members of the same family and related to property belonging to that family concerning which there was some dispute.

But I am quite unable to discern any case of a family arrangement in the present suit. I have always understood that the arrangements which go by this name are arrangements arrived at by members of the same family in settlement of doubtful claims cases in which, there being uncertainty as to the rights of the various claimants, the dispute is composed by a settlement based upon the acknowledgment of pre-existing title in the parties concerned. There must be a dispute, the parties must belong to the same family and the property which constitutes the subject-matter of the dispute must be the property of the family to which the parties belong.

In the case which is now before me we are concerned with property belonging to Dalip Singh. His widow adopted a relation of her own and thereby made him a member of Dalip's family : up to the time of his adoption he was not a member of that family but belonged to the family of his adoptive mother. So that any arrangement arrived at between him and her before the adoption took place or at that very time cannot be said to have been an arrangement between members of the same family.

Nor again is it apparent that there was any dispute for the settlement of which this arrangement was necessary? There could in fact have been no dispute—no agitation of doubtful claims—and there was no distribution of Dalip Singh's property between the widow and Data Ram each party acknowledging the title of the other? Nor can it be said that there was any family settlement embracing the plaintiffs and other persons named in the document executed by *Musammat* Manohri—for these persons who were outside Dalip Singh's family had no shadow of a claim to any portion of the estate belonging to Dalip Singh. The arrangements made for their benefit were not come to by way of settling any doubtful rights for they had no rights doubtful or otherwise but were merely candidates for favours from *Musammat* Manohri, the principles of the family arrangement or settlement cannot be invoked in support of the plaintiffs' case and the judgment in *Kashibai Ramchandra Ghatge* v. *Tatya Genu Pawar* (6), assuming it to be a correct judgment on the facts of that case, cannot afford any guide to the disposal of the present suit. With regard to the provisions of s. 23 of the Specific Relief Act what I have already said serves to show that the plaintiffs cannot ground on this provision of the law. Clause (c) of the section to which my leraned colleague refers relates to contracts of settlement on marriage and compromises of doubtful rights between members of the same family and gives a right of action to persons who are beneficially entitled thereunder. Neither case has arisen here; there is no question of any marriage settlement. Nor for the reasons I have given above is there any case of a compromise of doubtful rights between members of the same family.

The result of all this is that, in my opinion, the suit of the plaintiffs should have been dismissed *in toto*.

First Appeal No. 485 of 1921 should, therefore, be allowed with costs to the defendant Data Ram in both Courts including in this Court fees on the higher scale,

The plaintiffs' appeal, First Appeal No. 443 of 1921, in my opinion, fails and should be dismissed with costs including fees here on the higher scale.

By the Court.—As we are divided in opinion regarding the proper decision of both these appeals the result is that both appeals are dismissed with costs including fees in each case on the higher scale.

Z. K. *Appeals dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 121 OF 1924.

January 30, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

MAHADEV VITHU PATIL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GANOO CHANGOO PATIL—DEFENDANT—RESPONDENT.

Partnership, dissolution of—Accounts, suit for—Neglect of partner, liability for.

In a suit for accounts upon a dissolution of partnership one partner is not liable for the probable loss sustained by the firm owing to the neglect or failure of such partner to carry out the duties imposed upon him by the partnership agreement to the prejudice of the firm's business.

Thomas v. *Atherton*, (1879) 10 Ch. D. 185; 48 L. J. Ch. 370; 40 L. T. 77, distinguished.

Second appeal from the decision of the Joint Judge at Thana, in Appeal No. 137 of 1922, amending the decree of the First Class Subordinate Judge at Alibag, in Civil Suit No. 50 of 1921.

Mr. *T. N. Walavalkar*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.—This was a suit for accounts of a partnership entered into between the parties to the suit to ply a *machawa* for hire. The *machawa* itself has been sold, and the dispute now ranges about some minor matters in the account. The Trial Court came to a decision on those matters. It is contained in what is called a preliminary decree at page 11 of the print. That was not a real preliminary decree, as all the questions in dispute were actually decided, and nothing remained to be done except to make the necessary calculations to give effect to the Court's findings.

The defendant appealed and the Court came to a different conclusion on certain items of the account, and passed a decree accordingly.

The plaintiffs have appealed, and the first ground on which they rely is that the lower Appellate Court had no jurisdiction to interfere with the preliminary decree in an appeal from the final decree. As a matter of fact the decree was not a preliminary decree although the Judge called it so. Consequently that ground of appeal cannot be supported.

An objection is taken to the lower Appellate Court's disallowing an item of Rs. 225 to the plaintiffs on the ground hat one partner is not liable in a suit for accounts upon a dissolution of partnership for the probable loss sustained by the firm owing to the neglect or failure of one partner to carry out the duties imposed upon him by the partnership agreement to the prejudice of the firm's business.

It was contended that the defendant was negligent in not plying the boat for freight, The Appellate Judge has considered that, and has come to the conclusion that there was no negligence on which an action could be founded, and so the plaintiffs would not be entitled to recover damages for negligence against their partner.

We have been referred to Lindley on Partnership, (9th Edition) page 472. The passage runs:

"Before the Partnership Act, 1890, was passed, if a partner was guilty of a breach of his duty to the firm, and loss resulted therefrom, such loss fell on him alone. As was said by the Court in *Bury* v. *Allen* (1), 'Suppose the case of an act of fraud, or culpable negligence, or wilful default by a partner during the partnership to the damage of its property or interests, in breach of his duty to the partnership; whether at law compellable or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect.'"

But it cannot be said that the defendant has been guilty of fraud, culpable negligence, or wilful default.

Reference was also made to *Thomas* v. *Atherton* (2). But in that case the managing partner of a mine carried on the workings beyond the boundary. An action was brought by the adjoining owner against the managing partner, and the proceedings before the arbitrators ended in an order against him. In a suit brought by the managing partner against the other partners for contribution, it was held that the other partners were not liable.

That would be an entirely different question from the one now argued before us, namely, that the defendant, owing to his not having plied the boat for freight, would be liable to bring into account the freight that could have been earned as contended for by the plaintiffs.

(1) (1845) 1 Coll. 589 at p. 604; 63 E. R 556; 66 R. R. 200.

(2) (1879) 10 Ch. D. 185; 48 L. J. Ch. 370; 40 L. T 77.

We think, therefore, that the decision was right and the appeal must be dismissed with costs. The cross-objections are dismissed with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

CIVIL APPEALS NOS. 452 AND 456 OF 1922.

January 22, 1925.

Present:—Mr. Justice Ross and Mr. Justice Kulwant Sahay.

KAMESHWAR NARAIN SINGH—PLAINTIFF—APPELLANT

versus

JANARDHAN PRASAD NARAIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Exclusive possession—Ouster—Easement over joint property, whether can be acquired.

Exclusive possession by co-sharers of portions of undivided estates is a common thing. Such exclusive possession does not amount to an ouster of the other co-sharers. Every joint owner has a right to use any portion of the joint lands so long as he does not exclude the other co-sharers from it. [p. 737, col. 1.]

A person who alleges himself to be a co-sharer in certain property can have no right of easement in it. [*ibid.*]

Appeal from a decision of the District Judge, Darbhanga, dated the 31st January 1922, modifying that of the Additional Subordinate Judge, Darbhanga, dated the 20th September 1921.

Messrs. *S. M. Mullick* and *S. N. Rai*, for the Appellant.

Messrs. *K. P. Jayaswal*, *S. K. Mitter* and *Janak Kishore*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—These two appeals arise out of a decree passed by the District Judge of Darbhanga whereby he modified a decree of the Additional Subordinate Judge. Appeal No. 452 is by one of the defendants 1st party and Appeal No. 456 is by the plaintiff. The case made by the plaintff in the plaint was that he and the defendants 1st and second parties were the 16-annas proprietors of *Mouza* Bishunpur Narhan and Patti Nizamat bearing Touzi No. 3942, that the said *mouza* was under Collectorate partition which had not been finished at the time the suit was brought and that before the said Collectorate partition the said *mouza* was never divided by the proprietots amongst themselves. But for the sake of facility in enjoyment and use of the joint property the names of different proprietors were entered against some of the plots in the *khatian*. The plaintiff stated that his *zenana* house was situated on plots Nos. 2983, 2984 and 2985 and that his male quarters were situated on plots Nos. 2964 and 2965. The dispute was as regards plot No. 2966. The plaintiff claimed that this plot No. 2966 which was an open *parti* land in front of his male quarters was used by him under right of easement for holding parties, *panchayat* and celebrating marriage festivals, etc. He also claimed a right of easement to pass from his male quarters to his female quarters across a foot-path in plot No. 2966. He further claimed that plot No. 2966 belonged to him in proprietary interest. The reliefs asked in the plaint were:—

(1) It may be held by the Court that in the land bearing No. 2966, the plaintiff has acquired the right, to use the land at the time of marriage, dance parties, *sradhs*, *bhoj* and *panchayats* etc., and that the way which is marked as (*k*) (*kh*) and (*ga*) in the map attached to the plaint, has been in use without resistence for more than 60 years and that the said right of easement is necessary.

(2) It may be held by the Court that defendants 1st party have no right to erect the house on the said land and that if a house is erected on the aforesaid land the plaintiff will be put to serious loss and the way leading to the male quarters from the female quarters will be closed.

(3) That on adjudication of relief clauses (1) and (2) defendants 1st party may be forbidden by a perpetual injunction from erecting any house and the house which has already been built may be demolished and the aforesaid land be cleared.

The defence of the defendants was that plot No. 2966 belonged to defendant No. 1 exclusively. that the plaintiff had acquired no right of easement over the said plot and that the suit was barred by *res judicata*. The First Court held that the plaintiff had failed to prove any right of easement over plot No. 2966. He further found that the plaintiff had failed to prove that plot No. 2966 belonged to him exclusively. The learned Subordinate Judge, therefore, dismissed the suit. On appeal by the plaintiff to the District Judge the finding of the Subordinate Judge has

been upheld, as regards the question of the plaintiff's title to plot No. 2966 and also the easement claimed by the plaintiff as regards his right to hold parties over No 2966 but as regards the right of way, the learned District Judge has come to a finding that the plaintiff has succeeded in establishing a right of way from his *baithak* to his *zenana* house along the foot-path which extended over O to G in the map filed with the plaint in a straight line. The learned Judge also found that the defendants had completed the house on plot No 2966 before any notice was given to them to show cause why injunction should not be issued. In the circumstances he thought that it was not a fit case of mandatory injunction. He held that the plaintiff had no doubt a right of way over the disputed land in a straight line from O to G in the Commissioner's map, but in view of the circumstances appearing in the evidence he was of opinion that this right has now to be exercised by the plaintiff along the line marked O, N, B, F and G in the Commissioner's map and that the plaintiff would not be entitled to use the foot-path claimed although it was found that he had acquired a right by prescription.

Now having regard to the case made by the plaintiff I fail to see how the plaintiff can claim the right of easement over plot No. 2966. His own case is that the whole village is jointly held by him and defendants 1st and 2nd parties and that there is a partition proceeding going on in the Collectorate for a partition of the village among the proprietors. Now if he is the owner of the village he can obviously have no right of easement against himself. The learned Vakil for the plaintiff-appellant relies upon the finding of the District Judge that the plaintiff has failed to prove that plot No. 2966 belonged exclusively to him. What the finding means is that although there has been no actual partition of the village amongst the co-sharers, yet each co-sharer is in exclusive possession of certain plots. Now exclusive possession by co-sharers of portions of undivided estates is a common thing. Such exclusive possession does not amount to an ouster of the other co-sharers. Every joint owner has a right to use any portion of the joint lands so long as he does not exclude the other co-sharers from it. In the present case the use by the defendants of plot No. 2966 exclusively is not an ouster of the plaintiff and if the plaintiff is dissatisfied with the defendants' using plot No. 2966 exclusively, his only remedy is by way of partition. Upon the case made by the plaintiff, I fail to see how he can claim any right of easement over any portion of the village of which he is a co-owner. I, therefore, fail to see how the learned District Judge could come to a finding that the plaintiff had acquired a right of easement by prescription over plot No. 2966. In the circumstances, I think that the decree made by the Subordinate Judge was correct and the suit of the plaintiff must be dismissed with costs throughout. Appeal No. 452 of the defendant is decreed and No. 456 of the plaintiff is dismissed one set of hearing-fee being allowed in both the appeals.

I may add that upon the case made by the plaintiff it is not necessary to decide whether plot No. 2966 is the exclusive property of the defendants or whether the plaintiff has also got a title to this plot jointly with the defendants. That question must be left open in the present suit.

Ross, J.—I agree.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 1216 OF 1924.

January 8, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

SOURENDRA NATH MITRA AND ANOTHER —PLAINTIFFS—PETITIONERS

versus

JATINDRA NATH GHOSE AND OTHERS— DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 115, O. XXXIII, r. 5—Application for leave to sue in forma pauperis *—Cause of action—Allegations in plaint—Order granting leave—Revision.*

Per *Suhrawardy, J.*—Where on the allegations contained in an application for leave to issue *in forma pauperis* the application discloses a cause of action, however weak it may be, the order of the Court granting leave to sue cannot be upset in revision on the ground that the application does not disclose a cause of action, under O. XXXIII, r. 5 of the C. P. C. [p. 738, col. 1.]

Per *Cuming, J.*—Where on an application for leave to sue *in forma pauperis* the Court comes to the conclusion that there is a cause of action, the High Court cannot interfere with the order in revision on the ground that no cause of action is disclosed. The Court has jurisdiction to decide rightly or wrongly and a wrong decision even though on a question of

law can by no stretch of imagination be considered to be illegal exercise of jurisdiction or exercise of jurisdiction with material irregularity within the meaning of s. 115 of the C. P. C. [p. 739, col. 1.]

Rule against an order of the Sub-Judge, Second Court, Bakarganj, in Pauper Suit No. 1 of 1921.

Mr. *Sarat Chandra Roy Chowdhury* and Babu *Nando Gopal Banerjee*, for the Petitioners.

Babus *Brojendra Nath Chatterjee* and *Satindra Nath Roy Chaudhury*, for the Opposite Parties.

JUDGMENT.

Suhrawardy, J.—This Rule was issued on the ground that the plaint does not disclose a cause of action and, therefore, the Court below ought to have dismissed the application of the opposite party for leave to sue *in forma pauperis*. The plaintiffs' ancestors mortgaged certain properties and in execution of the decree on the mortgage the mortgaged properties were purchased by the predecessors-in-interest of the defendants. An application was made by the mortgagors to have the sale set aside under s. 244 of the old C. P. C., which was dismissed. The present suit is brought in respect of certain subordinate tenures to the *taluk* which according to the plaintiffs were never mortgaged. The plaintiffs' case is that the property that was mortgaged and sold was the *taluk* and not the subordinate tenures. The only question, therefore, that I am asked to look into is if the plaint in this case discloses a cause of action under O. XXXIII, r. 5. It is not necessary for me to go to the length of holding that if the plaint, as a matter of fact, does not disclose a sufficient cause of action but if the Court below wrongly holds that it does, we have no jurisdiction under s. 115 to interfere with that order. But in this case the plaint discloses a cause of action, however, weak it may be, according to the petitioners' allegations, and, therefore, it is not proper that we should interfere with the order of the Court below. Reading paras. 5 and 6 of the plaint together it appears that the plaintiff's case is that the property that was mortgaged was the *taluk* and what was sold was the *taluk*. The subordinate tenures were not sold at all. It is further alleged that the interpolations in the sale proclamation were made presumably after the sale. If the plaintiffs succeed in proving these facts they cannot be met by the objection that the suit does not lie under s. 244 of the Code of 1882. If all these questions are to be determined here as also the objections taken before us, it may very well be deciding the case. As I have observed, the allegations of the plaintiffs may be right or wrong but they do disclose a cause of action within the meaning of law. It is upon these allegations in the plaint that the Court below has observed that there is nothing in the evidence of the applicants themselves from which it can be held that the properties in dispute were, in fact, sold. In this view of the matter I decline to interfere with the order of the Court below.

The Rule is, therefore, discharged with costs three gold *mohurs*.

Let the record be sent down at once.

Cuming, J.—This is an application under s. 115, C. P. C. for revision of an order of the Second Subordinate Judge of Barisal granting the petitioner's leave to sue *in forma pauperis*. It is not necessary for me to set out the facts of the case as they have been stated by my learned brother in the order which he has just delivered. The petitioners in support of the application urge two points. First of all they contend that the learned Judge did not consider the allegations in the plaint but only considered the evidence of the plaintiffs in deciding as to whether the suit was or was not maintainable. On reading the order of the learned Subordinate Judge fairly it seems to me that what the learned Judge meant to say was that the only evidence to be looked into was the plaintiffs' own statements and that it was not open to him to consider any further evidence. It is I think clear that in passing his order and deciding whether the suit was or was not maintainable he was considering the allegations as set forth in the plaint.

The next point urged by the learned Advocate appearing for the petitioners is that the plaint does not disclose a cause of action. Whether the plaint does or does not disclose a cause of action, it is not necessary for me to decide. The learned Judge has decided that the plaint does disclose a cause of action and it is difficult to see how in deciding that the plaint discloses a cause of action he has exercised a jurisdiction not vested in him by law or failed to exercise jurisdiction so vested in him or has acted in the exercise of his jurisdiction illegally or with material irregularity. The learned Advocate who has

appeared for the petitioners complains of the action of the Judge under cl. (c) of s. 115, C. P. C, namely, that he acted in the exercise of his jurisdiction illegally or with material irregularity. What the learned Judge has done is that he has decided that there is a cause of action. This decision may be absolutely wrong. But in coming to this decision it is difficult to see how he acted illegally or with material irregularity. It has been pointed out by the Privy Council that the Court has jurisdiction to decide rightly or wrongly and a wrong decision even though on a question of law can by no stretch of imagination be considered to be illegal exercise of jurisdiction or exercise of jurisdiction with the material irregularity. I, therefore, agree with my learned brother in discharging this Rule.

Z. K. *Rule discharged.*

PATNA HIGH COURT.

CIVIL REVISION No. 489 OF 1924.

January 30, 1925.

Present:—Mr Justice Ross.

THE BENGAL NORTH WESTERN RY. CO.—PETITIONER

versus

SUKHDEO PRASAD—OPPOSITE PARTY.

B. & N. W. R. Provident Fund Rules, r. 14 (4)—Railway servant, dismissal of—Fine deducted from Provident Fund—Suit to recover amount of fine, whether maintainable—Jurisdiction of Civil Courts—Power to withhold bonus, exercise of.

Plaintiff, who was an employee of the B. & N. W. Railway Company, was dismissed from the service of the Company and was fined a certain sum which was ordered to be realized from his Provident Fund. Plaintiff thereupon brought a suit for recovery of the amount of the fine from the defendant Company on the allegation that his dismissal was wrongful and that the fine should not have been imposed upon him. It was found that the dismissal of the plaintiff was wrongful:

Held, (1) that the matter was of a civil nature and that any agreement entered into by the plaintiff which empowered the Company to impose a fine did not take away the plaintiff's right of action in a claim of this sort and did not deprive the Civil Courts of jurisdiction to determine such a claim; [p. 740, col. 1.]

(2) that in inflicting a fine upon plaintiff the defendant Company purported to exercise their legal powers to fine their servant under the terms of the agreement between them and their servant and did not purport to exercise any arbitrary powers over the bonus portion of the servant's Provident Fund under the Provident Fund Rules, and that, therefore, r. 14 (4) of the defendant Company's Provident Fund Rules had no application to the case; [*ibid.*]

(3) that as soon as it was held that the fine had been wrongly imposed upon the plaintiff the latter was entitled to a decree for a refund of the amount. [*ibid.*]

Appeal from a decision of the Subordinate Judge, Motihari, dated the 14th August 1924, reversing that of the Munsif, Bettiah, dated the 16th April 1924.

Mr. *S. M. Bose*, for the Petitioner.

Mr. *Janak Kishore*, for the Opposite Party.

JUDGMENT.—The petitioner is the Bengal and North Western Railway. The opposite party was the Assistant Station Master of Tarsarai. As the result of certain departmental enquiries into the disappearance of a consignment of paddy the opposite party was dismissed from the service of the Company and was fined Rs. 50 which was ordered to be realized from his Provident Fund. The opposite party then brought an action for recovery of this sum. He failed in the Munsif's Court both on the merits and on the ground that under the rules of the Provident Fund in case of dismissal the Agent may cause to be withheld all or any part of the bonus provisionally allotted to the servant.

The Provident Fund consists of two parts, the sum contributed by the Railway servant and the bonus and interest contributed by the Company. A note on the form of the statement of the depositor's account shows that the bonus although shown in the account cannot be claimed as a right by the depositor, but is under r. 14 (2) and (4) wholly at the disposal of the Company which reserves full power over it. The relevant r. 14 (4) has been referred to above. The learned Munsif referred to these rules and then went on to say that the plaintiff was under liability to the Company for payment of Rs. 150 as fine as the Company was entitled to deduct that amount from his account. It is evident, therefore, that the learned Munsif did not absolve the Company of the responsibility for this sum merely on the strenghth of these rules but on the substantial ground that the opposite party was liable to pay fine of Rs. 150. The learned Subordinate Judge held on the merits of the case that there was no proof of any misconduct or negligence on the part of the opposite party and he, therefore, gave the opposite party a decree.

The contention on behalf of the petitioner Company is that the learned Subordinate Judge has not dealt with the question discussed in the latter part of the Munsif's

judgment, namely, over that part of the Provident Fund which concerns the bonus and interest is subject to their control. Now the finding of the learned Subordinate Judge is that although the Company has under the terms of the agreement power to impose a fine on the Railway servant for breach of any rule or discipline, the Railway servant in this case has not been proved to have broken any rule and the fine was, therefore, illegally imposed and its deduction from the Provident Fund was not justified.

He, therefore, ordered a refund.

Now it seems to me that the Railway Company in deducting this sum from the Provident Fund of the plaintiff was not acting in arbitrary exercise of any power reserved to it under their Provident Fund Rules. It is not even specifically stated that the amount was realized from the bonus and not from the plaintiff's own contribution and it cannot be assumed that that was so. As soon as it is held that the fine was wrongly imposed it seems to me to follow as a necessary consequence that the plaintiff is entitled to a decree for a refund of the amount. The Company were purporting to exercise their legal powers to fine their servants under the terms of the agreement between them and their servants. They were not purporting to exercise any arbitrary powers over the bonus portion of the servant's Provident Fund. Consequently as the Court has found that the fine was wrongly imposed, the plaintff must get the money back. It was objected on behalf of the petitioner Company that by submitting to an agreement which empowers the Company to impose a fine, the plaintiff had chosen his forum and the jurisdiction of the Civil Court was ousted. In my opinion this argument is without foundation.

The plaintiff has been dismissed and has been fined a sum of money and he comes to Court and claims that he was wrongly dismissed and that the fine should not have been imposed. This is a matter of a civil nature and nothing in the terms of the agreement can take away the plaintiff's right of action in a claim of this sort.

I would, therefore, dismiss the application with costs.

Hearing-fee one gold *mohur*.

Z. K. *Application dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 422 OF 1923.

January 9, 1925.

Present :—Mr. Justice Suhrawardy and Mr. Justice Cuming.

GURUDAS SAHA—DECREE-HOLDER—APPELLANT

versus

Shaikh HIRA GAZI—JUDGMENT-DEBTOR—RESPONDENT.

Landlord and tenant—Occupancy holding, non-transferable, whether can be sold in execution of decree—Consent of landlord, whether necessary.

A non-transferable occupancy holding is liable to be sold at an execution sale at the instance of an ordinary creditor without the consent of the landlord.

Kenaram Pal v. *Kinu Mandal*, 75 Ind. Cas. 379; 50 C. 508; (1924) A. I. R. (C.) 52, followed.

Appeal against an order of the Subordinate Judge, Tippera, dated the 11th of June 1923, reversing that of the Munsif, First Court at Brahmanberia, dated the 27th January 1923.

Babus *Nripendra Chandra Das* and *Nikunja Behary Ray*, for the Appellant.

JUDGMENT.—The facts of the case out of which this second appeal has arisen are these. The present appellant in execution of a mortgage-decree sought to put to sale the *raiyati* holding of the judgment-debtor respondent. The judgment-debtor objected to the sale on two grounds. firstly, that the holding could not be sold as the *raiyati* holding was not transferable without the landlord's consent; and secondly, that being an agriculturist by occupation he was entitled to the protection accorded by s. 60, C. P. C. The First Court decided both these points against the judgment-debtor respondent. In appeal the learned Subordinate Judge held that as the attaching decree-holder was not the landlord and as there was no evidence to show that the holding was transferable by custom or usage and as the consent of the landlord was not alleged to have been obtained, the decree-holder was not entitled to put to sale the *raiyati* holding of the judgment-debtor respondent. In this view of the case he held that it was not necessary to decide the other objection raised by the judgment-debtor and allowed his objections.

The learned Vakil who has appeared for the decree-holder appellant before us contends that a non-transferable occupancy holding is liable to be sold at an execution sale at the instance of an ordinary creditor without the consent of the land-

lord and that the consent of the landlord is not necessary in such a sale. In support of this contention he has referred us to the decision of the Court in the case of *Kenaram Pal* v. *Kinu Mandal* (1), a decision to which one member of this Bench was a party. This decision, undoubtedly, supports the case of the decree-holder and we are bound to follow it. We are, therefore, of opinion that a non-transferable occupancy holding is liable to be sold at an auction sale at the instance of an ordinary creditor.

The result, therefore, is that this appeal is allowed, the order of the Court below set aside and the case sent back to the lower Appellate Court for the decision of the question raised by the judgment-debtor under s. 60, C. P. C. Costs will abide the result.

We assess the hearing-fee at one gold *mohur*.

Z. K. *Appeal allowed*; *Case remanded*.

(1) 75 Ind. Cas. 379; 50 C. 508; (1924) A. I. R. (C.) 52.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 806 OF 1922.

December 15, 1924.

Present:—Mr. Justice Das.

SHEO PERSHAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JHAMAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Record of Rights, entry in—Presumption of correctness—Suit for declaration that entry is wrong—Burden of proof.

Plaintiffs were landlords in a *patti* and defendants were tenants of certain land in the *patti* which belonged to persons other than the plaintiffs. A certain plot was recorded in the Record of Rights as *ghairmazrua bandh*, and as the property of the plaintiffs but certain trees standing on it were recorded as belonging to the plaintiffs and defendants jointly. Plaintiffs brought a suit for a declaration that the trees belonged to them and that the entry in the Record of Rights was wrong. It was found that the Survey Authorities in making the entry in dispute had proceeded solely on what was stated by the defendants on special oath which was administered to them at the instance of the plaintiffs' *gomashata*:

Held, (1) that the initial onus was on the plaintiffs to prove that the entry in the Record of Rights was incorrect and that they were entitled to the trees to the exclusion of the defendants; [p. 741, col. 2.]

(2) that the entry in the Record of Rights being based on no foundation at all and the plot in dispute having been recorded in the Record of Rights as *ghairmazrua bandh* and as the property of the plaintiffs in which the defendants had no interest at all, the presumption was that the trees standing on the plot belonged to the plaintiffs. [p. 742, col. 2.]

Appeal from a decision of the Subordinate Judge, Gaya, dated the 11th July 1922, reversing that of the Munsif, Gaya, dated the 17th August 1921.

Mr. *Janak Kishore*, for the Appellants.

Mr. *Siveshwar Dayal*, for the Respondents.

JUDGMENT.—Plot No. 469 has been recorded in the Record of Rights as *ghairmazrua bandh*; and certain trees standing on plot No. 469 have been recorded as belonging to the plaintiffs and the defendants. The plaintiffs are the admitted landlords, the defendants are the tenants in respect of the adjoining land in the *patti* not of the plaintiffs but of other persons. The plaintiffs embarrased by the entry in the Record of Rights giving half the interest in the trees in plot No. 469 to the defendants, sued for declaration that those trees belong to them and that the entry in the Record of Rights is wrong.

The Court of first instance decreed the plaintiffs' suit. The lower Appellate Court differed from the Court of first instance and has dismissed the plaintiffs' suit.

The first question argued before me turns on the question of onus as to which the Courts below have differed. The Court of first instance thought that the onus was on the defendants to establish that they had any title to these trees. The lower Appellate Court thought that the onus was on the plaintiffs to establish that the entry in the Record of Rights giving half the interest in the trees to the defendants is erroneous. It is true to say that the initial onus is on the party who attacks an entry in the Record of Rights. It was undoubtedly for the plaintiffs to establish that they were entitled to the trees to the exclusion of the defendants. But the plaintiffs showed that the land itself was recorded as *ghairmazruah bandh*. In other words the land upon which the trees are planted is the property of the plaintiffs in which the defendants have no interst whatever. This consideration had great weight with the Court of first instance.

This is not all. The learned Judge in the Court below apparently conceded that it was open to the plaintiffs to show that there

were no materials upon which the Survey Authorities could have decided that the defendants were entitled to half the interest in the trees; but he thought that the plaintiffs placed no materials before the Court. Now this is not correct. The judgment of the learned Munsif shows that the Survey Authorities proceeded upon the evidence of one of the defendants to whom special oath was administered at the instance of Gaya Prasad, the *gomashta* of the plaintiffs. What happened was this. Gaya Prasad apparently said that if the defendants took special oath and said that they had any interest in the trees he would give up his position that the plaintiffs were entitled to the trees to the exclusion of the defendants. The defendants had no hesitation in taking this special oath and this is how the Survey Authorities came to record these trees in the name of the plaintiffs and defendants jointly. If the Court of first instance is right in saying that the Survey Authorities proceeded solely on what was stated by the defendants on special oath, then clearly there is no foundation whatever for the entry in the Record of Rights. Gaya Prasad had no authority from his master to consent to his master's title being bartered away in this manner; and the Survey Authorities apparently did not examine the materials with a view to see whether the defendants had any interest in these trees.

Now the learned Subordinate Judge in the Court below does not deal with this matter at all. But there is a sweeping assertion that it was for the plaintiffs to show that there was no basis for the entry in the Record of Rights. In my opinion the way in which the learned Subordinate Judge has dealt with this matter is somewhat unsatisfactory, and the question should be re-investigated by him.

Mr. Siveswar Deyal draws my attention to that portion of the judgment where the learned Subordinate Judge says that he is satisfied on evidence that the defendants were all along in possession of the said trees and further that the plaintiffs and defendants were entitled to the trees jointly in equal shares. I recognize that this finding looks very much like a finding of fact; but the way in which the learned Subordinate Judge has dealt with the whole case has satisfied me that he ought to re-hear the matter. The learned Judge attached too great a weight to the entry in the Record of Rights and overlooked the fact first that the land upon which the trees stood was *gairmazrua bandh* and that, therefore, the trees presumably belonged to the plaintiffs, and secondly, that the plaintiffs placed materials before the Court in support of their case that there was no foundation at all for the entry in the Record of Rights. I do not know what the decision of the learned Subordinate Judge would have been had he considered the matter from this point of view.

I would accordingly allow the appeal, set aside the judgment and decree passed by the Court below and remand the case to that Court for a decision according to law.

Costs will abide the result and will follow the decision in the Court below.

Appeal allowed;
Case remanded.

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 366 OF 1923.

January 14, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

JATINDRA NARAIN BHADURI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHANDRA NATH PRAMANIK AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution of decree—Sale of property together with arrears of rent—Decree for arrears of rent, whether included in sale.

An arrear of rent which is unpaid is still rent even though it has been merged into a decree. If money is still due, the mere obtaining of a decree does not change the nature of the arrear of rent, and the money due under the decree must still be regarded as an arrear of rent

Ananda Mohan Roy v. *Promotha Nath Ganguli*, 57 Ind. Cas. 874: 25 C. W. N. 863, followed.

The applicant purchased certain property in execution of a decree "together with all moneys due from tenants in respect of arrears of rent and cesses or otherwise payable to the proprietors." Prior to the sale the judgment-debtors had obtained a decree for arrears of rent against certain tenants. The applicant sought to execute that decree by virtue of his purchase:

Held, that the decree represented arrears of rent and was included in the purchase of the applicant and that the applicant was, therefore, entitled to execute it.

Appeal against an order of the District Judge, Rajshahye, dated the 15th of August 1923, affirming that of the Subordinate Judge of that District, dated the 23rd of March 1922.

Babu *Krishna Kamal Moitra*, for the Appellants.

Dr. *Dwarka Nath Mitter* and Babu *Jatindra Mohan Chowdhury*, for the Respondents.

JUDGMENT.

Cuming, J.—This appeal arises out of a certain execution proceeding. The facts are as follows: Some estate belonging to the well-known Tagore family of Calcutta was sold in execution of a mortgage-decreé and purchased by the present applicant together with all moneys due from tenants in respect of arrears of rent and cesses or otherwise payable to the proprietors. The purchaser under the terms of his purchase seeks to execute against the present appellants a certain decree which had been obtained by the Tagores against the present appellants on the 28th January 1919. The purchase at the execution sale was made in December 1919. The judgment-debtors contend that the expression "with all moneys due from the tenants in respect of arrears of rent" does not include arrears of rent which have been merged into a decree. They would seem to contend that if it had been intended to sell such arrears of rent as had been merged into a decree the sale-certificate would have mentioned the same specifically. This contention found no favour with either of the Courts below nor are we prepared to accept it. The respondent purchased all moneys due from the tenants in respect of arrears of rent and an arrear of rent, if still unpaid, is still rent even though it has been merged into a decree. If money is still due, mere obtaining a decree does not change the nature of the arrears of rent and it must still be considered to be an arrear of rent. If any authority is needed for this elementary proposition reference may be made to the case of *Ananda Mohan Roy* v. *Promotha Nath Ganguli* (1). We are of opinion that the expression "all moneys due from tenants in respect of arrears of rent" includes also the rent decree which was obtained against the tenants prior to the sale. In this view of the case the appeal is dismissed with costs two gold *mohurs*. The respondent will also get the costs of the Rule which was assessed at one gold *mohur*.

Suhrawardy, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 57 Ind. Cas. 874; 25 C. W. N. 863.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 216 AND CIVIL REVISION No. 322 OF 1924.

March 13, 1925.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Ross.

Shaikh KALOO—JUDGMENT-DEBTOR—PETITIONER—APPELLANT

versus

BHOLANATH AND OTHERS—DECREE-HOLDERS—OPPOSITE PARTIES—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58—Suit dismissed as against some defendants—Execution of decreé—Attachment—Objection by defendant against whom suit dismissed—Appeal—Appeal, second, whether lies.

Parties to the suit within the meaning of s. 47 of the C. P. C. include parties against whom the suit has been dismissed. [p. 744, cols. 1 & 2.]

Where, therefore, a suit is dismissed as against some defandants but is decreed as against others, and in execution of the decree certain property is attached, and an objection is preferred to the attachment by a defendant against whom the suit had been dismissed, on the allegation that the property attached belongs to him and not to the judgment-debtor, the determination of the objection is a matter which falls within the purview of s. 47 of the C. P. C., and the order of the Execution Court thereon is subject to appeal and second appeal. [p. 744, col. 2.]

Appeal from an order of the District Judge, Gaya, dated the 8th July 1924, reversing that of the Munsif, Gaya, dated the 12th May 1924.

Mr. *N. K. Prasad, No. II*, for the Appellant.

Mr. *Kailash Pati*, for the Respondents.

JUDGMENT.

Mullick, J.—This appeal arises out of an order made by the District Judge of Gaya on the 8th of July 1924 allowing an appeal from the decision of the Munsif of Gaya, dated the 12th of May 1924. It appears that Bholanath and another got a decree for money against *Musammat* Wasihan and Toolia and in execution attached two houses in the town of Gaya alleging that they were the properties of the above judgment-debtors. An objection

was then preferred purporting to be made under s. 47 of the C. P. C. by the appellant Kaloo who alleged that the houses were his properties and did not belong to Wasihan and Toolia.

The Munsif allowed the application and withdrew the attachment whereupon the decree-holder appealed to the District Judge who set aside the Munsif's order and found that the properties belonged to the judgment-debtors and that they were liable to be sold.

The present second appeal is preferred by the defendant Kaloo who urges that no appeal lay to the District Judge as the decision of the Munsif was one under O. XXI, r. 58 of the C. P. C. and that the only remedy open to the decree-holder was to institute a regular suit. The appellant has also, by way of precaution, filed a petition in revision which has been marked as Civil Revision Case No. 322 of 1924.

The sole question argued before us is whether the appellant was entitled to come in under s. 47 of the C. P. C. The learned Vakil for the appellant urges that though the appellant was impleaded as a denfendant in the original suit in which the money-decree was made, eventually the suit was dismissed against him; and that although his name appears among both the parties to the suit in the decree, he was in fact not affected by the decree not a party within the meaning of s. 47. On this point, there was some conflict of opinion in the various Courts before the present C. P. C. was enacted. It was held, for instance, in *Sheo Pargas Singh* v. *Nawab Singh* (1) that s. 244 of the C. P. C. of 1882 does not apply to a dispute between the decree-holder and a person against whom though a party to the suit, no decree has been passed. The general principle upon which this decision and others of a similar kind were based was that it was not fair that a person against whom no decree had been made and who was really in the position of a stranger, should be compelled to have resort to the summary procedure of the Execution Court in order to establish his title. That principle, however, has not been accepted in s. 47 of the present C. P. C. of 1908, which has expressly enacted that the parties to the suit include the parties againnst whom the suit has been dismissed. Therfore, upon the plain wording of the Statute there can be no room for argument as to whether the appellant was entitled under s. 47 of the Code, to apply to the Execution Court for the determination of his claim; and as the decision of the Execution Court was a final decision on a question of right, it was a decree and an appeal lay against it to the District Judge. Therefore the objection that the District Judge had no jurisdiction to entertain the appeal against the Munsif's order fails. The Munsif also does not appear to have treated the application of Kaloo as one under O. XXI, r. 58, C. P. C., and, even if he had done so, the objection that an appeal did not lie would not have been entertainable if in fact that application was one entertainable under s. 47 of the Code.

A second appeal, therefore, would have lain to this Court against the order of the District Judge, if the matter had not been concluded by a finding of fact. The District Judge finds that the attached property was the property of the judgment-debtors and that finding is final in second appeal. The second appeal, therefore, fails and it is dismissed with costs.

Civil Revision No. 322 of 1924 is not pressed and the application is dismissed. There will be no separate costs in the revision.

Das, J.—I agree.

Z. K. *Application dismissed.*

(1) 5 Ind. Cas. 496; 32 A. 321; 7 A. L. J. 264.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 34 OF 1923.

January 12, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

SURENDRA NATH CHAUDHURY—AUCTION-PURCHASER—APPELLANT

versus

LAKSHAN CHANDRA RAY CHAUDHURY AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 173—Order setting aside sale—Appeal, whether lies.

No appeal lies at the instance of the auction-purchaser against an order setting aside a sale under s. 173 of the Bengal Tenancy Act.

Appeal against an order of the Subordinate Judge, Burdwan, dated the 11th of September 1922.

Babu *Gopendra Nath Das*, for the Appellant.

Mr. *Baranasibasi Mukherjee* and Babu *Susil Kumar Ghosal*, for Babu *Krishna Lal Banerjee*, for the Respondents.

JUDGMENT.

Cuming, J.—This appeal arises out of a certain proceeding in execution. A certain property putni Lat Jogeshwardihi has been sold in execution of a decree for rent. One of the judgment-debtors objected to the sale on the ground that the property had been bought at the sale in the *benami* of another judgment-debtor. The Trial Court held that the purchase of the property was made by Surendra Nath Chaudhury in the *benami* of his brother-in-law Jotindra Prosad Ray Chaudhury who was one of the judgment-debtors and, therefore, under the provisions of s. 173, Bengal Tenancy Act, set aside the sale.

The auction-purchaser has appealed to this Court. The objecting judgment-debtor has raised the preliminary objection that no appeal lies against an order passed under s. 173, Bengal Tenancy Act. This contention appears to us to be well-founded. Admittedly the sale took place under the provisions of the Bengal Tenancy Act and the order setting aside the sale was passed under s. 173, Bengal Tenancy Act. No doubt the application to set aside the sale was made under O. XXI, r. 90 as also under s. 173, Bengal Tenancy Act. Some of the objections which were raised at the time of the hearing of the appeal came under the provisions of O. XXI, r. 90 but the sale was set aside not for any of the reasons which justify a sale being set aside under O. XXI, r. 90, but because it came within the mischief of s. 173, Bengal Tenancy Act. Against such an order no appeal lies. This question was considered in the case of *Harabandhu Adhikari* v. *Harish Chandra Dey* (1) and this Court held in that case that no appeal lay at the instance of the auction-purchaser against an order setting aside a sale under s. 173, Bengal Tenancy Act. The same question was also considered in the case of *Jadab Chandra Mukherjee* v. *Joy Gopal Bhattacharya* (2) and the learned Judges after reviewing all the cases on the subject came to be of the same opinion. No appeal, therefore, lies in this case.

(1) 3 C. W. N. 184.
(2) 20 Ind. Cas. 191; 19 C. L. J. 81.

The learned Vakil who has appeared for the appellant has next contended that even though no appeal lies against the order setting aside the sale, an appeal does lie against the subsequent order by which the Court ordered that Rs. 5,040 which had been deposited in Court in the name of Surendra Nath Chaudhury was available to the decree-holder. This question is obviously one which cannot be decided in the absence of the decree-holder. The decree-holder, is not present and the record shows that no notice was properly served on him. The order-sheet shows as follows:—On the 22nd May 1923; "Notices of appeal and of application have been served by the peon on enquiry in the absence of an identifier lay before Registrar for orders" and the Registrar passed the following order. 'Let service be accepted at the appellant's risk." This expression apparently means that the appellant was willing to take the risk of the service not being considered satisfactory at the time of the hearing of the appeal and did not pray for any fresh service on the decree-holder. The service is clearly not satisfactory. There was no identifier and the peon's affidavit shows that he made the service on enquiry. There was no one to point out to him the decree-holder. In the absence of the decree-holder, we cannot go into the question as to whether this order was or was not rightly made. It is, therefore, not necessary to consider whether as against this order an appeal lies or whether we should or could deal with the matter under s. 115, C. P. C.

The result is that this appeal fails and is dismissed with costs to the respondents Nos. 4 and 5. We assess the hearing-fee at three gold *mohurs*.

Suhrawardy, J.—I agree.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 173 OF 1925.

February 19, 1925.

Present:—Mr. Justice Lindsay.

JAIDEO PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GHASI—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—

Execution of decree—Payment of process fees, whether application for step-in-aid of execution.

The deposit of process fees for the issue of attachment in execution of a decree is not an application for execution or an application to take a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I to the Limitation Act so as to operate to extend limitation for the execution.

Second appeal against a decree of the Subordinate Judge, Moradabad, dated the 15th of October 1924

Mr. *Durga Prasad*, for the Appellants.

JUDGMENT.—On the whole, after hearing the learned Counsel in this case, I have come to the conclusion that the decision of the lower Appellate Court is correct.

The question was a question of limitation. It seems that the decree-holder obtained a decree for possession of certain lands and also a decree for costs. On the 3rd of January 1921 he sought out execution of this decree by making an application (1) for delivery of possession; and (2) for attachment of certain property for the realization of his costs. On the 18th of January 1921 the decree-holder got delivery of possession by execution of a *dakhalnama*. On the 22nd January 1921 he was ordered to pay into Court the necessary process fees for attachment and on that date he paid in a sum of Rs. 3-12.

It was reported after this that no property of the judgment-debtor was available for attachment and so the application was infructuous. On the 16th January 1924 the decree-holder again applied for attachment of property in order to satisfy his decree for costs and he was met with the plea of limitation.

The last application for execution had been made undoubtedly on the 3rd of January 1921 and the application of the 16th January 1924 was, therefore, made more than three years afterwards. *Prima facie*, therefore, the application was barred.

It was contended, however, that the payment of the process fee on the 22nd of January 1921 saved limitation. I do not think that argument can be maintained. The ruling in *Thakur Ram* v. *Katwaru Ram* (1) seems to me to be clear authority against it, and there is also the other ruling of a Bench of this Court in *Sheo Prasad* v. *Inder Bahadur Singh* (2).

It seems to me that the only previous application which was made for execution was the application of the 3rd of January 1921 and I cannot treat the payment of process fee on the 22nd of January 1921 as another and distinct application for execution or even as an application to take some step-in-aid of execution. The payment of this process fee must clearly be associated with the application for execution dated the 3rd of January 1921. The two things cannot be detached and treated as separate transactions.

For these reasons I think the judgment of the Court below must be maintained and I dismiss this appeal under O. XLI, r. 11, C. P. C.

Z. K. *Appeal dismissed.*

(1) 22 A. 358; A. W. N. (1900) 108; 9 Ind. Dec. (N. S.) 1272.

(2) 5 A. L. J. 258; A. W. N. (1908) 74; 30 A. 179.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1703 OF 1921.

January 19, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

MAHAMAD KAMEL—PETITIONER—APPELLANT

versus

AHMAD ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20, Sch. I, Art. 181—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Payment towards interest, what amounts to—Mortgage-decree—Application for final decree—Limitation, commencement of—Application barred—Subsequent application by defendant to set aside preliminary decree, whether revives right of decree-holder to apply for final decree.

In order to save limitation under s. 20 of the Limitation Act, a payment towards interest must be made "as such;" that is, it must be expressly made towards interest. The section has nothing to do with the general right of the creditor of appropriating a payment either towards interest or towards principal.

An application for a final decree under O. XXXIV, r. 5 of the C. P. C. is governed by Art. 181 of Sch. I to the Limitation Act, and the limitation begins to run from the expiry of the period for payment allowed by the decree. After the right of the decree-holder to make an application for a final decree has become barred by time, an application by one of the defendants to set aside the preliminary decree does not revive the right of the decree-holder to make an application for a final decree.

Appeal against a decree of the District Judge, Noakhali, dated the 9th of August 1920, affirming that of the Munsif, First Court at Feni, dated the 27th of August 1919.

Babu *Radhika Ranjan Guha*, for the Appellant.

Babu *Surendra Nath Bose*, for the Respondents.

Babu *Biraj Mohan Mazumdar*, for the Deputy Registrar.

JUDGMENT.

Suhrawardy, J.—This is an appeal by the plaintiff in a mortgage-suit. He obtained a preliminary decree against all the defendants except defendants Nos. 7 to 9 on the 14th November 1914. The period of grace was fixed at one month from that date. Thereafter one of the defendants (19*ka*) applied on the 12th April 1918 for a re-hearing of the suit under O. IX, r. 13. On the 10th August 1918 the *ex parte* decree against defendants (19*ka*) was set aside and the suit restored so far as he was concerned. The suit against defendant No. (19*ka*) was eventually decreed on the 12th March 1919 as he did not appear at the hearing. But before this on the 6th November 1918 the plaintiff had applied under s. 115, C. P. C. to have the entire decree set aside against the other defendants also on the ground that the mortgage-decree was indivisible, and the same could not be set aside against 19*ka* alone. This application was rejected. On the 15th April 1919 the plaintiff applied to have the final decree against all the defendants under O. XXXIV, r. 5, C. P. C. Attempt was made on his behalf to save limitation by alleging that the defendants had paid the plaintiff Rs. 35 in December 1916. The other defendants resisted the plaintiff's application on the ground that it was barred by limitation. Both the Courts below have held that the decree was barred and dismissed the plaintiff's application.

On appeal to this Court two grounds have been taken before us (1) that the lower Appellate Court should have enquired into the fact of payment of Rs. 35 as alleged by the plaintiff and reckoned the period of limitation from that date, namely December 1916. On this question the learned Judge has come to a finding of fact which we are not able to question in second appeal. He has found that the payment alleged by the plaintiff if made towards the principal is not supported by any acknowledgment in writing according to law; and it is not also alleged that this amount was paid towards interest. The learned Vakil for the appellant, however, argues that it is the absolute right of the creditor when payment is made to appropriate it either towards interest or towards the principal; and as the plaintiff has appropriated this amount towards the interest, time ought to run under s. 20, Indian Limitation Act from the date of such payment. This contention is obviously unsound. Under s. 20, Limitation Act payment towards interest must be made 'as such'; that is, it must expressly be towards interest. It has nothing to do with the general right of the creditor of appropriation of money either towards interest or towards principal. This point accordingly fails.

The next question argued is that time should have been counted from the date when the decree was finally passed against one of the defendants namely, 19*ka*. With reference to this question reliance is placed upon the decision of the Judicial Committee in the case of *Ashfaq Husain* v. *Gauri Sahai* (1). That case on its facts has no application to the present case. Here, the preliminary decree was passed on the 14th November 1914 and if one month's grace is added to it, the 14th December 1914 was the date from which time ought to be reckoned. The application for final decree under O. XXXIV, r. 5 is governed by the residuary Art. 181 of the Limitation Act. The time for making this application, therefore, expired, about the middle of December 1917. The defendant No. 19*ka* applied for setting aside the *ex parte* decree against him and re-hearing of the suit on the 12th April 1919 namely, after the plaintiff's right to have the final decree passed was barred by lapse of time. On these facts the learned Judge was unquestionably correct in the view he has taken that the subsequent application by defendant No. 19*ka* did not affect the right of the plaintiff to apply for a final decree as the same was already barred by limitation. This ground also fails.

The appeal is accordingly dismissed with costs to the respondants who have appeared.

Cuming, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 9 Ind. Cas. 975; 33 A. 264; 15 C. W. N. 370; 8 A. L. J. 332; 13 C. L. J. 351; 9 M. L. T. 380; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140; 38 I. A. 37; (1911) 2 M. W. N. 177 (P. C.).

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITIONS Nos. 100 AND 99 OF 1924.

December 11, 1924.

Present:—Mr. Justice Phillips and Mr. Justice Krishnan.

GUNTUKU APPANNA AND OTHERS—PETITIONERS—APPELLANTS IN BOTH

versus

JELLEPALLI GAVARAPPADU AND OTHERS—DEFENDANTS—RESPONDENTS IN BOTH.

Civil Procedure Code (Act V of 1908), O. XXII, r. 3, O. XLI, r. 4—Appeal—Death of one appellant before hearing—Appeal allowed—Application by legal representatives of deceased appellant to be brought on record, whether can be allowed.

An appeal was filed by two appellants who were members of a joint Hindu family. A few days before the hearing of the appeal one of the appellants died and the appeal was heard and allowed in ignorance of his death. Subsequently the legal representatives of the deceased appellant made an application that the cause title of the decree may be amended and that they may be brought on the record in place of the deceased appellant:

Held, that having regard to the provisions of r. 4 of O. XLI of the C. P. C. the decree passed in appeal in favour of the surviving appellant must enure for the benefit of all the members of the appellant's family and that as the remaining members wished to be formally brought on the record as legal representatives of the deceased appellant, the application should be allowed.

IN CIVIL MISCELLANEOUS PETITION No. 100 OF 1924.

Petition praying that in the circumstances stated in the affidavits filed therewith, the High Court will be pleased to issue an order amending the cause title of the decree of the High Court in Appeal No. 355 of 1917, preferred against a decree of the District Court, Vizanagaram, in Original Suit No. 7 of 1915.

IN CIVIL MISCELLANEOUS PETITION No. 99 OF 1924.

Petition praying that in the circumstances stated in the affidavits filed with the said C. M. P. No. 100 of 1924 the High Court will be pleased to set aside a decree of the High Court in the said Appeal No. 355 of 1917, and rehear the said appeal in so far as it relates to the 2nd appellant and the 3rd respondent.

Mr. *P. Somasundaram*, for the Appellants.

Mr. *B. Jagannadha Doss*, for the Respondents.

ORDER.

IN CIVIL MISCELLANEOUS PETITION No. 100 OF 1924.

This is an application to amend the cause title of the decree in Appeal No. 355 of 1917. This appeal was unfortunately heard and determined a few days after the death of the 2nd appellant therein; the fact of this death was not known to the Court or to the Vakils arguing the case. The appeal succeeded and a decree was passed in favour of both the appellants. Subsequently when an application was made to pass a final decree in the Original Court, an application was also put in to implead the 2nd appellant's legal representatives. It is suggested for the respondent that, that application was out of time, even if the 2nd appellant had been alive on the date of the decree, and on that ground they should not have been brought on record. This is not a question which we have to decide here as that application is not before us; but it appears that this is a case where the delay in bringing on record the legal representatives should be excused; and we do not think that it is a ground for disallowing the present application. The fact that the 2nd appellant was dead on the date of hearing of the appeal cannot put his legal representatives in a worse position than if he had not been a party to the appeal at all; and assuming that he was not a party to the appeal, the decree which was given in favour of his undivided brother, the 1st appellant, would enure for the benefit of the other members of the family, namely, these petitioners who now wish to be added. In O. XLI, r. 4, it is laid down: "Where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be." On this principle we consider that the decree passed legally in favour of 1st appellant must enure for the benefit of all the members of the appellants' family, and as they now wish to be formally brought on record as legal representatives of the deceased 2nd appellant who was not a party when the appeal was heard, we think that this should be allowed; and we may refer to a similar case in *Chintaman* v. *Gangabai* (1), where the same order was passed.

(1) 27 B. 284; 5 Bom. L. R. 90.

We are also asked to implead the legal representatives of the 3rd respondent who had also died on the date of hearing. They do not appear to oppose this petition and, consequently, it may be taken that they assent to its being done.

We accordingly order the petition with costs against the contesting respondents.

IN CIVIL MISCELLANEOUS PETITION No. 99 of 1924.

The petition is dismissed.

V. N. V.
Z. K.

Petition dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 906 OF 1923.

January 16, 1925.

Present:—Mr. Justice Mukerji.

RAFIQ AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHANKAR LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Landlord and tenant—Tenants, whether entitled to sell site of house—Mixed question of law and fact—Custom, whether reasonable—Village Pandauli, Ghazipur District.

The question whether by custom a tenant is entitled to transfer the site of his house in the village *abadi* is a mixed question of law and fact and in second appeal the question of sufficiency or insufficiency of the evidence in support of such a custom may be gone into. [p. 749, col. 2.]

Ram Bilas v. *Lal Bahadur*, 30 A. 311; A. W. N. (1908) 112; 5 A. L. J. 456; 4 M. L. T. 169, followed.

Such a custom is really only a question of title and no question of the reasonableness or unreasonableness of the custom can arise. [p. 750, col. 1.]

Faiyaz Ali v. *Rekhab Das*, 61 Ind. Cas. 24; 19 A. L. J. 104, followed.

Ordinarily in a pure agricultural village the *zemindar* is owner of every bit of land in the village and whoever asserts that a mere resident in the village, not being a co-sharer, is entitled to sell the site of his house must prove his case by weighty evidence. [*ibid.*]

In village Pandauli in the Ghazipur District the occupiers of village sites are entitled to sell their houses as they stand, *viz.*, the sites as well as the materials thereof. [p. 750, col. 2.]

Second appeal against a decree of the Subordinate Judge, Ghazipur, dated the 26th February 1923.

Mr. *M. A. Aziz*, for the Appellants.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—The respondents brought the suit, out of which this second appeal has arisen, for recovery of the site of a house sold along with the building standing thereon by the appellant No. 4 in favour of the other appellants.

It appears that the respondents were co-sharers in the village of Pandauli and on a partition, they obtained exclusive ownership over that portion of the village in which the house in suit was situated. The respondents were dissatisfied with the sale and contended that the site was their property and could not be disposed of by the appellant No. 4 who, they said, was a mere tenant. They asked for recovery of possession and alleged that they had no objection to the purchasers removing the materials of the house.

The vendor did not enter appearance. The vendees, however, contested the suit on the ground that there was a custom in the village by which the residents were entitled to sell their houses along with the sites.

The Court of first instance came to the conclusion that the custom contended for on behalf of the appellants existed and it accordingly dismissed the suit. The Court of First Appeal, *viz.*, the learned Subordinate Judge, came to the conclusion that the evidence was insufficient for establishing the custom and he decreed the suit, allowing two months' time to the appellants to remove the materials.

The question raised being a mixed one of fact and law, *vide Ram Bilas* v. *Lal Bahadur* (1). I allowed the question of sufficiency or insufficiency of the evidence to be discussed.

It has been definitely held in this Court (see *Faiyaz Ali* v. *Rekhab Das* (2) that a custom like the one set up is not an invalid custom. Indeed, the custom comes only to this that the occupier of a house is also the proprietor of the site. It is really a question of title and, therefore, no question of the reasonableness or unreasonableness of the so-called custom arises [see also the judgment of Aikman, J., in the Full Bench case of *Ram Bilas* v. *Lal Bahadur* (1) referred to.]

(1) 30 A. 311; A. W. N. (1908) 112; 5 A. L. J. 456; 4 M. L. T. 169.

(2) 61 Ind. Cas. 24; 19 A. L. J. 104.

It has been held in this Court that ordinarily in a pure agricultural village, the *zemindar* is the owner of every bit of land in the village and whoever asserts that a mere resident in the village, not being a co-sharer, is entitled to sell the site of his house must prove his case by weighty evidence. In the case before me, it appears that the village Pandauli is a very big one and is also a very ancient one. The *wajib-ul-arz* of the year 1867, a copy of which is on the record, shows that the tradition is that the village was founded 500 years ago. The learned Pleader for the plaintiffs, in the Court of first instance, admitted that the village had a population of about 1,300 souls, out of whom 300 to 400 persons were not agriculturists. The *wajib-ul-arz* also gives a list of the several professions held by the residents of the village. This list will show that many of the residents were not agriculturists.

It cannot then be contended that all the residents of the village, who are not co-sharers, were there in the village for the purpose of cultivating the *zemindar's* lands and were, therefore, settled in the village for the benefit of the land-holders. There is a provision in para. 15 of the *wajib-ul-arz* and it throws some light on the question now before me. It lays down that subsequent to the drawing up of the *wajib-ul-arz* whoever would want to reside in the village must obtain permission from the landlords for the purpose. It is silent as to what are the rights of the villagers who had already been residing in the village from before the preparation of the *wajib-ul-arz*.

In this state of things we have to consider the evidence adduced on behalf of the appellants. They have produced no less than 19 sale-deeds, registered and unregistered, by which the residents of the village not being co-sharers, have sold their houses, sites and materials to co-sharers and non-co-sharers and in virtue of which purchasers have occupied houses along with the sites. The learned Judge of the Court below has remarked that only in one case the site is specifically mentioned. But there would be a clear difference between the language of sale-deed of a house in its entirety and that of the sale-deed of mere materials of a house, which the purchaser would remove, as soon as the sale is completed. I have heard most of the sale-deeds and I am clearly of opinion that they purported to transfer not only the materials but also the sites. The houses were described as "owned and possessed" by the vendors and they were sold as the absolute property of the transferrors. These sale deeds range from 1872 to 1920. Only three of these sale deeds are less than 12 years old. Not a single instance has been cited in which these sales were ever questioned.

In addition to the sale-deeds no less than seven witnesses have been examined to prove the so-called custom and three of these are co-sharers in the village. The co-sharers are Ahmad Ali aged 65, Abdul Karim aged 45 and Abdul aged 45. The witness Ismail once owned a share in the village. All these witnesses have sworn that they themselves have purchased houses owned and occupied by the *ryots* and that they have continued to be in possession of the properties purchased.

On behalf of the plaintiffs not a scrap of evidence has been adduced to explain such a heavy body of transactions and evidence adduced on behalf of the appellants.

Having regard to the history of the village, in my opinion, the evidence is overwhelming to establish the appellants' contention that the occupiers of the village sites are entitled to sell the houses as they stand, *viz.*, the material and the site.

It has nowhere been alleged that the vendors' predecessor-in-title occupied the village after the *wajib-ul-arz* of 1867 had been framed. No special tenancy subsequent to the *wajib-ul-arz* has been proved. Indeed, para. 2 of the plaint would indicate that the ancestor of the appellant No. 4 was an ancient resident of the village.

I accordingly allow the appeal, set aside the decree of the lower Court and restore the decree of the Court of first instance, dismissing the suit. The appellants will have their costs in this Court and in the Court below. The Counsel's fees in the Court will be calculated on the higher scale.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 354, 355 AND 361 OF 1924.

January 20, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr Justice Mukerji.

IN M. A. No. 354 OF 1924.

ANANTA KUMAR SAHA—APPELLANT

versus

SADHU CHARAN SAHA PODDAR—RESPONDENT.

IN M. A. No. 355 OF 1924.

ANANDA CHANDRA SAHA—APPELLANT

versus

SADHU CHARAN SAHA PODDAR—RESPONDENT.

IN M. A. No. 361 OF 1924.

SADHU CHARAN SAHA PODDAR—CREDITOR—APPELLANT

versus

HEM CHANDRA SAHA PODDAR—DEBTOR—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 24 (2)—Examination of debtor, absence of—Burden of proof—Adjudication—Petition, whether can be based on debt to which creditor is entitled along with others—Bond executed by debtor along with others, whether can form basis of petition—Suit to enforce bond, pendency of, effect of.

One of several persons who is entitled to the benefit of a decree is not entitled to utilize the decretal debt so as to found upon it a petition for adjudication against the judgment-debtor. [p. 751, col. 2.]

A bond upon which a debtor is jointly and severally liable along with other persons is sufficient to support a petition for adjudication. It is immaterial that the petitioning creditor may not be absolutely entitled to all the money secured by the bond, it is enough that the bond is in his favour. [p. 752, col. 1.]

The fact that a suit has been commenced to enforce the bond is not necessarily a bar to a petition for adjudication based on the bond. [*ibid.*]

The provisions of sub-s. (2) of s. 24 of the Provincial Insolvency Act, with regard to the examination of the debtor are mandatory, but are applicable only to a case where the debtor is present. Where a debtor alleges a contravention of the provisions of the sub-section the onus is on him to show that he was present in Court at the time of the hearing of the petition. [p. 752, col. 2.]

Appeals against the orders of the District Judge, Faridpur, dated the 13th of August 1924.

IN M. A. NOS. 354 AND 355 OF 1924.

Babus *Gopal Chandra Das* and *Bhuban Mohan Saha*, for the Appellant.

Babus *Asita Ranjan Ghosh* and *Debendra Nath Bhattacharjya*, for the Respondent.

IN M. A. No. 361 OF 1924.

Babu *Asitaranjan Ghosh*, for the Appellant.

Babus *Gopal Chandra Das* and *Bhuban Mohan Saha*, for the Respondent.

JUDGMENT.

IN M. A. NOS. 354 AND 355 OF 1924.

These two appeals are really covered by the same state of facts. The appeal that has been argued before us is Appeal No. 354 but the judgment which I am about to deliver will apply equally to Appeal No. 355.

The appeal is against an order of adjudication passed by the District Judge of Faridpur on the 13th August 1924. A petition was presented by the respondent in respect of two debts, first of all, a decree for Rs. 5,700 which was a consent-decree passed on the 11th January 1923 and secondly, an instalment bond for Rs. 6,400 dated the 24th January 1923. The acts of insolvency alleged in the petition were the removal of articles from the debtor's house so as to protect them from the creditors and secondly, the transfer of immoveable properties by the debtors to some other person who was a relative of the debtor's wife within two or three days of the presentation of the petition. The Court has found the debts established and the acts of insolvency proved and has made the adjudication order.

The first point urged before us in this appeal was with regard to the decree for Rs. 5,700. This was passed in favour of the present petitioner and other persons and accordingly it is said that as the petitioner is only entitled along with others to the benefit of the decree he alone cannot present an insolvency petition in respect of this decree. Secondly, it is urged that so far as the instalment bond is concerned the debtor is only a partner with a very small share in the Firm of Guru Charan Judhistir and that he really cannot be taken to be liable for the whole of the instalment bond and it is further urged that portions of the instalment bond, if not the whole, have already been paid and that a suit has been commenced to enforce the instalment bond. For these reasons, it is urged that there is no proper debt which would support the petition and that even if this is not so the petition was not presented *bona fide* but for ulterior purposes. So far as the decree for Rs. 5,700 is concerned I am inclined to think that the point is a good one and that as the respondent is not the only person entitled to the benefit of that decree he is not entitled to utilize this debt upon which to found a petition for adjudication. But this is not a question of any importance because it seems to me that the bond for

Rs. 6,400 is amply sufficient to support the petition. It is a bond executed by the debtors and others in favour of the petitioning creditor. It is a bond upon which the defendant is jointly and severally liable with the other persons by whom it was given and consequently, in my opinion, it is sufficient to support the petition for adjudication. It does not matter that the respondent may not be absolutely entitled to all the money secured by the bond, it is enough that the bond is in his favour. It is no answer to say that the debtor's share in the firm is a small one. He elected to give this bond upon which he is liable and he must bear the consequence and I am not prepared to say upon the evidence that the petition was presented with an ulterior motive. It is true that some of the persons who gave the bond are relatives of the petitioning creditor and that he is not proceeding against them but I do not think that this is sufficient by itself to establish a lack of *bona fides* on the part of the petitioning creditor.

As regards the suit this was not commenced until after the petition and need not, therefore, be taken into account. Even if it is necessary to consider it, if the debt of Rs. 6,400 is sufficiently established, I do not think that the fact that a suit had been commenced to enforce the bond is necessarily a bar to the petition for adjudication based on that debt. So much, therefore, for the bond.

So far as the acts of insolvency are concerned, we were referred to the evidence and were asked to say that we should not accept the evidence with regard to the removal of the articles. The learned Judge has accepted this evidence and the evidence read to us does not cause to doubt the correctness of the conclusion at which the Judge has arrived.

As to the transfer of the immoveables it is suggested that the transfer was made in favour of the person to whom the property was transferred not with a view to protect the property from the creditors but with a view to the transferee paying off the debts to the creditor on the debtor's account and holding the property as security. The learned Judge has disbelieved this story. The result is that there is a debt sufficient to support the petition and the acts of insolvency are to my mind established.

Various other minor points were urged, and amongst them is the fact that the debtor was not examined under the provisions of s. 24, sub-s. (2) of the Provincial Insolvency Act. The provisions of sub-s. (2) are mandatory but that depends upon the debtor being present and in this case there is no evidence before us to show that he was present in Court at the time of the hearing of the petition. The burden was on the debtor to show that he was there and as he has failed to discharge this burden there is nothing in this point, and I reserve my opinion as to whether even if the debtor was present the failure to examine him will necessarily vitiate the order for adjudication.

Then it is said that the debtor could pay his debts and we were referred to the valuation made by the Receiver of his property. The short answer to this is that the debtor has not paid his debts or made any attempt to do so and we do not think that it has been established that the debtor is in a position to pay his debts.

Then it is said that the amount which the debtor has to pay has not been established and that he has been placed in a difficulty thereby. I am not satisfied that this is so. I think that at any rate he is bound to pay the amount of the instalment bond or at any rate such amount as remains due thereon and I have no doubt that there will be no practical difficulty if the debtor were really willing to pay this amount. This I think disposes of all the points, that were raised and we see no reason to alter or set aside the order for adjudication which has been passed by the District Judge.

The result is that the appeal fails and is dismissed with costs. Hearing-fee, two gold *mohurs*, to be realized in the Court of Insolvency at Faridpur out of the debtor's assets.

IN M. A. No. 361 OF 1924.

We think that the learned Judge was right in the order that he made and this appeal is accordingly dismissed.

We make no order as to costs.

Z. K. *Appeals dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 560 OF 1922.

January 21, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

PURNA CHANDRA THAKUR AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAMESH CHANDRA ACHARJYA CHOWDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Suit for ascertainment of fair and equitable rent and for recovery of arrears of rent—Plea of jus tertii *—Previous suit between landlord and third person under whom tenant claims, decision in*—Res judicata—*Cause of action, accrual of.*

A certain *taluk* was sold for arrears of revenue and was purchased by the plaintiff. Some years afterwards the plaintiff brought a suit for possession of the lands in dispute against the owner of a neighbouring *taluk* and obtained a decree in execution of which he obtained symbolical possession of the lands. Subsequently he brought a suit against the defendants for ascertainment of fair and equitable rent and for recovery of arrears of rent. The defendants denied the title of the plaintiff and also denied the existence of the relationship of landlord and tenant between the plaintiff and themselves, alleging that the land belonged to the owner of the neighbouring *taluk*, against whom the plaintiff had already obtained a decree:

Held, (1) that the decision in the previous suit, irrespective of the fact whether it operated as *res judicata* against the defendants or not, was a strong piece of evidence as against the defendants on the question as to who was entitled to recover rent from them; [p. 754, col. 2.]

(2) that the plaintiff's cause of action as against the defendants arose when he took delivery of possession in execution of the decree obtained in the previous suit and thus became entitled to receive rent. [p. 754, col. 2; p. 755, col. 1.]

Appeal against a decree of the Additional District Judge, Noakhali, dated the 6th September 1921, modifying that of the Munsif, First Court at Lakhipur, dated the 27th of June 1919.

Babu *Jitendra Kumar Sen Gupta*, for the Appellants.

Babu *Surendra Chandra Sen*, *Dwijendra Krishna Dutt* and *Nagendra Nath Chowdhury*, for the Respondents.

Babu *Biraj Mohan Majumdar*, for the Deputy Registrar.

JUDGMENT.

Suhrawardy, J.—The suit out of which this appeal arises was brought by the Receiver of the estate of Khitish Chandra Acharjee Choudhury for ascertainment of fair and equitable rent under s. 157, Bengal Tenancy Act, in respect of lands in occupation of the defendants and for recovery of arrears of such rent from 1320 to the third quarter of 1323 *B. S.* with damages. The defence was that the land in suit did not belong to the plaintiff's *taluk* but was a part of a neighbourig *taluk* owned by one Radharaman Nag and others and that the defendants Nos. 1 to 4 had taken *putni* settlement of it from the Nags in 1879. The main defence, therefore, was that there was no relationship of landlord and tenant between the plaintiff and the defendants. The Court of first instance found that the land, as a matter of fact, belonged to the plaintiff's *taluks*, but as the defendants had set up their right as tenure-holders adversely to the plaintiff for more than 12 years, they had acquired the limited interest of a tenure-holder in the lands and assessed rent as against defendants Nos. 1 to 4 only and dismissed the plaintiff's claim against the other defendants. On appeal by the plaintiff and cross-appeal by the defendants the learned Additional District Judge decreed the plaintiff's suit with some modifications. The defendants Nos. 1 to 4 who may be described as the principal defendants and defendants Nos. 5, 6, 10, 11, 12, 24 and 49 contend that the decision of the lower Appellate Court is wrong on the following grounds: first, that the suit should have been dismissed as the plaintiff failed to prove his title to the lands in suit. This ground is directed against the finding of the learned Judge that the lands belonged to the plaintiff's *taluk*. The fact is that there are two adjacent *taluks* one called Gangamala and the other known as *Taluk* No. 190. *Taluk* Gangamala was sold for arrears of revenue and purchased by the plaintiff in 1883. In 1895 the plaintiff brought a suit for possession of the lands in suit against the owner of *Taluk* No. 190. On the 9th May 1902 that suit was finally decreed by the High Court. On the 30th January 1905 plaintiff obtained delivery of symbolical possession through Court and brought the present suit on the 18th January 1917. Both the Courts below have relied on the decision of the suit brought by the plaintiff against the Nags who were the owners of *Taluk* No. 190. The decree in that suit decided finally as between the plaintiff and the Nags that the lands in suit belonged to the plaintiff's *Taluk* Gangamala. It is contended on behalf of the appellants that the decision in that suit cannot in law operate as *res*

judicata against the defendants and, therefore, the plaintiff is bound to prove his title independently of the decision in the previous suit. In support of this contention reliance has been placed upon the cases of *Niaz-ullah Khan* v. *Nazir Begam* (1) and *Shib Chandra Roy Chowdhury* v. *Harendra Lal Rai Chowdhury* (2). The Allahabad case has no bearing on the present question as it was a case of assignment and not a lease. The decision in the case of *Shib Chandra Roy Chowdhury* v. *Harendra Lal Rai Chowdhury* (2) contains some observations based on the doctrine of representations holding that in the case of a permanent tenure-holder the landlord does not represent the tenant so as a decree against the former would estop the latter. That decision is based on the case of *Seshappaya* v. *Venkatramana Upadya* (3) which holds that a decision for or against a superior landlord does not operate as *res judicata* against a tenant holding a permanent subordinate interest. In the view we take of the findings of the Courts below on this point, we are relieved of the necessity of examining the *ratio* of these decisions. But were it necessary to do so, we would feel considerable hesitation in following them without a word of protest. See *Asghar Reza Khan* v. *Mahomed Mehdi Hossein Khan* (4). Even if it is conceded that the decision in the suit brought by the plaintiff against the Nags will not operate as *res judicata* (it does not appear that the Courts below used it as such), there can be little doubt that it is a strong piece of evidence as to whom the rent is payable. The plaintiff brought a suit for establishment of title and possession as *zemindar* against the Nags from whom the defendants had obtained their alleged settlement. The question relating to the nature of the defendant's settlement was outside the scope of that suit and the only issue on which the parties went to trial was as to who was the owner of the lands in suit; or, if there were tenants on the land, who was entitled to receive rent from the tenants. The result of the defendant's lessor having lost the suit was to transfer the right of receiving rent from the Nags to the plaintiff. The defendants cannot aver that they are not liable to pay rent to any one. In fact, their case is that they hold a subordinate interest and they are liable to pay rent for the *putni* to whoever it belongs. If the plaintiff was not entitled to recover rent from them the Nags must be so entitled. But it was decided as between the plaintiff and the Nags that the Nags were not entitled to receive rent. The decision, therefore, in that suit is a good piece of evidence as against the tenants on the question as to who is entitled to recover rent from them. It having been found in that suit that the land in dispute did not belong to the Nags who had, therefore, no right to settle it with the defendants, the defendants cannot claim to be permanent tenure-holders. Hence the theory of representation, or the absence of it, on which Shib Chandra Roy Choudhury's case proceeds does not apply to the present case.

There is another piece of important evidence in support of the plaintiff's case and that is the Record of Rights produced and proved on behalf of the defendants. The Record of Rights shows that the lands in suit belong to the plaintiff's *Taluk* Gangamala. There is nothing to rebut the presumption of the correctness of the entry and the Court was justified in coming to the conclusion that the plaintiff was the owner of the lands in suit.

The second point raised by the appellants (defendants Nos. 1 to 4) is that the plaintiff's suit for possession was barred by limitation and, therefore, his suit for assessment of fair and equitable rent is also barred. This objection is based on the fact that the plaintiff bought this property in 1883 and did not bring a suit for possession against the defendants till 1917. But it overlooks the fact that the plaintiff could not bring a suit for assessment of rent against the defendants who are the tenants before they could establish their right against the persons from whom they derived their title. Plaintiff accordingly brought a suit against the defendant's lessor and having succeeded in that suit he took symbolical possession of the lands in suit within 12 years before the institution of the present suit. The plaintiff's cause of action as against the defendants, therefore, arose when he took delivery of possession

(1) 15 A. 108; A. W. N. (1892) 246; 7 Ind. Dec. (N. S.) 786.

(2) 47 Ind. Cas. 315; 28 C. L. J. 223; 22 C. W. N. 721.

(3) 5 Ind. Cas. 732; 33 M. 459; 20 M. L. J. 752; (1910) M. W. N. 26.

(4) 30 C. 556; 30 I. A. 71; 7 C. W. N. 482; 8 Sar. P. C. J 439 (P. C.).

and became entitled to receive rent. He could not sue the defendants in ejectment because the defendants were tenants on the land either as tenure-holders or as occupancy *raiyats* as found by the lower Appellate Court. This objection, therefore, fails.

The third contention raised by the appellants (defendants Nos. 1 to 4) is that they asserted their *putni* right in these lands from 1879 the date on which the *putni* lease was granted by the Nags in their favour and, therefore, they have acquired the interest of a *putnidar* in the land in suit. This contention also has no substance. The defendants did not hold the *putni* adversely to the plaintiff from 1879 because the plaintiff had no title in the lands then. They were holding the lands under a lease from the Nags who had set themselves up as the owners of the land. There is no finding by the learned Additional District Judge as to when the plaintiff came to know of the defendant's alleged assertion of *putni* interest; but he observes that the fact that they held the land in suit in *putni* did not come to the knowledge of the plaintiff before he instituted the suit in 1895 and that the plaintiff had no right to take possession of the disputed land or to claim rent from the tenants so long as he did not get delivery of possession as against the Nags. It may, therefore, be taken at the best in favour of the defendants that they were holding adversely to the plaintiff from the date from which the plaintiff's right to sue for possession or rent accrued, namely, the 30th January 1905 when he obtained symbolical possession and the right to recover rent from the defendants. Then again the Record of Rights filed by the defendants show that they are entered there as tenure-holders whose rent was liable to be assessed. Their right, therefore, as *putnidars* was not admitted at the time of the publication of the Record of Rights and it cannot, therefore, be said that they held such right adversely to the plaintiff when he became entitled to possession. It is not found by any of the Courts below that the presumption raised by this entry in the Record of Rights was in any way rebutted by the defendants.

The last point urged on behalf of the appellants is that the decree for assessment of rent should have been passed against defendants Nos. 1 to 4 alone and it should have been held that as the other defendants are holding under defendants Nos. 1 to 4 they are not liable to pay rent directly to the plaintiff. On this point the learned Additional Judge observes that the other defendants set up the defendants Nos. 1 to 4 as their landlords. He finds that defendants Nos. 1 to 4 are merely occupancy *raiyats* they being in actual occupation of some portion of the disputed land for a long time. He accordingly considers that the other defendants holding likewise had the same status as defendants Nos. 1 to 4.

The case of all the defendants is that defendants Nos. 1 to 4 were tenure-holders and as such had settled the lands with the other defendants. The claim of defendants Nos. 1 to 4 that they were tenure-holders has not been established. The position of the other defendants, therefore, is that they were brought on the land by persons having no title or authority, but as they have been in possession of the land for a long time they have acquired right of occupancy in it. The occupancy right to which the defendants Nos. 1 to 4 have been found to be entitled is only in respect of the portion of the land in suit of which they are in actual possession. It was not claimed and it cannot be extended over other portions of the land in suit of which the other defendants are in possession. The result of the finding on the other issues is that the plaintiff's title to the land in suit unencumbered by the alleged claim of defendants Nos. 1 to 4 as holders of an intermediate interest has been established, thus creating a direct relation between the plaintiff and the occupants of the land, the other defendants. In this view the decree passed by the Court of Appeal below is correct and should be maintained and this objection overruled.

All the points taken on behalf of the appellants failed and the appeal is dismissed with costs.

Cuming, J.—I agree.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 205 OF 1924.
February 16, 1925.
Present:—Mr. Justice Mukerjee.
Musammat KANIZ FATMA—APPLICANT
versus
IMAM-UD-DIN—OPPOSITE PARTY.

Transfer of Property Act (IV of 1882), s. 55—Sale of immoveable property—Encumbrance, existence of, not disclosed—Purchaser compelled to pay amount of encumbrance, whether can recover from vendor.

If, when an immoveable property is sold, the vendor does not disclose an encumbrance on the property and subsequently the vendee has to pay off the encumbrance to save the property from sale in execution of encumbrancer's decree, there is a breach of warranty of title and possession and the vendee is entitled to recover from the vendor the amount paid by him.

Ram Chander v. *Bhagwati*, 79 Ind. Cas. 590; 22 A. L. J. 576; (1924) A. I. R. (A.) 937; L. R. 5 A. 382 Civ., distinguished.

Civil revision against an order of the Judge, Small Cause Court, Aligarh, dated the 15th September 1924.

Mr. *M. A. Aziz*, for the Applicant.

Mr. *Panna Lal*, for the Opposite Party.

JUDGMENT.—This is an application to revise a judgment of a learned Judge of the Small Cause Court.

It appears that the applicant who was the plaintiff in the Court below purchased a house from the respondent. The respondent assured the applicant that there was but only one encumbrance over the property. It, however, turned out that one Hazari Lal also held a simple mortgage over the property. Hazari Lal brought a suit on the mortgage and obtained a decree for sale. The applicant as the purchaser of the property to save it had to pay a sum of Rs. 170 and she sued the respondent to make her good this amount.

The learned Judge of the Court below dismissed the suit on the ground that the parties had express stipulations for compensation and as the case did not fall within those express stipulations the suit could not be maintained.

I am afraid the learned Judge has entirely misread and misunderstood the ruling he purported to follow. The ruling is the case of *Ram Chandar* v. *Bhagwati* (1). It was held that where in the place of a particular statutory contract parties substitute a contract of their own they must be guided by their own contract and a party to it cannot rely on the statutory one. In that case, as in this there was a previous encumbrance which had not been disclosed. But in the case of *Ram Chander* v. *Bhagwati* (1) the parties had stipulated for the express case in which a prior encumbrance might turn out to exist. In the case before me there was no stipulation whatsoever as to what was going to happen in case a previous encumbrance, not contemplated by the parties, happened to exist. The two stipulations relied upon by the respondent relate to warranty of title and warranty of possession and nothing beyond that. In the circumstances the plaintiff ought to have succeeded.

I allow the application, set aside the decree of the Court below and remand it for disposal of the remaining issue. The costs here and hitherto will abide the result.

S. D. *Application allowed; Case remanded.*

(1) 79 Ind. Cas, 590; 22 A L. J. 576; (1924) A. I. R. (A.) 937; L. R. 5 A. 382 Civ.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1436 OF 1923.
December 22, 1924.
Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.
SAILESH CHANDRA DUTTA AND OTHERS—PLAINTIFFS—APPELLANTS
versus
JOY CHANDRA ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 11—Civil Procedure Code (Act V of 1908), O. XXI, r. 60, O. XXXVIII, r. 9—Attachment before judgment—Claim, dismissal of—Dismissal of suit, effect of—Appeal—Reversal of dismissal—Attachment—Fresh claim—Title suit—Limitation.

It is obligatory upon the Court to withdraw an attachment before judgment upon the dismissal of a suit, and the reversal of the judgment of dismissal on appeal does not operate to revive the cancelled attachment. [p. 757, col 2.]

Protap Chandra Gope v. *Sarat Chandra Gangopadhya*, 62 Ind. Cas. 348; 33 C. L. J. 201; 25 C. W. N. 544, *Sasirama Kumari* v. *Meherban Khan*, 9 Ind. Cas. 918; 13 C. L. J. 243 and *Abdur Rahaman* v. *Amir Sharif*, 44 Ind. Cas. 229; 22 C. W. N. 927; 45 C. 780, followed.

Certain property was attached before judgment, and the plaintiff put in a claim under O. XXI, r. 60 of the C. P. C. which was disallowed. The claim under which the attachment was made was subsequently dismissed but was decreed in appeal. Defendants, who were the decree-holders, thereupon again attached the property which had been attached before judgment and the plaintiff put in another claim against the attachment. That claim was also disallowed and within one year of the order disallowing the claim but after more than one year of the date of the previous order by which the plaintiff's claim was disallowed, the plaintiff brought a suit for declaration of his title to the property in dispute :

Held, that the attachment before judgment disappeared as soon as the claim was dismissed and that the reversal of the order of dismissal on appeal did not revive the attachment, and that when in the execution proceedings started after the decree of the Appellate Court a fresh attachment was effected the plaintiff had a right to prefer a fresh claim, on the dismissal of which he was entitled to bring a suit for declaration and that his present suit was, therefore, not barred under Art. 11 of Sch. I to the Limitation Act. [p. 758, col. 1.]

Appeal against a decree of the Subordinate Judge, Fifth Court, Dacca, dated the 20th February 1923, affirming that of the Munsif, Second Additional Court at that place, dated the 8th May 1922.

Babus *Upendra Lal Roy* and *Jitendra K. Sen Gupta*, for the Appellants.

Babus *Prokash Chandra Pakrasi* and *Promothonath Mukherjee*, for the Respondents.

JUDGMENT.

Chakravarti, J.—The question raised in this appeal is whether the suit is barred by the rule of one year's limitation as provided for in Art. 11 of the First Schedule of the Limitation Act. The plaintiff's suit for declaration of his title to certain immoveable property was dismissed by both the Courts below and the present second appeal is by the plaintiff against the decree of the Subordinate Judge of the Fifth Court of Dacca, affirming the decision of the Munsif, Second Additional Court of that district. The facts which are necessary for the purpose of this appeal shortly stated are these. Defendants Nos. 1 to 4 obtained a decree for possession of certain immoveable property and also a decree for mesne profits to be determined in execution proceedings against the predecessors of defendants Nos. 5 and 6. Defendants Nos. 1 to 4 applied for execution of their decree and amongst other things prayed for ascertainment of mesne profits and obtained an order for attachment of the land in suit before judgment ascertaining mesne profits. The plaintiff put in a claim under O. XXI, r. 60 of the C. P. C. The claim was disallowed on the 28th February 1914. It appears that the execution proceedings were dismissed disallowing the claim for mesne profits on the 22nd of January 1915. It also appears that the execution proceedings were revived on appeal in 1918, the Appellate Court holding that the order disallowing the execution was erroneous. Defendants Nos. 1 to 4 after they had obtained a decree for mesne profits attached the same property again in the year 1921. The plaintiff put in another claim against the attachment. That claim was disallowed on the 2nd of August 1921, and the present suit was instituted by the plaintiff on the 3rd of August 1921 for declaration of his title to the property to which his claim had been dismissed. The defendants amongst other pleas contended that the suit not having been brought within one year from the 28th February 1914, was barred by limitation. The plaintiff, on the other hand, contended that the present suit was brought well within one year from the date of disallowance of his present claim. Both the Courts below have held that the suit, as it was not brought within one year from the 28th of February 1914, was barred.

In this appeal it was contended by the learned Vakil for the appellant that the Courts below were in error in holding that the present suit was barred by limitation. It was urged by the learned Vakil that the effect of dismissal of the execution proceedings on the 22nd January 1915, put an end to the attachment before judgment under the provisions of O. XXXVIII, r. 9.

It is unnecessary to discuss the point at any length, as it is covered by the direct authority which discussed the effect of dismissal of a claim in which an attachment before judgment was obtained. In the case of *Protap Chandra Gope* v. *Sarat Chandra Gangopadhya* (1) after reviewing all the previous authorities and the provisions of the Code, Sir Ashutosh Mookerjee, the Acting Chief Justice at page 206* states as follows : " We arenot unmindful that a different rule has been adopted with regard to attachments before judgment. There the view has prevailed that it is obligatory upon the Court to withdraw an attachment before judgment upon the dismissal of the suit and the reversal of the judgment of dismissal on appeal does not operate to revive an attachment which has been cancelled. As ex-

(1) 62 Ind. Cas. 348; 33 C. L. J. 201; 25 C. W. N. 514.

*Page of 33 C. L. J.—[*Ed.*]

plained in the case of *Sasirama Kumari* v. *Meherban Khan* (2) this result follows from the provisions of O. XXXVIII, r. 9 which directs the withdrawal of attachment on dismissal of the suit and contains no provision which makes such withdrawal temporary and liable to be vacated on reversal of the decree of dismissal." This view of the law is also supported by the cases *Abdur Rahaman* v. *Amir Sharif* (3) and *Sasirama Kumari* v. *Meherban Khan* (2). In this view of the law it is clear that the attachment which was put upon the property on the 28th February 1914, disappeared as soon as the claim for mesne profits was dismissed on the 22nd January 1915. The reversal of the order of the 22nd January 1915 on appeal did not revive the attachment. When in the execution proceedings of 1921 a fresh attachment was effected the plaintiff had a right to prefer a fresh claim which was dismissed on the 2nd August 1921 and the period of one year should be counted from that date.

We, therefore, think that the judgments and decrees of the Courts below are wrong and should be set aside and the case is accordingly remanded to the First Court for a re-trial on the merits. The appellants will be entitled to their costs here and the costs of the Courts below are to abide the result of the suit.

Greaves, J.—I agree.

By the Court.—The Rule is discharged as it has become infructuous. We make no order as to costs.

Z. K. *Appeal allowed.*
Case remanded.

(2) 9 Ind. Cas. 918; 13 C. L. J. 243.
(3) 44 Ind. Cas. 229; 22 C. W. N. 927; 45 C. 780.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1330 OF 1922.

January 6, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

RADHA GOBINDA BANIKYA CHOUDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HEM CHANDRA CHAKRAVARTY AND OTHERS—DEFENDANTS—RESPONDENTS.

*Landlord and tenant—Construction of document—*Nimhowla pattah—*Enhancement of rent—Conduct of parties.*

A *zemindar* holding under the Permanent Settlement has a right from time to time to raise the rent of all rent-paying lands within his *zemindari* at the current rate, unless he is precluded from the exercise of that right by a contract binding on him or by the law in force. [p. 759, col. 1.]

Bamasoondery Dassyah v. *Radhika Chowdhrain*, 13 M. I. A. 248; 4 B. L. R. P. C. 8; 13 W. R. P. C. 11; 2 Suth. P. C. J. 293; 2 Sar. P. C. J. 524; 20 E. R. 544 and *Nirod Chandra Singha Sarma* v. *Harihar Chakravarti Chowdhury*, 58 Ind. Cas. 867; 32 C. L. J. 19; 24 C. W. N. 874, followed.

A contract in one case should not be interpreted in the light of the view taken with regard to another contract which is differently worded and under consideration in another case [p. 759, col. 2.]

A *nimhowla pattah* contained the following clause: "When Survey and *jamabandi* are made in respect of (the lands of) the other *howladars* and *nimhowladars* of the said *tappa*, the *nimhowla* will be measured and you will get reduction of proportionate area (*jigha rakba*) according to the practice in respect of the other *nimhowladars*, and upon *bandobast* (Settlement) according to the rates paid for other *nimhowlas*. If the rent is greater you will pay the same into my office, and if it is less you will get reduction." The parties treated the *pattah* for a long period of time as creating a tenure the rent of which was not liable to enhancement:

Held, that the terms of the lease were ambiguous and that as the conduct of the parties showed that they had been understood by the parties as creating a tenure of which the rent could not be enhanced, the rent of the tenure was not liable to enhancement. [p. 760, col. 1.]

Taruck Chunder Nundee v. *Madhoo Soodun Nundee*, 5 W. R. Act X Rul. 80 and *Ram Dayal Giri* v. *Midnapur Zemindary Co., Ltd.* 7 Ind. Cas. 785; 15 C. W. N. 263, referred to.

Appeal against the decree of the Subordinate Judge, Second Court, Bakargunj, dated the 1st March 1922, reversing that of the Munsif, Second Court at Bhola, dated the 28th September 1920.

Babus *Joges Chandra Ray* and *Asita Ranjan Ghose*, for the Appellant.

Dr. *Sarat Chandra Basak* and Babu *Sajani Kant Nag*, for Defendant No. 2, Respondent.

Mr. *Gunoda Charan Sen* and Babu *Probodh Chandra Kar*, for Defendant No. 1, Respondent.

JUDGMENT.

Suhrawardy, J.—The main and substantial ground on which this appeal has been pressed is that the finding of the lower Appellate Court that the *pattah* in suit created a tenure the rent of which was not liable to enhancement is not correct. The tenure, it appears, was created by the *pattah* dated the 30th December 1885. It was a *nimhowla pattah* granted by Rajlakshi Debya (who was the *howladar*) to the predecessor of the defendants. It begins with the following words "There was my husband's permission to grant to

you *nimhowladari pattah* in respect of the entire lands and *jamas* comprised in the said *howla* at a profit of Rs. 75." Then follow some words which it is not material to quote and then it proceeds to run as follows: "I grant to you a *nimholadari pattah* in respect of the entire lands and *jamas* of the said *howla*. You shall without objection pay into my office Rs. 102-7-6 being the rent for the *howla* and Rs. 75 being the amount of my profits the total amount being Company's Rs. 177-7-6 year by year and month by month according to the *kists* mentioned below." This is followed by the usual recitals in a document of this description with regard to the mode of possession and other matters. The last clause is in the following words: "When Survey and *jamabandi* are made in respect of (the lands of) the other *howladars* and *nimhowaldars* of the said *tappa*, the *nimhowla* will be measured and you will get reduction of proportionate area (*jigba rakba*) according to the practice in respect of the other *nimhowladars*, and upon *bundobast* (Settlement) according to the rates paid for other *nimhowlas*. If the rent is greater you will pay the same into my office, and if it is less you will get reduction." The learned Subordinate Judge in the Court of Appeal below construing this document with certain other documents executed since its creation has come to the conclusion that the tenure created by this *pattah* was one at a fixed rent and consequently dismissed the plaintiff's suit.

It is argued before us by the learned Vakil for the appellant that this *pottah* should be read as not interfering with the general right which a *zemindar* possesses of enhancing the rent of his subordinate tenure-holders. The proposition of law that the *zemindar* holding under the Permanent Settlement has a right from time to time to raise the rent of all rent paying lands within his *zemindari* according to the current rate unless he is precluded from the exercise of that right by a contract binding on him or by the law in force is unquestionably correct. See the cases of *Bamasoondery Dassyah* v. *Radhika Chowdhrain* (1) and *Nirod Chandra Singha Sarma* v. *Harihar Chakravarti Chowdhury* (2). That being so, the only question that remains for consideration is whether the contract embodied in this *pattah* precluded the *zemindar* from exercising that general right which he has of enhancing the rent of lands of his *zemindari*. The learned Vakil for the appellant has strenuously argued that as there are no words in the contract curtailing or barring the right of the *zemindar* to enhance the rent of the lands within his *zemindari*, it must be held that the tenure created under the *pattah* was one the rent of which was liable to be enhanced. In fact the learned Vakil has gone so far as to argue that unless any express words are to be found in a document evidencing a contract debarring the lessor from claiming enhancement of rent in future, it must be held that the tenancy is one in which the rent is liable to be enhanced; and in support of this view reliance has been placed upon the case of *Taruck Chander Nundee* v. *Madhoo Soodan Nandee* (3). We do not think that the case carries us so far. In all the cases that have been placed before us attempts have been made to construe the particular contracts invovled in them and it does not seem to be proper that a contract in one case should be interpreted in the view taken with regard to another contract which is differently worded and under consideration in another case. In the case of *Taruck Chandra Nandy* v. *Madhoo Soodan Nandy* (3) the learned Judges found that the *pattah* was a *mourashi pattah* but the rent fixed in the lease did not appear to have been fixed and invariable, and they remarked as follows: "There are not in it any such words as these: 'that the rent shall not hereafter be altered or increased.'" It is not laid down that these words are necessary in order to establish fixity of rent. In the case of *Ramdayal Giri* v. *Midnapore Zemindari Co. Ltd.* (4) the learned Judges observe at page 265* of the report as follows: "It is true there are in the leases no words which by themselves would bar an enhancement such as are used in formal leases in other parts of the country. But there is the contract of the parties.....". We, therefore, consider ourselves relieved from looking for any expression or word in the document fixing the rent in perpetuity.

We are next called upon to consider the

(1) 13 M. I. A. 248; 4 B. L. R. P. C. 8; 13 W. R. P. C. 11; 2 Suth. P. C. J. 293; 2 Sar. P. C. J. 521; 20 E. R. 544.

(2) 58 Ind. Cas. 867; 32 C. L. J. 19; 24 C. W. N. 874.

(3) 5 W. R. Act X Rul. 80.

(4) 7 Ind. Cas. 785; 15 C. W. N. 263.

*Page of 15 C. W. N.—[*Ed.*]

general effect of the document. The learned Advocates for the respondents have argued that the contract is plain enough and gives sufficient indication that what the parties intended was that it should be a *mourashi mokarari* lease. The words, no doubt, lead to a conclusion very much akin to what is contended for by the respondents. The *pattah* states that the lease was granted by the lessor and according to the wishes of her husband she reserved for herself a profit of Rs. 75 only. The last clause mentions the circumstances in which the rent can be varied so that it may be reduced or increased according as on the Survey of the lands of the other *howlas* and *nimhowlas* the assets are found to be less or more than the present and fresh Settlements made according to the rates paid for by other *nimhowladars*. This contingency has not arisen and it is not necessary, therefore, to consider what would have happened if it arose. But the fact remains that the term of the lease as to enhancement of rent is restricted to the one condition mentioned in it, namely, when the Survey and *jamabandi* are made in respect of lands of other *howlas* and *nimhowlas* of the same *tappa*. It is argued on behalf of the appellant that it cannot be maintained that because one circumstance is mentioned in which the rent can be varied it cannot be varied under any other circumstance. On the other hand the respondents contend on the doctrine of *expressio unius est exclusio alterius* that the mention of one condition restricts the power of the landlord to vary the rent only to the happening of that event. We are unable to give effect to the contentions of either side on the mere construction of the *pattah* before us. We are, therefore, constrained to hold that the lease is not unambiguous in its terms and the interpretations which the parties attempt to put upon it are not without some force. The lease, therefore, being ambiguous in its terms, it is necessary to look as to how it was understood by the parties. The facts are that since its creation in 1855 there has been no variation of rent up to the present time, *i. e.*, for about 70 years and that the *nimhowla* in suit was described as a mortgage-bond executed by the *nimhowladar* in favour of the plaintiffs themselves in 1898 as well as in the *kobala* executed by them in favour of a predecessor of the defendants in 1902. It is also in evidence that the plaintiffs themselves described the *nimhowla* in suit as a *mokarari jama* in the plaint filed by them in the suit on the aforesaid mortgage of 1898. These facts were considered by the lower Appellate Court and it came to the conclusion that the lease was a *mourashi mokarari* lease. The finding thus arrived at by the lower Appellate Court is in the nature of a finding of fact. We think that the conclusion arrived at by the Court of Appeal below was correct and that the lease must be taken to be permanent in character with the rent fixed. In the view that we take of this question it is not necessary to consider the other question raised in the appeal with regard to the procedure adopted in fixing the enhanced rent or to the inapplicability of s. 7 of the Bengal Tenancy Act to the facts of the present case as was contended for by the respondents.

The result is that this appeal is dismissed with costs to the two sets of respondents.

Cuming, J.—I agree.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 87 OF 1922.

August 27, 1924.

Present:—Mr. Charles Gordon Spencer, Officiating Chief Justice, and Mr. Justice Srinivasa Iyengar.

P. KANAKASABAPATHY MUDALIAR —APPELLANT

versus

V. *Hajee* OOSMAN SAHIB AND OTHERS—RESPONDENTS.

Gift—Muhammadan Law - Bonus to employee—Entry in account books, effect of—Contract - Implied consideration.

Plaintiff, a godown keeper in the employ of a Muhammadan firm, was credited with a bonus of a sum of money out of the profits of the firm in consideration of the good services rendered by him and of the profits made by the firm. Plaintiff alleged that the bonus was carried to his credit in the firm's books some years before and that in the following year he was allowed to draw out a portion of it, but that the defendant firm had since refused in spite of his demand to pay the balance:

Held, that on the facts stated the plaint disclosed a cause of action; there was a completed gift and a transfer of ownership in favour of the plaintiff; and, if ownership in the bonus was completely transferred and there was more than a mere promise without consideration to give the plaintiff a bonus, it was im-

material that the amount was originally of the nature of a bonus. [p. 762, col. 2.]

Per *Srinivasa Iyengar, J.*—It is well-known that apart altogether from the salary paid to the servants in Muhammadan firms the expectation is held out to them according to practice, that, if they should render exceptionally good service during the period of the settlement, they would be rewarded at the time of the settlement by the grant of a substantial bonus. If, in these circumstances, the servants put forth extra work which the masters find satisfactory and, in consideration thereof, a bonus is promised to them, it is really in law a promise for past consideration which is good under the Indian Law; and even apart altogether from any question of gift completed or not, the servant has a case on the footing of a contract which is clearly sustainable. [p. 763, col. 1.]

Appeal from the judgment of Mr. Justice Coutts Trotter, dated the 2nd of August 1922, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court and made in C. S. No. 917 of 1920.

ARGUMENT.—Mr. *C. S. Nageswara Iyer*, for the Appellant:—The learned Judge is wrong in dismissing the suit in demurrer. The plaintiff has been given bonus in previous years and the same understanding must be held to have continued during the suit period. The accounts will show the sum due to the plaintiff and credited in his name. The plaintiff has also been operating upon the same by making occasional withdrawals. The defendants are in the position of trustees. *Vide Sir Jamsetji Jijibhai* v. *Sona Bai* (1). The same principle was followed in *Bai Mahakore* v. *Bai Mangla* (2). The plaintiff has been doing exceptionally good service to the defendant firm and this is the implied contract that if the plaintiff would do good service he would be entitled to bonus. *Sabjan Sahib* v. *Abdul Azeez Sahib* (3).

Mr. *A. Srirangachari* (with him Messrs. *R. Purushothama Iyengar* and *N. M. Prasad*), for the Respondents:—The plaint does not disclose any cause of action. Admittedly the amount claimed is a bonus and so there was no legal obligation on the part of the defendant to pay any amount to the plaintiff. No legal claim can be made to any bonus. It has been held that if cheques had been drawn in favour of the employee, the payment may be directed to be withheld. *Vide Natha Gulab & Co.* v. *Shallar and G. I. P. Ry.*, (4) and *Janki Das* v. *The East Indian Railway Co.* (5). There is no allegation that the character of the amount was anything but a bonus. The mere fact that the amount has been credited in plaintiff's name cannot constitute a payment to the plaintiff. The same is decided in the very case cited by the appellant [*vide* the observation of Abdur Rahim, J., in *Sabjan Sahib* v. *Abdul Azeez Sahib* (3).] See also *Re Glover* (6). To constitute a valid gift, the property being moveable there must be actual delivery (s. 123, Transfer of Property Act). Here the amount has not been paid over to the plaintiff nor have the defendants done all they can to put the amount in plaintiff's possession; *Ramamirtha Ayyan* v. *Gopala Ayyan* (7). Even delivery of pro-note without endorsement is no good: *Akhoy Kumar Pal* v. *Hari Das Basak* (8). The defendants cannot be deemed to have been trustees. There has been no declaration on their part as required by the Trusts Act that they have constituted themselves as such. *Bai Mahakore* v. *Bai Mangla* (2) does not apply as the decision there turned upon the construction of the document which constituted the parties as trustees. An incomplete gift cannot be converted into a valid trust. *Manchershaw* v. *Ardeshir* (9). The plaintiff has not been operating upon the amount to his credit as of right. The defendants have stated in their written statement that they did not pay the amount as they were displeased with plaintiff's conduct and their discretion cannot be questioned by the Court.

JUDGMENT.

Spencer, Offg. C. J.—This suit was dismissed upon a demurrer, as the learned Judge was of opinion that the plaint disclosed no cause of action. No evidence was taken on either side. From the allegations in the plaint, it appears that the plaintiff, a godown keeper in the employment of a Muhammadan firm styled Messrs. Oosman Hasan and Company, was credited with a bonus of Rs. 3,500 out of the profits of the firm in consideration of the good services rendered by him and of the fine

(1) 2 B. H. C. R. 133 at p. 139.
(2) 11 Ind. Cas. 564; 35 B. 403 at pp. 406, 409; 13 Bom. L. R. 564.
(3) 42 Ind. Cas. 684 at p. 689.
(4) 87 Ind. Cas. 312; 25 Bom. L. R. 593; (1924) A. I. R. (B.) 88.
(5) 6 A. 634; A. W. N. (1884) 210; 4 Ind. Dec. (N. S.) 247.
(6) (1862) 2 J. & H. 186; 70 E. R. 1023; 134 R. R. 186.
(7) 19 M. 433; 6 M. L. J. 207; 6 Ind. Dec. (N. S.) 1007.
(8) 22 Ind. Cas. 500; 18 C. W. N. 494; 19 C. L. J. 335.
(9) 10 Bom. L. R. 1209.

profits made by the firm. The plaintiff alleged that this bonus was carried to his credit in the firm's books in 1919 and that in 1920 he was allowed to draw out of it Rs. 420 but that the defendants refused, in spite of his demand, to pay the balance.

The question of law is whether on the facts alleged the entry in the firm's books constituted a completed gift and whether the defendants were trustees or depositees as regards the undisbursed amount of the bonus. Section 5 of the Indian Trusts Act says: "No trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust.....and registered, or by the Will of the author of the trust, * * * * or unless the ownership of the property is transferred to the trustee." Section 123 of the Transfer of Property Act declares that "for the purpose of making a gift of immoveable property, the transfer may be effected either by a registered instrument signed or by delivery." The defendants' liability, therefore, turns on the question whether there was any delivery or transfer of ownership to the plaintiff.

A number of cases have been cited before us. The nearest to the facts of the present case appears to be *Bai Mahakore* v. *Bai Mangla* (2). In that case there was a credit entry made by Damodardas in his account books in the name of Harkore, his wife; Chandavarkar, J., held that this constituted a valid trust in favour of Harkore. Heaton, J. held that Damodaradas became a depositee and that the addition of interest to the deposit account and the debiting of money spent on pilgrimage was a further indication of the relations of the parties being those of depositor and depositee. In *Sabjan Sahib* v. *Abdul Azeez Sahib* (3), Abdur Rahim, J., held that a mere entry in books of account did not create a completed gift on the facts of that case and he attached much importance to the fact that Sabjan in whose name the credit stood did not draw upon the amount standing at his credit. The present case may be distinguished by the fact that there was a drawing upon the fund. In *Sir Jamsetji Jijibhai* v. *Sona Bai* (1) Couch, J., considered all the circumstances of the case as to whether there was an intention on the part of Sir Jamsetji Jijibhai to create a trust in favour of Sorabji Pestanji and, as indicating that intention, he had regard to the manner in which the money was dealt with, which was placed on the credit side of the account. He held in that case that a trust was created because there was no instance in which a sum of money had been placed on the credit side of the account in which the donor afterwards attempted to deal with the money as his own. In *Natha Gulab & Co.* v. *Shallar and G. I. P. Railway* (4) a cheque was issued and attached before it was cashed and before the remittance was made by the Bank to the payee. Similarly in *Janki Das* v. *The East India Railway Company* (5), before actual delivery took place, the bonus recommended to an employee of the Railway was attached in execution of a decree obtained against him. In the present case, there is not only the allegation that the amount of Rs. 3,500 was credited to the plaintiff in the firm's accounts, but there is the further allegation that he was allowed to operate upon this account. If the firm had paid out the *bonus* into the hands of the plaintiff and if the next moment he had deposited it for safe keeping with his employers, the position would have been in no way different from that disclosed by the entries as they were made. On the alleged facts which are, of course, open to be rebutted at the trial, it appears to us that there is a case of a completed gift and a transfer of ownership in favour of the plaintiff; and, if ownership in the bonus was completely transferred, and there was more than a mere promise without consideration to give the plaintiff a bonus, it is immaterial that the amount was originally of the nature of a bonus.

The case must go back for hearing evidence and disposing of it upon its merits. The defendants have since the disposal of the suit become insolvent and are now represented by the Official Assignee. The respondents must bear the costs of this appeal which will come out of the estate. The costs of the suit will abide and follow the result. The appellant will be entitled to a refund of the Court-fee on the appeal.

Srinivasa Iyengar, J.—I agree with my Lord the learned Chief Justice in the order proposed and only wish to add this. I do not at all see why the plaintiff's claim should not be deemed to be based on contract, apart from any question whatever of a contemplated gift, or a completed gift, or apart from any relationship between the parties as depositor and depositee or creditor and debtor. No doubt,

if the services of the plaintiff had been rendered only for the salary stipulated, a promise of a grant of bonus to him would not be a promise for past consideration. But all those who know anything of these Muhammadan firms know that, apart altogether from the salary paid to the servants of the firm, the expectation is held out to them, according to the *mamool* or practice, that, if they should render exceptionally good service during the period of the settlement, they would be rewarded at the time of the settlement by the grant of a substantial bonus. If, in these circumstances, the servants put forth extra work which the masters find satisfactory and, in consideration thereof, a bonus is promised to them, it seems to me that it is really in law a promise for past consideration which is good under the Indian Law. It is for the purpose of establishing the implied agreement in such firms that, I take it, the plaintiff has referred in his plaint to the previous settlements, and to the grant of bonus to the plaintiff at those settlements, to such bonuses having been credited at every settlement to his account and to his having operated upon the amount so credited. I, therefore, consider that, even apart altogether from any question of gift completed or not, the plaintiff has a case on the footing of a contract which is clearly sustainable. The averments in the plaint are sufficient for the purpose. I, therefore, agree to the order proposed.

V. N. V. *Case remanded.*

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 204 OF 1924.

February 16, 1925.

Present:—Mr. Justice Mukerji.

MESSRS. DURGA PRASAD-BADRI PRASAD—PLAINTIFFS—APPLICANTS

versus

THE BOMBAY BARODA AND CENTRAL INDIA RAILWAY—DEFENDANTS—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Art. 31—Suit against Railway Company for compensation of non-delivery of goods—Limitation, commencement of.

On 27th July 1922, certain goods were consigned to the defendant Company for carriage and delivery to the plaintiff. On 21st August 1922, plaintiff sent his man to take delivery of the goods who paid the freight, handed over the Railway receipt and obtained permission to remove the goods. The goods could not, however, be found and the plaintiff consequently instituted a suit on 10th December 1923 for recovery of compensation for non-delivery of the goods consigned:

Held, (1) that the suit was governed by Art. 31 of Sch. I to the Limitation Act and that limitation began to run from the date when the goods ought to have been delivered; [p. 764, col. 1.]

(2) that as in this case the parties expected that the goods would be delivered on the 21st August 1922, limitation began to run from that date and the suit having been filed more than one year after that date was barred by time. [*ibid.*]

Great Indian Peninsula Railway v. *Ganpat Rai*, 10 Ind. Cas. 122; 33 A. 544; 8 A. L. J. 513, followed.

Jugal Kishore v. *Great Indian Peninsula Railway*, 68 Ind. Cas. 981; 20 A. L. J. 792; 4 U. P. L. R. (A.) 219; (1923) A. I. R. (A.) 22; 45 A. 43, distinguished.

Civil revision from an order of the Judge of the Court of Small Causes at Cawnpore, dated the 1st of September 1924.

St. *C. Thompson*, for the Applicants.

Mr. *Ladli Prasad Zutshi*, for the Opposite Party.

JUDGMENT.—This application in revision arises out of a suit instituted in the Court of Small Causes at Cawnpore for recovery of compensation for non-delivery of goods consigned. The suit was dismissed on the ground of limitation and the question is whether the decree of the Court below was incorrect.

It appears that on the 27th of July 1922 a bale of cotton goods was consigned to the opposite parties for delivery at Cawnpore. The plaint recites that on the 21st of August 1922 the plaintiffs sent their man to take delivery of the goods who paid the freight, handed over the Railway receipt and obtained a gate-pass in order that he might remove the goods. When, however, the goods were to be actually removed they were found missing. On these allegations the suit was brought for compensation. In para. 7 of the plaint the cause of action was stated to have arisen on the 21st of August 1923.

It appears to me that this date, *viz.*, 21st of August 1923 is merely a slip for 21st of August 1922, the date mentioned in para. 3 of the plaint. It is, however, immaterial for my purpose whether the date given in para. 7 of the plaint is the correct one or not.

It is common ground that Art. 31, Sch. I of the Limitation Act applies to the case. If that be so, the limitation begins to run from the date when goods ought

to be delivered. Evidently the parties expected that the goods would be delivered on the 21st of August 1922, the date mentioned in para. 3 of the plaint. The suit was not filed till the 10th of December 1923, that is to say, some sixteen months after the date on which the parties expected the goods to be delivered. On the face of it, therefore, the suit is barred by time.

The learned Counsel for the applicants has relied on a two Judge case decided by this Court, *viz. Jugal Kishore* v. *Great Indian Peninsula Railway* (1). On the peculiar facts of that case the learned Judges of this Court held that the defendant Company had been putting off the plaintiff with assurances that they were making an enquiry for the goods and were hoping to find them and to deliver them. The learned Judges, therefore, found that they were unable to say that the goods ought to have been delivered more than one year before the institution of the suit. The case was really decided on the peculiar facts involved therein and does not lay down any general rule of law.

Mr. Thompson sought to argue that in this case also correspondence was going on between the parties and that some subordinate officers of the opposite parties were making reports to their superior officers. Most of the documents referred to by the learned Counsel are not on the record and there is nothing in the judgment of the Court below to show that the plaintiffs were being put off from seeking their remedy by suit on account of any conduct of the opposite parties. In the circumstances the plain rule of law as laid down in Art. 31 of the Limitation Act and as laid down in the two Judge case of *Great Indian Peninsula Railway* v. *Ganpat Rai* (2) applies.

The application is dismissed with costs.

Z. K. *Application dismissed.*

(1) 68 Ind. Cas. 981; 20 A. L. J. 792; 4 U. P. L. R. (A.) 219; (1923) A. I. R. (A.) 22; 45 A. 43.
(2) 10 Ind. Cas. 122; 33 A. 544; 8 A. L. J. 543.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1389 OF 1924.
January 12, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

J. C. DAS—DEFENDANT No. 4—PETITIONER

versus

THE CACHAR NATIVE JOINT STOCK COMPANY, LTD.—PLAINTIFF AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXVI, r. 11—Accounts, suit for—Order for taking accounts, whether can be made before determination of defendant's liability.

The proper course in a suit for accounts is to try the suit in order to determine the liability of the defendant to render accounts and after this liability has been established to make an order for the taking of accounts. An order for taking accounts cannot be made, notwithstanding the provisions of O. XXVI, r. 11 of the C. P. C., before the liability of the defendant has been established.

Rule against an order of the Court of the Sub-Judge, Cachar (Assam), in Miscellaneous Suit No. 8 of 1920.

Sir *B. C. Mitter*, Mr. *J. N. Mazumdar* and Babus *Jatindra Mohan Chowdhury* and *Narayan Chandra Kar*, for the Petitioner.

Mr. *S. R. Das* and Babu *Hemendra Kumar Das*, for the Opposite Parties.

JUDGMENT.—This is a Rule obtained at the instance of one of the defendants in the suit with regard to an order that was made by the Subordinate Judge directing certain accounts to be taken by a Commissioner appointed in the suit. The suit was commenced so long ago, I think, as the year 1920 by the Company against certain of its officers including the auditor seeking to make them liable for certain loss which had been incurred by the Company which, it is alleged is owing to the defalcation of some of the officers of the Company.

The claim against the auditor at whose instance this Rule was obtained was for a specific sum of some Rs. 69,000 and before all this was established a reference was made by the Subordinate Judge to a Commissioner directing certain accounts to be taken preliminary to the hearing of the suit. The order in the form in which it had been made by the District Judge was admittedly too wide and an application with regard thereto was made before Mr. Justice Chakravarti and myself sometime in November last. The actual question that now arises before us was not so fa

as I recollect raised at that time, the application being confined to the form and extent of the order which had been made. It has now been brought to our notice that the order made by the Subordinate Judge involves the taking of certain accounts before any liability has been established against the present petitioner. We think that this, on the face of it, is not warranted by the nature of the suit notwithstanding the provisions of O. XXVI, r. 11 to which we have been referred. We think the proper course for the Subordinate Judge is to try the suit in order to determine whether the petitioner is liable at all to the Company for the defalcation which has been alleged and we accordingly make the Rule absolute and we direct that the proceedings before the Commissioner shall be stayed and that the suit shall proceed in order that the liability of the various defendants to the Company may be determined if such liability in fact exists.

It is extremely unfortunate that this suit which was commenced so long, I think, as the year 1920 has not been brought to trial and in making the Rule absolute we direct that the Subordinate Judge shall take this case up within one month from date and the matter will be brought to our notice if the case is not commenced within that time with liberty to apply.

Costs-hearing-fee, five gold *mohurs* will be costs in the cause.

Z. K. *Rule made absolute.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 683 OF 1922.

December 15, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

TARABAI RAMRAO PATANKAR—APPELLANT

versus

DATTARAM GOVINDBHAI GUJAR—RESPONDENT.

Adverse possession—Mortgagee—Equity of redemption, whether can be acquired—Physical possession, whether necessary.

A possessory title to a property can only be acquired by physical possession which ripens int ownership by the failure of the true owner to tae steps to reocver possession. [p. 766, col. 1.]

Though a trespasser by holding possession against a mortgagor can bar the mortgagor's right to redeem, it cannot be said that an equity of redemption can be acquired by adverse possession unless the person claiming adversely is in physical possession of the mortgaged property. In the case of a possessory mortgage where possession has been delivered to the mortgagee a trespasser obtaining possession may hold adversely to the mortgagee but not to the mortgagor. [p. 766, cols. 1 & 2.]

Putappa v. *Timmaji*, 14 B. 176; 7 Ind. Dec. (N. S.) 576 and *Chinto* v. *Janki*, 18 B. 51; 9 Ind. Dec. (N. S.) 542, referred to.

Second appeal from the decision of the First Class Subordinate Judge, A. P., at Satara, in Appeal No. 68 of 1921, reversing the decree passed by the Subordinate Judge at Karad, in Civil Suit No. 542 of 1918.

Mr. *G. N. Thakor* (with him Mr. *P. B. Shingne*), for the Appellant.

Mr. *H. C. Coyajee* (with him Mr. *K. N. Koyajee*), for the Respondent.

JUDGMENT.

Macleod, C. J.—The main facts in this appeal are common to S. A. No. 683 of 1922 and need not be set out again. The heirs of Vinayak filed the suit to recover possession of the other half of the *vatan* lands. After the final decree in the suit of 1896, was passed in April 1912, Vinayak obtained possession of his half share, in July 1913. In August 1915, Tarabai, in execution of her decree against Antaji dispossessed the tenants of Vinayak as well. Jankibai, widow of Vinayak's uncle sought to recover possession, but her application was rejected in 1916. After her death her grand-daughter filed this suit against Tarabai making Vinayak's grandson and nephew party defendants.

The Trial Judge held that the validity of the mortgage ceased at the death of Hanmantrao, and Parchure who was then in possession became a trespasser. But the plaintiff did not claim through Parchure and until July 1913, neither they nor their predecessors had any possession at all. From July 1913 they had only symbolical possession. As Tarabai sued Parchure for possession and was successful, plaintiff's right to possession also ceased. Consequently the suit was dismissed. The Appellate Judge agreed with this decision except that he found that the Agashes obtained possession in 1913.

In appeal before us it was argued that the Agashes had acquired a title by adverse possession to a moiety in the suit lands Now Antaji Parchure was in posses-

sion as sole mortgagee till it was declared in the suit of 1896 that the assignment of Dattaram's share in the mortgage was void, and it was further held that the mortgage had been paid off. If Antaji could have been considered as holding adversely to the next heir of Hanmantrao while holding possession as mortgagee any suggestion of that sort is put an end to,

(1) by the finding that the mortgage was paid off so that the owners of the equity of redemption became entitled to possession under their purchases;

(2) by the decision in Tarabai's suit against Antaji.

It was faintly argued that Antaji must be considered as having been in possession of half the mortgaged lands in trust for Dattaram and consequently that Dattaram had acquired some interest by adverse possession. But this was an impossible argument. There could be no question of trust while Antaji was holding under the assignment in his favour; when that was set aside he became liable to account for half the profits.

But it was argued that the Agashes had acquired a title to the equity of redemption by adverse possession. It is difficult to see how a person can be in possession of an equity of redemption adversely to the true owner. A possessory title to property can only be acquired by physical possession which ripens into ownership by the failure of the true owner to take steps to recover possession. It is true that it appears to have been considered in *Putappa* v. *Timmaji* (1) that an equity of redemption can be acquired by adverse possession, but in that case Narsibai actually delivered possession to her vendee Ramappa in 1856 and it was contended that the plaintiff's suit was barred by his adverse possession for more than twelve years, and consequently it did not become necessary to determine what right Narsibai had when she sold. In *Chinto* v. *Janki* (2), it was held that there may be possession adverse to the interest of a mortgagee which never the less is not adverse to the interest of the mortgagor: *Putappa* v. *Timmaji* (1) was considered and I think that though a trespasser by holding possession against the mortgagor can bar the mortgagor's right to redeem, it cannot be said that an equity of redemption can be acquired by adverse possession unless the person claiming is in physical possession of the mortgaged property. In the case of a possessory mortgage where possession has been delivered to the mortgagee, a trespasser obtaining possession may hold adversely to the mortgagee but not to the mortgagor. Since Tarabai must be considered as the only person with a title other than possessory to the moiety in suit she is entitled to succeed against the plaintiffs who are out of possession unless they can show not only that her rights have been extinguished but that they have already acquired a good title. But at the most they obtained possession in July 1913 and retained it for two years. It is impossible, therefore, to say that they have a right to oust Tarabai and, in my opinion, the decree in her favour was correct and the appeal should be dismissed with costs.

Crump, J.—This is a suit by the heirs of Agashe against Tarabai. As regards this moiety of the lands Agashe's heirs hold the rights of both mortgagor and mortgagee by virtue of the order of the High Court in 1907. The question is whether they or those through whom they claim have acquired any title by adverse possession. It is obvious that on Hanmantrao's death in 1897 any alienation by him became null and void, but it may be that persons who remain in possession after that date could acquire a title by prescription against the heirs of Hanmantrao who were at that date entitled to immediate possession. It is necessary, therefore, to consider the possession of the lands from 1897 onwards.

If I apprehend the position correctly the only persons who could acquire any title by adverse possession would be the persons in actual possession of the lands. The actual possession up to 1913 was with Parchure. Up to 1907 the heirs of Agashe held one-half of the equity of redemption, and in 1912 they became the full owners but they got no possession until 1913. If the possession of Parchure as mortgagee was adverse to the heirs of Hanmantrao, they might have become entitled to hold as mortgagees, but from 1907 their possession was also adverse to the heirs of Agashe whose share was then declared free of the mortgage. It is difficult therefore, to see how the heirs of Agashe could acquire a title by adverse possession and as between Parchure and the

(1) 14 B. 176; 7 Ind. Dec. (N. S.) 576.
(2) 18 B 51; 9 Ind. Dec. (N. S.) 542.

heirs of Ramrao the matter is concluded by the suits of 1912. As regards the suggestion that there was adverse possession of the equity of redemption, it is clear that Agushe's heirs could not hold that equity adversely when they were never in physical possession of the property. As matters stood Hanmantrao's heirs could not at any time have sued the heirs of Agashe alone as holders of the mere right to redeem.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1626 OF 1922.

January 13, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

NABIN CHANDRA SAHA PODDAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DUDU MIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Contract Act (IX of 1872), s. 74—Res judicata—*Question of law—Interest, high rate of—Penalty.*

A case must be decided upon the law as it stands when the judgment is pronounced and not upon what the law was at the date of a previous suit, and if the law has been altered in the meantime and the effect of the law has been differently interpreted by judicial decision or altered by Statute, a decision on a point of law in an earlier suit will not operate as *res judicata* with regard to the same question in a subsequent suit. For instance, where a stipulation as to the payment of interest contained in a *kabuliyat* is held to be penal and, therefore, unenforceable, and the law is subsequently altered by judicial pronouncements, the decision as to the penal nature of the stipulation will not operate as *res judicata* in a subsequent suit to recover rent on the basis of the same *kabuliyat*. [p. 768, col. 1.]

In the absence of anything to prove undue influence or to show that there was an unconscionable bargain, a mere high rate of interest is not to be treated either as penal or unconscionable. [*ibid.*]

Balla Mal v. *Ahad Shah*, 48 Ind. Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.), followed.

Appeal against a decree of the Subordinate Judge, First Court, Bakargunj, dated the 22nd of February 1922, modifying that of the Munsif, Second Court at Bhola, dated the 27th of May 1921.

Babus *Jogesh Chandra Roy* and *Bhuban Mohan Shaha*, for the Appellants.

Babu *Suresh Chandra Taluqdar*, for the Respondents.

JUDGMENT.

Mukerji, J.—This appeal arises out of a suit for rent instituted by the plaintiffs for the years 1323 to 1326, the allegation being that the defendants were holding under a *kabuliyat* executed by their predecessor-in-interest for dwelling purposes in the year 1281. The Court of first instance decreed the plaintiffs' suit. The lower Appellate Court gave the plaintiffs a decree for the amount of rent claimed for the years in suit together with interest at the rate of 12 per cent. per annum, the rate of interest stipulated in the *kabuliyat* being 75 per cent. per annum at which the suit had been decreed by the Court of first instance. The plaintiffs appeal to this Court, and their contention is that the decision of the lower Appellate Court on the question of interest is wrong. It appears that the ground upon which the rate of interest was objected to in the Court of first instance on behalf of the defendants was that it was penal and unconscionable. The learned Munsif held that according to the present trend of judicial decisions the stipulation as to interest cannot be held to be either penal or unconscionable. The learned Subordinate Judge on appeal was of opinion that the question as to the rate of interest was *res judicata* as between the parties by reason of a previous decision in a suit for rent as between the parties which had been marked as Ex. 7 in the case; and inasmuch as in that decision it was held that the stipulation was of a penal nature, it disallowed the interest at the rate mentioned in the *kabuliyat* and gave the plaintiffs a decree, as I have said at the rate of 12 per cent. per annum. It is contended on behalf of the appellants that the decision in the previous suit on the question of interest cannot in law operate as *res judicata*. On behalf of the respondents it is urged that the said decision does operate as *res judicata*; and it is further contended that in any event inasmuch as the defendants were holding over the plaintiffs are not entitled to interest at the rate mentioned in the *kabuliyat* but are entitled only to such interest as in the opinion of the Court is fair and reasonable. So far as the question of *res judicata* is concerned, it is necessary to refer to the decision, Ex. 7, upon which the Court of

Appeal below has relied. It appears that in the previous suit the issue as to interest was as to whether the plaintiffs were entitled to get interest at the rate mentioned in the *kabuliyat* and it was decided that the interest claimed was high and was, therefore, penal. This decision was passed on the 30th of April 1917. Since then there have been a number of decisions on the question of penal character or otherwise of interest stipulated in contracts of which it is necessary to mention only one case, namely, the case of *Balla Mal* v. *Ahad Shah* (1), a decision of the Judicial Committee, in which it has been laid down that in the absence of anything to prove undue influence or to show that there was an unconscionable bargain, the mere high rate of interest is not to be treated either as penal or unconscionable. The law having thus been altered the question is whether the decision in the earlier suit should operate as *res judicata* in the present one. On behalf of the appellants reliance has been placed with regard to this matter on the case of *Alimunnissa Chowdhurani* v. *Shama Churn Roy* (2). In that case it was laid down that cases must be decided upon the law as it stands when the judgment is pronounced and not upon what the law was at the date of a previous suit, and if the said law has been altered in the meantime and the effect of the law has been differently interpreted by the Judicial decisions or altered by the Statute, the decision on the question of interest in an earlier suit for rent would not operate as *res judicata* with regard to the same question in a suit for rent for subsequent years. The decision upon which the earlier decision was based in that case had, in the meantime, been overruled by a Full Bench decision. That case seems to me very much the same as the present case. On behalf of the respondents reliance has been placed upon a number of decisions especially upon the decisions in the cases of *Rai Churn Ghose* v. *Kumud Mohan Dutta* (3), *Rash Behary Sarkar* v. *Mohendra Nath Ghose* (4) and *Waman* v. *Hari* (5) for the purpose of contending that the decision upon a pure question of law, even though erroneous, may, under certain circumstances, operate as *res judicata*. There can be no dispute as to the proposition of law which is contended for on behalf of the respondents. But, as I have said, the facts appearing in the present case are distinguishable from the facts appearing in the cases cited on behalf of the respondents and I can see nothing upon which I can distinguish the case of *Alimunnissa Chowdhurani* v. *Shama Charan Roy* (2) upon which reliance has been placed on behalf of the appellants. I am of opinion, therefore, that the decision in the earlier suit for rent does not operate as *res judicata*. The mere fact that 75 per cent. per annum is a rate stipulated in the *kabuliyat* does not show that the rate was a penal one nor is there anything to show nor any finding has been arrived at to the effect that the bargain was penal and unconscionable and this is not the first instance in which interest at the rate of 75 per cent. per annum has been allowed on the basis of a stipulation in a *kabuliyat*. I may refer for instance to the case of *Ashutosh Dhar* v. *Joy Lal Sardar* (6), where in awarding interest in a suit for rent at the contract rate which was 75 per cent. per annum this Court observed as follows: "The rate no doubt is very high, 75 per cent. per annum, but the tenants have the remedy in their own hands. They have only to pay their rent regularly and no interest will be chargeable." I can, therefore, see no reason for not awarding a decree to the plaintiffs at the rate stipulated in the *kabuliyat*.

So far as the second ground is concerned a reference to the *kabuliyat* shows that on the face of it, is not a *kabuliyat* for a period of nine years as contended for on behalf of the respondents and there is nothing to show that, as a matter of fact, the respondents were holding over after the expiry of the *kabuliyat*. On this ground it is not possible for us to say that the defendants are liable to pay interest at any rate other than that mentioned in the *kabuliyat*. I, accordingly, think that the decision of the learned Subordinate Judge is not correct and I set it aside and restore the decision of the learned Munsif with costs in this Court and the lower Appellate Court.

Greaves, J.—I agree.

Z. K. *Appeal allowed.*

(1) 48 Ind. Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

(2) 32 C. 749; 9 C. W. N. 466; 1 C. L. J. 176.

(3) 1 C. W. N. 687.

(4) 21 Ind. Cas. 979; 19 C. L. J. 34.

(5) 31 B. 128; 8 Bom. L. R. 932.

(6) 18 Ind. Cas. 621; 17 C. L. J. 50.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 237 OF 1924.

January 5, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

GULABRAO YESHVANT HARPHALE AND OTHERS —APPELLANTS

versus

MAGAN GHELABHAI GUJARATHI—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48, whether retrospective—Mortgage-suit—Instalment decree—Default—Limitation, commencement of.

Section 48 of the C. P. C. is retrospective and governs an application for the execution of a mortgage-decree passed before that Code came into force. Therefore, such an application if presented 12 years after the date of the decree is barred.

Konsilla v. *Ishri Singh*, 6 Ind. Cas. 188; 32 A. 499; 7 A. L. J. 420, dissented from.

Gopaldas v. *Tribhovan*, 59 Ind. Cas. 790; 22 Bom. L. R. 1420; 45 B. 365, followed.

In a mortgage-suit redemption was allowed on payment of Rs. 2,000 by annual instalments of Rs. 50 and it was directed that if there was a default in payment of an instalment, the plaintiff was entitled to take out execution for the whole amount. The decree was passed in 1899. There was default in conforming to the terms of the decree in 1901. Various attempts were made to recover the decretal amount by execution and the last application was made in 1922:

Held, (1) that on the occurrence of the first default in 1901 the decree-holder obtained the right to execute his decree for the whole amount and that time began to run against the decree-holder from the date of the default;

(2) that, therefore, the execution application was barred under the provisions of s. 48 of the C. P. C.

Second appeal from a decision of the District Judge at Poona, in Appeal No. 231 of 1922, confirming the order passed by the First Class Subordinate Judge, at Poona, in Darkhast No. 678 of 1922.

Mr. *K. V. Joshi*, for the Appellants.

Mr. *K. H. Kelkar*, for the Respondent.

JUDGMENT.—In this case a decree was passed against the present appellants in 1899 in a suit for sale of certain mortgaged property. Redemption was allowed on payment of Rs. 2,000 by annual instalments of Rs. 50 and it was directed that if there was a default in payment of two instalments, the plaintiff was entitled to take out execution for the whole amount. It is admitted that there was default in conforming to the terms of the decree so far back as 1901. The plaintiff had then the right to execute his decree for the whole amount, and necessarily time was running against the plaintiff from that date with regard to that right. It seems that thereafter various attempts were made by the plaintiff to recover the decretal amount by *darkhasts*, and it is not suggested that the present *Darkhast* was filed more than three years after the date of the last *darkhast*. Accordingly it was held by the Subordinate Judge and also by the District Judge in appeal that the *darkhast* was in time.

It was argued before us that as this application for execution was made more than twelve years after 1901, it was barred under s. 48 (*i*) (*b*) of the C. P. C. Against that view the decision in *Konsilla* v. *Ishri Singh* (1) was relied upon. But that decision has been dissented from by this Court in *Gopaldas* v. *Tribhovan* (2), where it was held in a considered judgment that s. 48 of the C. P. C., has retrospective effect, and governs an application for the execution of a mortgage-decree passed before that Code came into force. Hence such an application if presented twelve years after the date of the decree was barred.

Therefore, the application to execute the decree for the whole amount cannot be within time, since time began to run against the decree-holder in 1901. He cannot be allowed to continue to execute for the instalments as they fall due, as on default the decree was no longer an instalment decree.

The respondent relied upon the case of *Narsinha* v. *Balvant* (3). In that case the judgment-debtor applied for an extension of time to pay one of the instalments, and this Court held that in cases of default of payment of instalment decrees the Court in Equity has power to relieve the debtor from the consequences of his default. But we do not think we can order at the instance of the judgment-debtor that a decree which has ceased to be an instalment decree should be restored to its previous status so as to prevent time from running against him.

We, therefore, think that the appeal should be allowed and the *darkhast* dismissed with costs throughout.

Z. K. *Appeal allowed.*

(1) 6 Ind. Cas. 188; 32 A. 499; 7 A. L. J. 420.
(2) 59 Ind. Cas. 790; 22 Bom. L. R. 1420; 45 B. 365.
(3) 64 Ind. Cas. 570; 23 Bom. L. R. 1238; 46 B. 463; (1922) A. I. R. (B.) 170.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1417 OF 1922.

December 22, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

NRITYA GOPAL MITRA—DEFENDANT No. 1—APPELLANT

versus

JORIT MONJARI DASI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, rr. 1, 4, 7—Review, grounds for—Evidence, re-consideration of, whether ground for review—Appeal—Appellate Court, whether can examine grounds for review—Procedure.

When an application for review is granted the party dissatisfied with the order may, under r. 7 of O. XLVII of the C. P. C., appeal against that order or may take the same objection in an appeal filed against the final decree, and on such an appeal it is open to the Appellate Court to examine the ground upon which the review was admitted, and if the ground for review does not come within the words of r. 1 of O. XLVII, then the Appellate Court is competent to hold that the review was improperly admitted and should have been rejected under r. 4 of the Order. [p. 770, col. 2.]

Chhajju Ram v. *Neki*, 72 Ind. Cas. 566; 49 I. A 144; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. (P. C.) 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.), followed.

A review cannot be granted for re-consideration of the evidence in the case or for re-examination of a finding of fact. [p. 771, col. 1.]

Appeal against a decree of the District Judge, Murshidabad, dated the 19th of April 1922, affirming that of the Munsif First Court at Kandi, dated the 2nd of July 1920.

Babu *Panchanan Ghose*, for the Appellant.

Babu *Tarkeshwar Pal Chaudhury*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This second appeal is on behalf of the defendants and arises out of a suit for possession of land, decreed by the District Judge of Murshidabad on the 19th April 1922.

The facts shortly stated are these. The plaintiff sued the defendants as trespassers with reference to the lands which admittedly comprised the holding of a tenant Khetra Nath Pal under the plaintiff and the defendants are in possession of those lands as purchasers of the holding which was not transferable by custom. The defence mainly, was, that the entire holding had not been sold and, therefore, the plaintiff could not treat the holding as abandoned.

The learned Munsif decreed the suit but his judgment was reversed on appeal by Mr. Ross, the Additional District Judge and the suit was dismissed on the 25th November 1921.

The plaintiff filed an application for review of that judgment and a notice was issued by the learned Judge who had dismissed the suit.

Mr. Nelson the successor-in-office of Mr. Ross heard the parties and admitted the application for review and re-heard the appeal and set aside the decree of his predecessor and in the result the plaintiff's suit was again decreed with costs.

The present second appeal is against this judgment.

The first point raised by the learned Vakil for the appellant was, that the learned District Judge was in error in admitting a review of the judgment of his predecessor because the grounds for the review did not come within the purview of O. XLVII, r. 1, cl. (2).

The learned Vakil for the respondent submitted that there was no appeal to this Court on the ground that the review was not in accordance with the provisions of O. XLVII, r. 1 (1). He submitted further that the appeal was limited to the grounds set out in O. XLVII, r. 7 and it was further argued that this review was admitted on the ground of "for other sufficient reason" and that a review granted on such a ground was not open to correction by appeal.

We do not think that the objection raised by the learned Vakil for the respondent is sound. Order XLVII, r. 7, expressly provides that when an application for review is granted the party dissatisfied with the order may appeal against that order or may take the same objection in an appeal filed against the final decree.

Rule 7 read with rr. 1 and 4 appears that it is open to the Appellate Court to examine the ground upon which the review was admitted and if the ground for the review does not come within the words of O. XLVII, r. 1 then the Appellate Court is competent to hold that the review was improperly admitted under r. 4 (1) but should have been rejected. This is clear from the case of *Chhajju Ram* v. *Neki* (1)

(1) 72 Ind. Cas. 566; 49 I. A. 144; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. (P. C.) 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.).

and this was the ground which was pointed by their Lordships, their interference in that case when they say that there could be no re-hearing for the purpose of seeing whether a different conclusion on the merits should be adopted.

In this view we think the review was really granted for re-consideration of the evidence in the case and in fact the learned District Judge has reversed the findings of fact by his predecessor.

Although the judgment of the District Judge which was set aside in review is not quite satisfactory still we think that as, the review was not permissible on the grounds upon which it it was admitted, we should not allow the last judgment to stand. If the previous judgment was not open to review it must stand. The result is that the judgment and decree of the District Judge dated 19th April 1922 is set aside and that of the District Judge dated 25th November 1921 is restored. In the circumstance we allow only the costs of this appeal. The parties must bear their costs in the Courts below.

Greaves, J.—I agree.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL.

August 15, 1924.

Present:—Mr. Justice Taraporewala.

ALIMAHOMED SALEMAHOMED—PLAINTIFF

versus

MUNICIPAL COMMISSIONER OF BOMBAY—DEFENDANT.

City of Bombay Municipal Act (III of 1888), ss. 3 (z), 394, 515—Specific Relief Act (I of 1877), s. 45—Stables—License, refusal of—Municipal Commissioner, discretion of—High Court, power of, to interfere—Court prohibiting issue of license on ground of private nuisance—Abatement of nuisance—License, whether can be granted under changed circumstances—Public and private nuisances, distinction between—Remedies.

Where a Municipal Commissioner has acted illegally in refusing to exercise his discretion in granting a license under s. 394 of the City of Bombay Municipal Act, the High Court would interfere under s. 45 of the Specific Relief Act and order him to exercise his discretion and issue the license. [p. 772, col. 2.]

Section 515 of the City of Bombay Municipal Act is designed to empower a Magistrate to give summary relief by way of prevention or otherwise, not only in respect of a public nuisance, but in respect of any nuisance as defined by s. 3 (*z*) of the Municipal Act which includes both private and public nuisances. [p. 773, cols. 1 & 2.]

Where in proceedings under s. 515 of the City of Bombay Municipal Act relating to certain stables the Court thinks that the nuisance complained of relates to the whole locality, the nuisance is a public nuisance, but if it relates only to one or two houses it is a private nuisance. The relief which the Court can give in both cases under s. 515 is, *inter alia*, abatement of the nuisance by ordering the Municipal Commissioner not to grant the license for the stables. But it does not follow from the Court making an order on the Commissioner that he should not grant a license that that order is to govern all circumstances and all cases at all times. [p. 775, col. 2.]

Where the order of the Court proceeds on the assumption that a private nuisance exists, the Commissioner is at liberty to grant a license when he finds that the private nuisance complained of in the proceedings under s. 515 of the City of Bombay Municipal Act has ceased to exist, owing to the residents of the particular houses affected by the nuisance having vacated those houses. [*ibid.*]

With regard to a private nuisance each individual has his remedy in civil law by way of injunction and damages. He has further his remedy under s. 515 of the City of Bombay Municipal Act. It is necessary for the protection of the health and comfort of the inhabitants of a big city like Bombay that any resident who is affected by the nuisance in the manner mentioned in s. 3 (*z*) of the Act, should have a right to go to a Magistrate over the head of the Commissioner or the Corporation that the Commissioner should be restrained from exercising his powers so as to affect the complainant's individual right as a resident by the creation of a private nuisance. If the private nuisance affects two or three houses only, the inhabitants of the houses might either join in a civil suit or a complaint before a Magistrate and ask the Magistrate to decide specifically that a particular nuisance is a private nuisance affecting to residents of those particular houses. With regard to a public nuisance also, any resident can ask for an order under s. 515 and if the Court finds a public nuisance proved, the order of the Court would give relief to the public of the locality as against the nuisance and the vacating of any one or more houses would not mean abatement of the nuisance as the nuisance, is in respect of the public. In the case of a public nuisance no particular limits need be defined. [p. 775, col. 2; p. 776, col. 1.]

Mr. *B. J. Desai*, for the Plaintiff.

Mr. *Campbell*, for the Defendant.

JUDGMENT.—This is an application under the Specific Relief Act, s. 45, for an order on the Municipal Commissioner to grant the applicant a license for stables for hack victorias erected by him at Love Lane, Mazagaon, under s. 494 (1) (c) of the City of Bombay Municipal Act III of 1888. The Municipal Commissioner has declined to issue a license in this case on the ground that he was prevented from doing so by the order of the Appeal Court: *Municipal Corporation of Bombay* v. *Mallandaine* (1). The Municipal Commissioner has put in

(1) 84 Ind. Cas. 854; 25 Bom. L. R. 1321; 48 B. 241; (1924) A. I. R. (B.) 241; 26 Cr. L. J. 374.

an affidavit in reply to the application in which he concedes that but for the judgment of the Appeal Court he is quite willing to exercise his discretion in favour of the applicant and to issue a license to him as applied for by him. In the opinion of the Commissioner, who has a discretion in the matter, the applicant is entitled to the license and he says that if he had not been advised by his legal advisers that the Appeal Court judgment prevented him from exercising his discretion in the matter he would have issued the license to the applicant.

The question of the jurisdiction of this Court to order the Municipal Commissioner to exercise his discretion under certain circumstances under s. 45 of the Specific Relief Act has not been disputed, but I should like to refer to the judgments of this Court on the point which make it quite clear under what circumstances this Court has jurisdiction to interfere with the discretion of the Commissioner under s. 45 of the Specific Relief Act. As to the interference with the discretion of the Municipal Commissioner there is a decision of the Appeal Court in *Haji Ismail* v. *Municipal Commissioner of Bombay* (2). That was also a case of refusal to grant a license to the applicant under s. 394 of the City of Bombay Municipal Act. The learned Judges of the Appeal Court lay down at page 260* as follows:—"The power, then, to grant licenses vested in the Municipal Commissioner under s. 394 being purely discretionary, the only limit to its exercise is that it should not be arbitrary, vague and fanciful; but it must be legal and regular." Then, on the facts of the case, the Appeal Court found that they were not satisfied that the Commissioner had exercised his discretion arbitrarily and without any regard to the sanitary interests of the City for which the power is vested in him and accordingly dismissed the application of the applicant.

There is another decision of this Court in *Gell* v. *Taja Noora* (3), where the question was of the exercise of discretion by the Commissioner of Police in refusing to grant a license for the conveyance of the applicant on the ground that the Commissioner had approved a certain pattern of victoria as a public conveyance and had refused a license to the victoria of the applicant on the ground that it did not conform to the pattern. That case also went up to the Appeal Court and both the Judge of the first instance Mr. Justice Russell and the Appeal Court held that the ground on which the Police Commissioner had refused to grant the license was illegal and that, therefore, the Court had jurisdiction under s. 45 of the Specific Relief Act to order him to issue the license asked for. The observations of Mr. Justice Batty at page 320* and Mr. Justice Starling at page 321* show that where the Commissioner has acted illegally in refusing to exercise his discretion this Court would interfere, and order him to exercise his discretion and issue the license.

The ground in this case on which the Municipal Commissioner has declined to grant the license to the applicant is that he is prevented by the decision of the Appeal Court referred to by me from doing so. If, therefore, the Appeal Court judgment does not bear the construction which is put upon it by the legal advisers of the Municipal Commissioner, clearly the action of the Municipal Commissioner in declining to grant the license would be illegal.

The sole question, therefore, before me is whether the judgment of the Appeal Court bears the construction which is put upon it by the legal advisers of the Municipal Commissioner and whether that judgment covers the altered circumstances of the case as now existing and, therefore, prevents the Municipal Commissioner from granting the license. I have very carefully considered this question, as I find from the proceedings that the matter was fought out in the Court of the Chief Presidency Magistrate and before the Appeal Court in the most acrimonious spirit and as found both by the Magistrate and by the Appeal Court the parties concerned refused to consider any compromise or any middle way out of the difficulty created by the action of the Municipal Commissioner in then proposing to grant a license to the applicant. It further appears that long before the Municipal Commissioner decided to grant a license the residents of the locality had made complaints to the Municipality and the Municipal Sanitary Committee had examined the locality and made a report and the matter had again come before the Corporation, and ultimately the Corporation

(2) 28 B. 253; 5 Bom. L. R. 1001.
(3) 27 B. 307; 5 Bom. L. R. 133

*Page of 28 B.—[*Ed.*]

*Pages of 27 B.—[*Ed.*]

having decided to support the action of the Municipal Commissioner in his proposal to grant a license to the applicant, proceedings were taken, under s. 515 of the Municipal Act, by one L. R. Mallandaine, who lived in a bungalow belonging to the applicant and which bungalow was on three sides surrounded by the stables, before the Chief Presidency Magistrate. This was the first case of its kind in Bombay. It appears to me that by reason of its being the first case neither the parties nor the Chief Presidency Magistrate were quite clear in their minds as to what was exactly the issue before the Court and what was exactly the relief as bearing on that issue asked for by the complainant. I make these observations advisedly after very carefully going through the proceedings and the judgment of the Magistrate as I find, as pointed out by Mr. Campbell in his very fair and able argument on the point, that there are stray observations in the judgment of the Chief Presidency Magistrate and indications in the evidence led before the Chief Presideney Magistrate on behalf of the complainant that the complainant was fighting not only his own battle but the battle of the other residents in the locality, who, it appears, had also financed him. The learned Magistrate has, however, based his decision mainly on the evidence which showed that the stables would cause a nuisance to the residents of the house in which the complainant resided. That the point as to whether the nuisance complained of affected the public was before the minds of the parties and the Magistrate appears to me to be clear from the fact that from the very first Mr. Campbell, who appeared for the Municipal Commissioner in that case, raised the point that the Magistrate had no jurisdiction under s. 515 of the Municipal Act to entertain the complaint as the complaint was in respect of a private nuisance and not a public nuisance. The question as to the nature of the nuisance complaind of and whether it came within the terms of s. 515 had to be and was considered by the Magistrate. Moreover, the scope of the order, which he ultimately made, was bound to be circumscribed by the finding as to the nature of the nuisance, with regard to which the Magistrate found action on his part was necessary under s. 515 of the Municipal Act. Here it is important to bear in mind that s. 515 of the Municipal Act is designed to empower the Magistrate to give summary relief by way of prevention or otherwise not only in respect of a public nuisance but any nuisance as defined by s. 3 (*z*) of the Municipal Act. Section 3 (*z*) makes it clear that "nuisance" under the Municipal Act includes both private nuisances and public nuisances. The definition runs as follows:—"'Nuisance' includes any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smelling or hearing, or which is or may be dangerous to life or injurious to health or property." The point taken in the very first instance by Counsel for the Municipal Commissioner was that notwithstanding the wide terms of the definition of "nuisance" in the Municipal Act, the words should be read as confining the definition to public nuisance only. That is to say the argument was that unless the community or a large part of the community or a street or locality was affected by the nuisance the Magistrate was not to exercise the summary jurisdiction under s. 515. That point was considered at some length by the learned Chief Presidency Magistrate and although he does not quite clearly find that the nuisance complained of was not a public nuisance, he impliedly holds that it was not. Otherwise one would have found in the very forefront of his judgment that the nuisance complained of was a public nuisance and that, therefore, there was no force in the contention that it was not covered by s. 515. He might then have further held that even if he was wrong in holding that it was a public nuisance, the nuisance complained of was covered by the definition given in s. 3 (*z*). But he does not do so, and to my mind advisedly. There was no case of public nuisance which was either seriously put forward or which was seriously advanced in the evidence or which was seriously considered by the Chief Presidency Magistrate. There are indications of an attempt on the part of the complainant to bring this nuisance within the definition of a public nuisance by adducing evidence of people in the locality to the effect that since the user of these stables malaria had prevailed in their houses and that malaria was due, if not solely, to a great extent to the fact of the user of the stables. There was nothing to prevent the Chief Presidency Magistrate from holding on the evidence before him that not merely the residents in this house but the residents of

the locality were affected by the user of these stables and that, therefore, it was not merely a private nuisance but a public nuisance which he wanted to abate under the powers given to him under s. 515. If one looks at the whole of the judgment, notwithstanding stray remarks here and there which might indicate that the Chief Presidency Magistrate had some doubts as to whether remotely there might not be some danger of malaria to the residents of the locality and the public, in coming to his conclusion he definitely confines himself to the particular house and the residents in that particular house. I need not quote passages from the judgment of the Chief Presidency Magistrate to show that throughout he was considering the question as if it was a fight between the complainant, as representing the residents of the bungalow in which he was living, and the Municipal Commissioner. I may here refer particularly to the appreciation by the Chief Presidency Magistrate of the evidence of Mr. Niblett, Mr. Masani and Mr. Daruwalla, who all stated that although the stables were not a public nuisance, they might result in a certain amount of nuisance to the occupants of the bunglow on the ground of noise caused by the syces talking and shouting and of insanitary conditions which might result by the washing of the horses and the victorias in the stables; and particularly on the evidence of these three gentlemen the learned Chief Presidency Magistrate holds that the stables were proved to be a nuisance within s. 3 (*z*) of the Municipal Act. He then also refers to the judgment of Mr. Justice Beaman in *Bai Bhicaiji* v. *Parojshaw Jivanji* (4) which case also was a case of a private nuisance. In the final conclusion the learned Magistrate does bring in the occupants of the neighbourhood, but considering the judgment as a whole, I am of opinion that the learned Magistrate did not find that there was a public nuisance likely to be created by the user of the stables but a private nuisance which he had jurisdiction to abate under s. 515.

Coming to the judgments of the Appeal Court, although, particularly in the Acting Chief Justice's judgment there are certain remarks which might be construed as referring to the residents of the locality, the judgments as a whole are devoted to the consideration of the question whether the user of the stables would result in a nuisance to the residents of the bungalow of whom the complainant was one. The words in which the learned Chief Justice finds on the question of nuisance are these (page 1326*):—"I hold that it is a nuisance with reference to the residents of this house in relation to the particular circumstances of the case. I do not say generally that any stables properly licensed, and kept according to the terms of the license, would necessarily be a nuisance. My finding has relation to the particular facts of the case including the situation of the stables and the extent to which the stabling accommodation is allowed on this land." This conclusion to which the learned Judges of the Appeal Court came is further made quite clear from their appreciation of the evidence on the complainant's behalf to the effect that the danger of malaria was increased in the locality. There was a divergence of medical evidence on the point, but so far as I can see the Judges of the Appeal Court were inclined to hold that the evidence did not prove the contention of the complainant and of the other residents of the locality that malaria was increased in the locality by reason of the user of these stables. If the ground of malaria was eliminated no other ground remained for holding that it was a public nuisance. I have gone through the whole evidence in that case. One Nibelett, who resided in the house of Ismailji, and Nazir who occupied another house, which two houses are the nearest to the stables next to the bungalow in question, say that they suffered discomfort on account of smell and noise. Their evidence, however, was very perfunctory, and the Judges of the Appeal Court do not specifically refer to it at all and have not brought their mind to bear upon those statements. It is a very doubtful question whether, assuming two or three houses were affected, it would be a case of public nuisance. I find in Halsbury's Laws of England, Vol. XXI, at page 511, where public and private nuisances are defined, in the note (*k*), that where a noise caused by a tinman plying his trade affected three houses only, it was held that there was a private nuisance and not an indictable one. The case referred to is *R.* v. *Lloyd* (5). There-

(4) 33 Ind. Cas. 192; 40 B. 401; 17 Bom. L. R. 1040.

(5) (1802) 4 Esp. 200.

Page of 25 Bom. L. R.—[Ed.]*.

fore, even if these two houses were affected practically by this nuisance, it might not amount to a public nuisance. The Judges of the Appeal Court did not particularly consider the case from the point of nuisance being created in respect of the residents of the locality. As I stated the question of the residents of the locality appears to me to have been dismissed from consideration by the Appeal Court on the ground that the evidence did not show that there was increase of malaria or that there was likelihood of increase of malaria. The judgment of Mr. Justice Crump, the other Judge of the Appeal Court, is to my mind equally clear on the question of the stables not affecting the other residents of the locality. He considers at some length the question of increase of malaria and he discards the evidence of the other residents of the locality as evidence of no value at all.

There are further indications given in the judgments of both the Appeal Court Judges that they were merely considering the case of the residents of the particular bungalow. It appears from the judgments that they tried to bring about a compromise and find a middle way of solving the dispute between the residents of the house in question and the owner of the stables and they express their regret that both the parties were fighting the matter so bitterly that they would not consider the suggestion of a middle way. One party insisted on the issue of the license while the other wanted to prevent it absolutely and neither was willing to give up its extreme contention. Now to my mind if the nuisance was considered by the Court to be a public nuisance there would have been no ground at all for a compromise between the complainant and the owner of these stables.

As observed by Mr. Justice Holmwood in *Khagendra Nath Mitra* v. *Bhupendra Narayan Dutt* (6), the Court ought most strongly to deprecate the use of the Municipal Act for the purpose of interfering in any way with the rights of private ownership beyond those limited powers which the Corporation had obtained by Statute for the necessary protection of the public and the enforcement of proper sanitation. I entirely agree with those observations, as after all in a big city like Bombay one cannot omit the consideration of the rights of ownership which might be affected to a very large extent by any hasty and improper action of the Commissioner or the Corporation or the Court. No doubt, if the user of the stables was in fact found to be a nuisance in respect of houses other than the bungalow, it was open to the Court and it would have been right for the Court, to find that the nuisance did not relate merely to the particular bungalow but to other houses also. If they thought that the nuisance related to the whole locality it was a public nuisance but if it related to the bungalow in question it was a private nuisance. The relief which the Court can give in both cases under s. 515 is *inter alia* abatement of the nuisance by ordering the Commissioner not to grant the license for the stables. But it does not follow from the Court's making an order on the Commissioner that he should not grant a license that that order is to govern all circumstances and all cases at all times. Mr. Desai argued that if the order was meant to cover any larger area than the bungalow, such area ought to have been defined in the judgment of the Magistrate and the Appeal Court. I have looked through a good many cases of nuisance and I do not find any where that any limitation as suggested by Mr. Desai has been put and for the obvious reason because it would be very difficult in particular cases to demarcate any particular line. The law has, therefore, provided two very proper demarcating lines which are clear and on which there can be no discussion, and that is, dividing nuisances into private and public nuisances. With regard to a private nuisance, each individual has his remedy in civil law by way of injunction and damages. He has further his remedy under s. 515 of the Municipal Act as interpreted by the Appeal Court and by the Calcutta High Court in two cases arising under a similar provision in the Calcutta Municipal Act: *Bhagwan Das* v. *Rash Behari Mullick* (7) and *Khagendra Nath Mitra* v *Bhupendra Narayan Dutt* (6). It is necessary for the protection of the health and comfort of the inhabitants of a big city like Bombay or Calcutta that any resident, who is affected by a nuisance in the manner mentioned in s 3 (*z*) of the Municipal Act, should have a right to go to a Magistrate over the

(6) 8 Ind. Cas. 530; 38 C. 296 at p. 299; 15 C. W. N. 316; 11 Cr. L. J. 665.

(7) 6 Ind. Cas. 595; 14 C. W. N. 637; 11 Cr. L. J. 377.

head of the Commissioner or the Corporation and ask that the Commissioner should be restrained from exercising his poweres so as to affect the complainant's individual right as resident by the creation of a private nuisance. If private nuisance affects two or three houses, the inhabitants of the two or three houses might either join in a civil suit or they might file separate suits, or they might join in a complaint before the Magistrate and ask the Magistrate to decide spcifically that the particular nuisance is a private nuisance affecting the residents of houses A, B and C. With regard to a public nuisance also, any resident of Bombay can ask for an order under s. 515, and if the Court finds a public nuisance proved, the order of the Court would give relief to the public of the locality as against the nuisance and vacating of any one or more houses would not mean an abatement of the nuisance in respect of the public. In the case of a public nuisance, no particular limits need be defined.

I have looked through various cases of public nuisance and I find that carrying on of obnoxious trades has been held in some cases to be a public nuisance. As to keeping of animals, under which the user of stables would come, I also find observations in Halsbury's Laws of England, Vol. XXI, at page 513 to the following effect:—

"The keeping of any animals in such a position or in such circumstances as to cause material discomfort or annoyance to the public in general or to a particular persons is a nuisance. If it affects the public generally, it is a public nuisance, and may be punished by indictment or restrained by proceedings taken by the Attorney-General; if it violates private rights only, it is actionable by the individual who is thereby injured."

I have gone through all the cases I could find on the question of nuisance created by stables and I do not find a single case where it has been held that the keeping of animals in a stable was a public nuisance. It may be that if a person keeps a very large number of horses and the locality is very thickly populated it may cause discomfort, annoyance and injury to health, not only to the residents of two or three houses but of a much larger number of houses. In that case it would be a public nuisance.

But I particularly wish to emphasize the fact that it was open to the Appeal Court, if it came to that conclusion, to hold that there was a public nuisance. It does not do so. The Appeal Court held that a private nuisance was created which affected the residents of the bungalow only. The private nuisance to the residents of the bungalow no longer exists as the bungalow is not tenanted and is not to be used any more for purposes other than those connected with the stables.

That being the case, to my mind, the applicant is entitled to the relief claimed by him.

I need not go in detail into the various decisions, but the decisions as to stables which are referred to by Mr. Justice Crump in his judgment all relate to private nuisances, and the case in point as regards public nuisance created by the carrying on of an obnoxious trade is *Attorney-General* v. *Code & Son* (8), I may mention here that in the English Public Health Acts there are similar provisions for the abatement of nuisances and the provisions apply both to public and private nuisances. There also, therefore, the order passed under summary jurisdiction would be interpreted on the basis of the finding of the Court as to whether the nuisance was a private nuisance or a public nuisance.

In the case of a public nuisance there is a special remedy provided in the C. P. C. Under s. 91 of the C. P. C. the Advocate-General or two or more persons having obtained his consent in writing may institute proceedings for abatement of a public nuisance. There is, further, a provision in s. 268 of the Indian Penal Code in respect of a public nuisance. There "public nuisance" is defined as an act or an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right. I refer to these provisions, because I find from what Mr. Campbell very properly brought to my notice that the inpabitants of the locality have been under the impression, the same impression as conveyed by the Municipal Commissioner to the applicant and which necessitated these proceedings, that the order of the Appeal Court protected all the

(8) (1901) 1 Ch. 205; 70 L. J. Ch. 148; 65 J. P. 88; 13 L. T. 725.

inhabitants of the locality in respect of this nuisance. Probably they financed that litigation and backed up the complainant Mr. Mallandaine in the belief that if he succeeded, there would be an end of the matter. They did not count upon the ingenuity of the landlord, who got the particular house vacated and got the nuisance in respect of that particular house abated in a manner which was not contemplated by the other residents of the locality. I have looked at the plans put in in that case and I find that the two nearest houses next to the bungalow in that case are the houses of Ismailji and of Nazir.

I express no opinion whatsoever as to whether the user of these stables will result in discomfort or annoyance amounting to a nuisance as defined in s. 3 (*z*) of the Municipal Act, or whether there will be a nuisance at law actionable in this Court as a private nuisance in respect of any house or houses other than the bungalow or whether it will result in a public nuisance which would be indictable under s. 268 of the Indian Penal Code or actionable under s. 91 of the C. P. C. It may be that the residents of the locality may make a fresh effort and succeed perhaps so as to lay the matter at rest for all time. But unfortunately for them the Courts which considered that case confined their orders to the bungalow and did not hold there that a case of public nuisance was made out. The result is that if these parties are so advised there will be possibly further litigation in this matter. I do not want in any way to debar any resident or residents of the city of Bombay from taking proceedings under s. 515 of the Municipal Act or under the civil law or under s. 91, by moving the Advocate-General or under s. 268 of the Indian Penal Code.

At one time I proposed to order the Municipal Commissioner not to issue the license for a period of one month: but, as pointed out both by Mr. Campbell and Mr. Desai, such an order will really serve nobody's purpose. If the other residents of the locality, or whoever may be affected by the user of these stables, are so advised, they will have ample time to move the Magistrate, or file a suit in this Court and move for an injunction and obtain adequate relief. The applicant had these stables on his land for a long time and he has asked for a license again with his eyes open that other residents may have a cause for complaint and may again drag him to the Presidency Magistrate's Court under s. 515 of the Municipal Act. I trust that the Municipal Commissioner will not unduly hasten the grant of the license. The applicant will have no ground to complain if the issue of the license is delayed for a fortnight or any time which the Municipal Commissioner may think proper so as to give the other parties an opportunity of asserting their rights if they have any. I must say that the Municipal Commissioner has adopted a very proper attitude in bringing to my notice the letters addressed to him by the residents of the locality. Under the circumstances of the case to my mind, he did right in getting this question brought before the Court and decided by the Court, more particularly as he was advised by eminent Counsel who are the retained Counsel of the Municipality, that there would be a contempt of Court if he issued the license in face of the Appeal Court's decision. It is unfortunate that the matter may have to be re-litigated but that cannot be helped in view of the judgments of the Appeal Court. I have not considered the question whether the stables might be a nuisance with regard to the other houses or other residents of the locality and I express no opinion on the question. I wish to make this point quite clear so that it may not be said that the Commissioner uses his discretion under my orders and that, therefore, the other parties are debarred from proceeding under s. 515 of the Municipal Act or taking proceedings under the C. P. C., or taking criminal proceedings. My order is based entirely on the view I have taken that the Commissioner illegally declined to use his discretion on the ground that he was restrained by the Appeal Court's order. I hold that he is not so restrained; therefore, the refusal to exercise his discretion was on an illegal ground. That is all that I decide on this application.

As to whether he has otherwise rightly exercised his discretion or not, is a matter for the Municipal Commissioner and persons affected by the exercise of the discretion. I have not exercised any discretion in the matter. I have not gone into the merits of the question whether apart from the decision of the Appeal Court the Commissisoner would be right in exercising his discretion and issuing a license to the applicant. What I mean is this, in exercising his discretion the Commissioner has to consider whether this would be a nuisance to the

other residents of the locality and whether under the circumstances he should grant the license or not. On that point his opinion as expressed in his affidavit before me is clear that there would be no nuisance and he is willing in the exercise of his discretion to grant a license. I am not exercising that discretion at all. I leave open the remedies under s. 515 of the Municipal Act and under the civil and criminal law to any party who may feel aggrieved by the exercise of the discretion by the Commissioner.

The order will be on the Municipal Commissioner in terms of prayer (*a*). I direct the Municipal Commissioner in the exercise of his discretion to grant the applicant a license under s. 394 (1) (*c*) of the Municipal Act.

In my opinion the Municipal Corporation has been wrongly made a party to this application.

The applicant shall pay the costs of the respondents.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 187 OF 1924.
January 15, 1925.
Present :—Mr. Justice Mukerji.
KANDHAI LAL—APPLICANT
versus
DEBI PRASAD—OPPOSITE PARTY.

Burden of proof—Contract, suit on—Minority, plea of.

Where in a suit to enforce a contract, the defendant asserts that he was a minor at the date of the contract, the burden to prove the same lies on him. [p. 779, col. 1.]

Where a plaintiff wishes to enforce a contract it is for him to prove the validity of the contract on which he relies. But the age of a person entering into a contract with him is not such an essential part of the contract as must be proved by a plaintiff. [*ibid.*]

When a person enters into a contract as a major he really makes an admission that he is of age. If in spite of such an admission he asserts that he was not of age at the date of the contract the burden of proof is on him to establish the fact. [*ibid.*]

Narain Singh v *Chiranji Lal*, 79 Ind. Cas. 945; 22 A. L. J. 461; 46 A. 568; (1924) A. I. R. (A.) 730; L. R. 5 A. 353 Civ. and *Raja of Deo* v. *Abdullah*, 45 Ind. Cas. 770; 45 C. 909; 16 A. L. J. 576; 5 P. L. W. 83; (1918) M. W. N. 406; 22 C. W. N. 891; 8 L. W. 163; 24 M. L. T. 62; 28 C. L. J. 192; 20 Bom. L. R. 851; 35 M. L. J. 46; 45 I. A. 97 (P. C.), relied on.

Kanhaya Lal v. *Girdhari Lal*, 13 Ind. Cas. 956; 9 A. L. J. 103 and *Gaya Din* v. *Dulari*, 2 Ind. Cas. 839; 6 A. L. J. 693, referred to.

Civil revision from an order of the Judge of the Court of Small Causes at Cawnpore, dated the 1st of September 1924.

Mr. *N. Upadhiya*, for the Applicant.
Mr. *U. S. Bajpai*, for the Opposite Party.

JUDGMENT.—This is an application to revise a judgment of the Court of Small Causes at Cawnpore.

The plaintiff of the Court below is the applicant here. He brought the suit for recovery of money on foot of two promissory notes alleged to have been executed by the respondent. The suit was contested on several points, one of these being that at the date of execution of the promissory notes the defendant was a minor. The learned Judge found on all points in favour of the plaintiff. But on the question of defendant's minority he, laying the burden of proof on the plaintiff, came to the conclusion that the plaintiff had failed to establish that the defendant was a major at the date of execution of the promissory notes.

It appears that no satisfactory evidence was adduced on either side and the Court had to rely on the question of onus of proof. The learned Judge was of opinion that it was for the plaintiff to establish that the contract was a valid one and was entered into by people who were majors. Two cases of this Court would support the view taken by the learned Judge, *viz.*, *Kanhaya Lal* v. *Girdhari Lal* (1) following an earlier case of *Gaya Din* v. *Dulari* (2), on the other hand a Bench of two Judges of this very Court in the case of *Narain Singh* v. *Chiranji Lal* (3) laid down that the burden of proof lay on the party who asserts that he was a minor at the date of the contract. In the last mentioned case their Lordships purported to follow the case of *Raja of Deo* v. *Abdullah* (4), a decision of the Privy Council.

I have myself considered the case decided by the Privy Council and am of opinion that it does support the view taken in the case of *Narain Singh* v. *Chiranji Lal* (3). In the circumstances, the case of *Narain Singh* v. *Chiranji Lal* (3) should be followed, not only because it is a later case but it is supported by the opinion of the Privy Council which was not available when the two earlier cases were decided by this Court. Speaking personally, with respect, I should think that the burden of proof should be laid on the party who says

(1) 13 Ind. Cas. 956; 9 A. L. J. 103.
(2) 2 Ind. Cas. 839; 6 A. L. J. 693.
(3) 79 Ind. Cas. 945; 22 A. L. J. 461; 46 A. 568; (1924) A. I. R. (A.) 730; L. R. 5 A. 353 Civ.

that at the date of contract he was a minor. There can be no doubt that it is for the plaintiff to prove the validity of a contract on which he relies. But the age of a person entering into a contract is not such an essential part of the contract as must be proved by the plaintiff. Take for example a case like this. A man apparently of the age of 60, borrows money from a money-lender. When a suit is brought to enforce the payment the borrower pleads that he is a minor. The plea may be ludicrous and may appear to be so to the Court who will see the defendant. But if the burden of proof be laid on the plaintiff, he would be called upon to prove that his debtor was more than 18 at the date of the loan. It would be impossible for the plaintiff to find out the witnesses who would be able to prove the date of the birth of the defendant. Medical evidence can be accepted only as a matter of expert opinion. But the question is whether it is desirable that the plaintiff should be called upon to prove such an obvious case. Question of age is eminently one which the party raising it alone can prove by satisfactory evidence, although he himself may not be able to swear to it with sufficient accuracy from personal knowledge.

When a party enters into a contract as a major he really makes an admission that he is of age. If, in spite of such an admission, he asserts that he was not of age at the date of the contract, the burden of proof should be on him to establish the fact. In any view of the case, the burden of proof should lie on the party who asserts that he was a minor at the date of the contract in which he entered.

The result is that the judgment of the Court below should be set aside. I accordingly set it aside and decree the plaintiff's claim with costs throughout, I make no order as to interest after the institution of the suit.

Z. K. *Appeal dismissed.*

(4) 45 Ind. Cas. 770; 45 C. 939; 16 A. L. J. 576; 5 P. L. W. 83; (1918) M. W. N. 403; 22 C. W. N. 891; 8 L. W. 163; 24 M. L. T. 62; 28 C. L. J. 192; 20 Bom. L. R. 851; 35 M. L. J. 46; 45 I. A. 97 (P. C.).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 591 OF 1923.

December 5, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

VISHNU RAMCHANDRA DESHPANDE —PLAINTIFF—APPELLANT

versus

TUKARAM GANU BOGAR—DEFENDANT —RESPONDENT.

Landlord and tenant--Watan *land- Fixity of rent, right of -Adverse possession.*

A person who is in possession of *watan* lands as a tenant of the *watandar*, cannot acquire a right by adverse possession to fixity of rent, so as to deprive the *watandar* of his right to enhance the rent. It may be that a tenant can acquire a right of fixity of rent as against the immediate holder of the *watan*, but that would not prevail against the next holder, where the latter brings a suit for enhancement of rent within 12 years of his succeeding to the *watan*. [p. 781, col. 1.]

Case-law referred to.

Second appeal from a decision of the District Judge, Satara, in Appeal No. 381 of 1921, reversing the decree passed by the Subordinate Judge, Islampur, in Civil Suit No. 708 of 1919.

Mr. *K. N. Koyajee*, for the Appellant.

Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff sued to obtain possession of the lands described in the plaint, or in the alternative for a declaration that he as *inamdar* was entitled to demand enhanced rent from the defendants, stating that the lands belonged to the Deshpande family as *inam watan* lands.

The defendants admitted that the lands were *watan inam* lands; but they contended that the lands belonged to them as their ancestral properties; that they were in possession from ancient times; that the ancestors of the plaintiff had got the right to recover the Government assessment only from them and accordingly they used to pay Rs. 31-32 only in the *khata* of Ramchandra Gopal for the Judi; that they were not annual tenants; that no proper notice was given to them by the plaintiff; that the father of the plaintiff had instituted Suit No. 34 of 1891, against their ancestors; that in that suit their ancestors had claimed the lands as of their ownership; and that since then they were in possession adversely to the plaintiff and his father for more than twelve years.

It was found in the lower Court that the

lands in dispute were the *watan inam* lands of the plaintiff's family, that on account of the antiquity of the defendants' tenancy there was no satisfactory evidence of its commencement and, therefore, under s. 83 of the Bombay Land Revenue Code the presumption arose that as against the *inamdar's* family there was fixity of tenure. The learned Judge said:—

"I, therefore, hold that the defendants are permanent tenants. The usage to enhance the rents of permanent tenants is very widely known and well understood. Such tenants are liable to have their rents enhanced by their landlords: *Vyasacharya Madhavacharya* v. *Vishnu Vithal* (1)."

He held that the plaintiff's suit was not barred by adverse possession and that the defendants were liable to pay the enhanced rent. Accordingly he gave a decree to the plaintiff for Rs. 65 for the year 1917-18.

In appeal the learned Judge said:—

"The plaintiff's right to enhance was distinctly denied in Suit No. 34 of 1891, in the written statement Ex. 88. The suit was dismissed owing to a compromise. Then in 1911, they were still obdurately denying the right to enhance. This is clear from the notice Ex. 72. This state of things continued until the present suit. Thus for twelve years and more before suit the right to enhance was adversely held against the plaintiff."

Accordingly the plaintiff's suit was dismissed.

We have been referred to the Full Bench decision of this Court in *Radhabai* v. *Anantrav Bhagvant Deshpande* (2) in which it was held that in the absence of fraud and collusion adverse possession for twelve years during the lifetime of one holder of service *watan* lands would be a bar to succeeding holders. The contest in that case was between an entire stranger holding adverse possession of the *watan* lands on the one hand and the *watandars* on the other. There must be a distinction with regard to the question of adverse possession when the contest is between a tenant already in possession of the *watan* land as a tenant and the *watandar*.

In *Gopalrao* v *Mahadevrao* (3), it was held that the *inamdar's* right to enhance the rent and to recover the land in default of payment of such rent was barred by limitation, the tenant so far as the right was concerned having been holding adversely to him for more than twelve years. No reasons were given for this decision and the Court merely said (page 396*):—

"The defendant, therefore, so far as the right of the plaintiff to enhance the rent and to evict the defendant in default of payment is concerned, has been holding adversely to the plaintiff for more than twelve years, and the plaintiff's right to enhance the rent and to recover the land in default of payment of such rent has become lost by operation of the law of limitation."

The question whether persons, who and whose predecessors-in-title, claimed to be, and were, tenants of service *watan* lands would acquire title to a permanent tenancy of the lands by adverse possession as against the *watandars* from whom they held was considered in *Madhavrao Waman Saundalgekar* v. *Raghunath Venkatesh Deshpande* (4). The case of *Radhabai* v. *Anantrao Bhagvant Deshpande* (2) was distinguished. Their Lordships said (page 264†):—

"A careful consideration of Sir Charles Sargent's judgment as given in *Radhabai* v. *Anantrav Bhagvant Dishpande* (2) shows that he was considering the question referred to the Full Bench from the point of view of the grantee having been a stranger to the *watan*, It is not necessary for their Lordships to decide in this case whether the answer of the Full Bench, limited as it must have been to the case of a stranger to the *watan*, setting up as a defence, twelve years' adverse possession, was or was not correct, although they are constrained to say that it is somewhat difficult to see how a stranger to a *watan* can acquire a title by adverse possession for twelve years of lands, the alienation of which was, in the interests of the State, prohibited...In the present case the defence of twelve years' adverse possession as permanent tenants is set up by persons who and their predecessors-in-title, always claimed to be and were tenants of service *watan* lands, and in the opinion of their Lordships neither the defendants nor their predecessors-in-title could have acquired any title to a permanent tenancy in the lands by adverse possession as

(1) 58 Ind. Cas. 289; 22 Bom. L. R. 717; 44 B. 887.
(2) 9 B. 198; at p. 210; 5 Ind. Dec. (N. S.) 133 (F. B.).
(3) 21 B. 394; 11 Ind. Dec. (N. S.) 265.
(4) 74 Ind. Cas. 362; 50 I. A. 255; 25 Bom. L. R. 1005; (1923) M. W. N. 689; (1923) A. I. R. (P. C.) 205; 33 M. L. T. 389; 47 B. 798; 28 C. W. N. 857; 20 L. W. 248; 47 M. L. J. 248 (P. C.).

*Page of 21 B.—[*Ed.*]
†Page of 50 I. A.—[*Ed.*]

against the *watandars* from whom they held the lands."

If then a person who is in possession of the *watan* lands as a tenant of the *watandar* cannot acquire title to a permanent tenancy, that is to say, to fixity of tenure, it is difficult to see how such a tenant can acquire a right by adverse possession to fixity of rent. It may be that, as was held in *Gopalrao* v. *Mahadevrao* (3), a tenant can acquire a right of fixity of rent as against the immediate holder of the *watan*, but that would not prevail against the next holder, and in this case the suit having been filed within twelve years of the plaintiff succeeding to the *watan*, it is not barred. Therefore, following the decision of the Privy Council, we hold that the right of the plaintiff to enhance the rent exists.

There was another question which arose in this case and it was this. There was no permanent tenancy until the Court declared that the presumption under s. 83 of the Bombay Land Revenue Code arose. Until that was decided the defendants were only annual tenants not even having fixity of tenure, and consequently the plaintiff's right to enhance the rent which was recognised by s. 83 could not have been denied as against the *watandars*.

On both these grounds it seems to me that the decision of the Trial Court was right. The appeal should be allowed and the decree of the Trial Court restored with costs throughout.

Crump, J.—In my opinion it is impossible to apply to this case the principles laid down by the Full Bench in *Radhabai* v. *Anantrav Bhagvant Deshpande* (2) for that case has been distinguished by the Privy Council in *Madhavrao Waman Saundalgekar* v. *Raghunath Venkatesh Deshpande* (4). The facts of that latter case were so similar to the facts now before us that it is binding upon us as an authority for the proposition that a permanent tenancy cannot be acquired by a tenant of *watan* property as against the holder of the *watan*, and that authority is, therefore, sufficient for the decision of the case before us. Whether in other circumstances *Radhabai* v. *Anantrav Bhagvantrao Deshpande* (2) can still be regarded as an authority is a question which may have to be considered when those circumstances are before us. It seems to me, therefore, clear that the defendants in the present case cannot assert that they have by twelve years' adverse possession acquired a right to hold the property at a fixed rent. I should like further to point out that there is an error in the judgment of the District Judge as to the date on which the suit was filed. The correct date is October 29, 1919, and not October 29, 1921, and, therefore, the suit was within twelve years from the death of the last holder.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2200 OF 1921

January 7, 1925.

Present :—Mr. Justice Suhrawardy and Mr. Justice Cuming.

OFFICIAL TRUSTEE OF BENGAL —PLAINTIFF—APPELLANT

versus

SAGAR PAIK AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Compromise rent-decree.*

A rent-decree passed in a previous suit on the basis of a compromise is, in the absence of the terms of the compromise, by itself no evidence to prove what the defendant admitted, and amounts only to proof of an admission in respect of the amount claimed. It does not operate as *res judicata* in a subsequent suit between the parties with regard to the rate of rent.

Modhusudan Shah Mundul v. *Brae*, 16 C. 300; 8 Ind. Dec. (N. S.) 197 (F. B.), followed.

Appeal against a decree of the Second Additional District Judge, Midnapur, dated the 3rd June 1921, affirming that of the Munsif, First Court, Tamluk, dated the 11th May 1920.

Mr. *Gunoda Charan Sen* and Babu *Santosh Kumar Bose*, for the Appellant.

Babu *Khirode Narain Bhuian*, for the Respondent.

JUDGMENT.

Suhrawardy, J.—This is a suit for recovery of arrears of rent in respect of 4-annas share of the plaintiff in the holding. The rent is claimed at Rs. 54-11-7 for the 16-annas share; but the Record of Rights shows the *jama* at Rs. 36-6-7. Both the Courts below have agreed in dismissing the plaintiff's suit on the finding that the plaintiff had failed to prove the *jama* as alleged by him. The plaintiff produced

neither the collection papers nor any other evidence in proof of realization of rent at the rate claimed by him; but he has simply relied upon a certain decree passed in 1895 in a rent suit against the present respondent on confession. A copy of the decree in that suit has been filed in this case which shows that the amount claimed was decreed on confession by the defendant. The terms of the compromise have not been put in. The decree itself does not prove as to what the defendant admitted. As it stands the admission is only in respect of the amount claimed in that suit. It cannot, therefore, operate as *res judicata* in the present suit with regard to the rate of rent on the principle laid down in the Full Bench case of *Modhusudan Shaha Mundul* v. *Brae* (1), Mr. Sen for the appellant has further argued that if the decree in the previous suit may not operate as *res judicata*, it is a strong piece of evidence against the defendant. Admitting that to be so, the Courts below have on a consideration of this and other evidence came to the conclusion that the plaintiff has failed to rebut the presumption arising from the Record of Rights and it is a decision on facts. This appeal is accordingly dismissed with costs.

Cuming, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 16 C. 300; 8 Ind. Dec. (N. S.) 197 (F. B.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 828 OF 1923.

January 2, 1925.

Present:—Mr. Justice Mukerji.

MUNSHI RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BHAGWANT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 32—Suit by co-tenant for damages or profits, whether maintainable.

Section 32 of the Agra Tenancy Act bars a suit for partition of a holding. It does not bar the maintenance of a suit for damages or profits where one of the parties entitled to a holding is kept out of possession by his co-tenants.

Najibullah v. *Gulsher Khan*, 1 Ind. Cas. 594; 31 A. 348; 6 A. L. J. 343, relied on.

Second appeal against a decree of the Additional District Judge, Aligarh, dated the 23rd February 1923.

St. *C. Thompson*, for the Appellants.

Mr. *Durga Charan Banerji*, for the Respondents.

JUDGMENT.—This appeal involves a very short point and it is one of law. On the death of one Charan who was recorded as an ex-proprietary tenant of 21 and odd *bighas* of land, his brother's sons and his son's sons had a dispute about the division of the tenancy. They went to the Revenue Court and ultimately came to an agreement which took the shape of a document in writing registered. By this document plaintiffs who are the respondents in this Court were allowed 7 *bighas* 1 *biswa* of land. They came to Court with the allegation that the defendants kept them out of possession of this 7 *bighas* and odd area and were liable to pay damages. The plaintiffs accordingly sued for recovery of possession and for recovery of Rs. 70 as damages.

The Court of first instance dismissed the suit *in toto*. One of the plaintiffs Chet Ram appealed and he asked for damages only. The first ground of appeal was that the suit could not fail in its entirety.

The learned District Judge was of opinion that the suit could not fail *in toto*. He found that the plaintiffs were at least entitled to joint possession, if they were not entitled to separate physical possession. He accordingly assessed the damages and decreed the claim for a small amount, *viz.*, Rs. 17-8-0.

In this Court the learned Counsel for the defendants-appellants contended that the entire suit was unmaintainable having regard to the provision of s. 32 of the Tenancy Act.

I cannot agree with this contention. Section 32 of the Tenancy Act bars a suit for partition of a holding. It does not bar the maintenance of a suit for damages or profits where one of the parties entitled to a holding is kept out of possession by his co-tenants. The principle of the Full Bench case of *Najibulla* v. *Gulsher Khan* (1) applies. I need not express any opinion as to whether a suit for recovery of possession over 7 *bighas* of land could have been maintained in spite of s. 32 of the Tenancy Act; because that question does not arise in this case.

(1) 1 Ind. Cas. 594; 31 A. 348; 6 A. L. J. 343.

In my opinion there is no force in the appeal and it is hereby dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 1082 OF 1924.

December 19, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

GIRINDRA NATH RAY—PETITIONER

versus

KEDAR NATH BIDYANTA AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), ss. 63, 73—Assets, when can be regarded as realized—Rateable distribution—Decrees of inferior Courts stayed by superior Court—Decree-holders in inferior Courts, whether entitled to rateable distribution—Procedure—Practice, uniformity in, desirability of.

Where a sale of property belonging to the judgment-debtor is held in execution of a decree, the mere deposit of the earnest money cannot be said to be assets realized by the sale, within the meaning of s. 73 of the C. P. C., until the balance of the purchase-money is deposited and the sale becomes a concluded transaction. Where, however, separate properties belonging to the judgment-debtor are sold separately and their sale-proceeds are realized separately, the sale of each lot must be regarded as having been completed when the whole of the balance of the purchase-money in respect of that lot is deposited in Court. [p. 784, cols. 1 & 2.]

Ramjash Agarwala v. *Guru Charan Sen*, 3 Ind. Cas. 105; 14 C. W. N. 396; 11 C. L. J. 69 and *Maharaja of Burdwan* v. *Apurba Krishna Roy*, 10 Ind. Cas. 527; 15 C. W. N. 872; 14 C. L. J. 50, referred to.

The duty of a superior Court under s. 63 of the C. P. C. is to consider and determine the rights of the attaching creditors in all the cases to which that section applies, whether they have applied to the superior Court or not. There is nothing in that section which requires that before an attaching creditor can have his claim to rateable distribution determined he must obtain a transfer of the decree to the superior Court and apply to that Court for execution. The holders of decrees of inferior Courts, therefore, whose execution has been stopped by a superior Court under s. 63, are entitled to rateable distribution under that section read with s. 73 without any further application. [p. 785, col. 1; p. 786, col. 2.]

Case-law referred to.

In matters of practice uniformity is of great practical importance and when a practice has been established it should not be departed from even if there may be some doubt as to its strict soundness. [p. 786, col. 1.]

Rule against an order of the Court of the Sub-Judge, Nadia, dated the 23rd August 1924, in Money Ex. Case No. 17 of 1924.

Babus *Mritunjoy Chatterjee* and *Pasupati Ghosh*, for the Petitioner.

Mr. *Amarendra Nath Bose*, Dr. *Radha Benode Pal*, Babus *Nagendra Nath Ghose*, *Rupendra Kumar Mitter*, *Charu Ch. Bhattacharjee*, *Jatindra Mohan Chowdhury* *Bhupendra Kissore Roy* and *Dharma Das Set*, for the Opposite Parties.

JUDGMENT.

Chakravarti, J.—The Rule No. 1082 of 1924 and the analogous application pending in this Court, raise the question as to the distribution of the assets, realized in execution of decree for money, by the Subordinate Judge of Nadia in Execution case No. 17 of 1924. The properties of the judgment-debtor, who is opposite party No. 9 in this Rule, were sold in three lots. Lot No 3 was sold for Rs. 283 on the 17th July 1924, and the whole of the purchase-money deposited on that very day. On the same day lot No. 4 was sold for Rs. 125 out of which Rs. 40 only was deposited and lot No. 5 was sold for Rs.7,800 out of which only Rs. 2,000 was paid on the date of sale. On the 29th July 1924, Rs. 5,800 the balance of the price of lot No. 5 was deposited and on the 1st of August 1924, Rs. 85, the balance of the price of lot No. 4 was deposited. Now the petitioner in the Rule, obtained his decree in the Court of the Subordinate Judge on the 30th July and made his application for rateable distribution on the 31st July 1924. The applicant, in an analogous petition, obtained his decree and made his application on the same days as the petitioner in the Rule. Besides these two petitioners it appears that a decree was obtained by opposite party No. 2 and was executed in Execution case No. 754 of 1924, in the Munsif's First Court at Nadia that opposite party No. 3 also obtained a decree in the same Court and executed it (Execution case No. 1284) and that opposite party No. 4 obtained a decree in the Munsif's Court at Ranaghat which was executed in execution case No. 1016 of 1924. It appears that the records for execution of all these three decrees passed by the Munsifs were transferred to the Court of the Subordinate Judge, by an order of the Court on the 17th July 1924, after the decree-holders in Execution Cases Nos. 754 and 1016 had applied for rateable distribution on the 7th and 4th of July 1924 respectively. Execution Case No. 1248 was transferred along with other two executions on the same day; but, it appears, no specific application for rateable distribution was made before

such transfer. I ought to have stated that all the three decree-holders holding decrees of the Munsif's Court had attached the same properties of opposite party No. 9 in execution of their respective decrees, long before their executions were transferred to the Subordinate Judge's Court. The Subordinate Judge before whom all these applications were made for participation in the assets which were realized in the manner stated before, held that the petitioners were entitled to obtain rateable distribution only of the sum of Rs. 85 which was deposited after they had obtained their decrees and made their application for rateable distribution. As to the holders of the three decrees of the Munsif's Court by opposite parties Nos. 2, 3 and 4 the learned Subordinate Judge held that they were entitled to rateable distribution out of the entire sum realized after their decrees had been transferred to the Court. Against this order the Rule now before us was obtained and the analogous petition filed and the learned Vakil for the petitioners contended that their clients were entitled to rateable distribution of the whole of the sale proceeds on the ground that the sale proceeds were not realized until the last deposit was made. Their next contention was that at any rate their clients were entitled to rateable distribution out of Rs. 125, the price realized for property No. 4 on the ground that until the sum of Rs. 85 was deposited, the mere deposit of the earnest money could not be held to be assets of lot No. 4. Lastly, it was contended that opposite parties Nos. 2, 3 and 4 were not entitled to rateable distribution as there were no applications for execution made before the learned Subordinate Judge; and as regards one of the decree-holders, namely, the opposite party in No. 1248, there was no application for rateable distribution. As to the first point it appears to us that there is no ground for this extreme contention: the properties were sold separately their sale proceeds were realized separately and the sale of each lot was at any rate completed when the whole of the balance of the purchase-money was deposited in Court. As to the second contention, it appears to us that it is sound. The point is covered by express authorities. The earliest of these is the case of *Ramjash Agarwala* v. *Guru Charan Sen* (1) and the case of *Maharaja of Burdwan* v. *Apurba Krishna Roy* (2) also support this view. The mere deposit of the earnest money cannot be said to be the assets realized by the sale until the balance of the purchase-money was deposited and the sale becomes a concluded transaction. In this view we think that the petitioner and the applicant in the analogous case are entitled to the rateable distribution out of Rs. 125 realized for lot No. 4. The third point, namely whether the holders of decrees of any inferior Court the executions of whose decrees had been stayed by the superior Court under the provisions of s. 63, are entitled to rateable distribution of the assets realized by the superior Court under the provisions of s. 63 read with s. 73, C. P. C. As a matter of bare justice to the decree-holders of the inferior Courts whose execution cases were stayed under the provisions of s. 63, because the superior Court is the only Court which could realize assets they are entitled to participate in the assets as they were precluded on that ground from pursuing their own execution cases and bringing the properties which they had attached to sale. But the language of s. 63, which is substantially the same as of s. 285 of the old Code and the provisions of s. 73 which are substantially the same as the provisions of s. 295 of the old Code have been construed differently and in consequence there is a divergence of judicial decisions on the point. The view which has favoured the claim of the holders of the decrees of the inferior Courts, has in effect held that although the right to distribution arises out of provisions of s. 63, the distribution in effect is made under the provisions of s. 73 or at any rate on the principles laid down in it. The divergence of views relates to three points: Firstly, whether s. 63 does at all give any right to the holders of decrees of the inferior Courts to claim satisfaction of their decrees out of the proceeds realized by the superior Court and whether the determination of such claim is contemplated by s. 63, secondly, whether the holders of such decrees must, apply for execution of their decrees before the superior Court and also apply for rateable distribution to that Court before the assets are realized as provided by s. 73. The second point may be very shortly dealt with. If the holders of such decrees

(1) 3 Ind. Cas. 105; 14 C. W. N. 396; 11 C. L. J. 69.

(2) 10 Ind. Cas. 527; 15 C. W. N. 872; 14 C. L. J. 50.

have no right of claim under s. 63 and their only remedy is to apply under s. 73 then it is quite clear that they must comply with the provisions of s. 73 before they can claim benefits under that section. As to the first question, the real point is this :—Do the provisions of s. 63, which prevent the inferior Court from executing their decrees and direct that the sale should be held by the superior Court, leave the holders of such decrees to remedy of s. 73 which is open to any decree-holder of any Court or does s. 63 which provides for the methods for realization of the assets by the superior Court give power to that Court to distribute the assets realized by the sale of the attached properties? It would seem unreasonable to suppose that s. 63 which imposes a bar against the holders of the decrees of the inferior Courts does not contemplate a method by which such decree-holders can ask the superior Court to give them their share of the assets realized by the sale of the properties which they had attached. This question arose in the case of *Clark* v. *Alexander* (3) It is a judgment of Mr. Justice Sale sitting on the Original Side and the learned Judge had long experience of the practice on the Original Side of this Court, therefore, his view on a matter of practice is of considerable weight, the present question being really and ultimately a question of practice. The learned Judge at page 203* laid down the Rule in these terms:—" To give s. 295 the signification contended for by the plaintiff would, in my opinion, have the effect of altogether nullifying s. 285. The duty of the superior Court under s. 285 is to consider and determine the rights of the attaching creditors in all the cases to which that section applies whether, they have applied to the superior Court or not. There is nothing in that section which requries that before an attaching creditor can have his claim determined he must obtain a transfer of the decree to the superior Court and apply to that Court for execution. If that were required it would operate with great hardship in the case of creditors for small amounts who had attached through the Small Cause Court, especially where the attached property was of small value. The extra expense that would be incurred by reason of the transfer to the superior Court and the re-attachment through that Court would in some cases deprive the Small Cause Court creditors of all benefit arising under their attachments and the result in those cases would be, at the least, the practical postponement of the rights of such creditors to those of creditors for larger amounts who had attached through the superior Court. It certainly would be a remarkable result if, where property is attached under s. 285, the superior Court, while required by that section to consider the rights of all attaching creditors, irrespective of the Courts by which the attachments were made, should at the same time be restricted so as to have no alternative but to apply the rule of exclusion contained in s. 295 to all creditors except those who have applied to the superior Court prior to realization, and so came strictly within the terms of that section. Such a result cannot have been intended, and may be avoided if ss. 285 and 295 be read together and due effect be given to each." The learned Judge then considered all the authorities then available and referred to three cases of this Court. Apart from the previous authority it appears to us that the reasons upon which the Rule is based are convincing unless there is anything in s. 63 which clearly debars the superior Court from doing what is manifest justice to the holder of decrees of inferior Courts. There is no reason why this Rule based upon long practice should not be followed. Turning to s. 63 of the Code the words " Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of the highest grade." It would be putting a very narrow construction upon the word " shall determine any claim thereto," that is, to the property, to hold that they exclude the determination of the claim of the holders of the decrees of the inferior Court while providing that all the assets should go into the hands of this superior Court. It may be conceded that all the claims coming under O. XXI, r. 60 whether made before the superior Court or the inferior Court should be determined by the former. The determination of the rights of the decree-holders *inter se* is not in any way excluded, and for the reasons given by the learned Judge, whose words I have quoted above I think that this practice is based upon considerations of

(3) 21 C. 200; 10 Ind. Dec. (N. S.) 766.

*Page of 21 C.—[*Ed.*]

justice and simplicity. This question is really more a matter of procedure and practice than of substantive right. The right of all the decree-holders to a rateable distribution is undoubted, the only question is as to the procedure to be adopted. In these matters uniformity is of great practical importance and when a practice has been established it should not be departed from even if there may be some doubt as to its strict soundness. Sir Lawrence Jenkins in the case of *Mandal & Co.* v. *Fazul Ellahi* (4) says: "Uniformity on questions of procedure under the Code is of such importance that I think I ought to follow the decision." This view of Mr. Justice Sale was adopted in the case of *Bejoy Singh Dudhuria* v. *Hukam Chand* (5) by Mr. Justice Ghose sitting with Mr. Justice Brett, both of whom had considerable experience in these matters. In that case the learned Subordinate Judge sent for the execution case from the Court of the Munsif and without further application made a rateable distribution amongst all the decree-holders including the decree-holder of his own Court. This was done under ss. 285 and 295 read together. A similar view was taken in the case of *Harbhagat Das Marwari* v. *Anandaram Marwari* (6) by Mr. Justice O'Kinealy sitting with Mr. Justice Rampini; both of whom had along experience of the practice of the District Courts and those learned Judges, even without referring to the earlier cases, took the same view. The only case in which a contrary view was taken is the case of *Ramjash Agarwala* v. *Guru Charan Sen* (1). In that case Mr. Justice Mookerjee and Mr. Justice Vincent held that the holders of decrees of inferior Courts were not entitled to participate in the sale proceeds unless they strictly comply with the provisions of s. 295 and the learned Judges further held that s. 285 had no application to the question of determination of the rights of the decree-holders but the word "claim" in s. 285 was limited to the claim under s. 278 of the old Code The learned Judges there decided the case in the light of the authority of the case reported as *Bejoy Singh Dudhuria* v. *Hukam Chand* (5), but did not follow the rule laid down by Mr. Justice Ghose that the Subordinate Judge was right in making the distribution even in the absence of any application either for execution or for rateable distribution filed before the superior Court. Again the learned Judges were not prepared to differ from the rule laid down by Mr. Justice Sale, but observed: "That the whole question shall have to be re-considered in a case in which the question arises in future". The learned Judges observed as follows: "But we need not express any opinion upon the question whether the decision in *Clark* v. *Alexander* (3) may or may not be justified on the grounds suggested, nor need we discuss whether that decision may not require re-consideration when another case precisely similar to it, in fact, arises." The view of Mr. Justice Sale was, it appears, also followed in effect in the case of *Krishna Kumar Ghose* v. *Pasupati Banerjee* (7) by Mr. Justice N. R. Chatterjea sitting with Mr. Justice Newbould. Although in that case their Lordships did not wish to differ from the case of *Ramjash Agarwala* v. *Guru Charan Sen* (1), they held that the decree-holder of the inferior Court in which the attachment was prior to the attachment made by the superior Court was entitled to rateable distribution although application either for execution or for rateable distribution appears to have been made before the superior Court, but not in respect of the decree in which the attachment was subsequent. It is not necessary to discuss that distinction for the purpose of the present case. It is enough to point out that rateable distribution was allowed to holders of decrees of the inferior Courts without any application specially made under s. 295. The decision of Mr. Justice Sale is still good law and although attempts have been made for distinguishing it, it has never been dissented from, much less overruled. On the whole, therefore, on a review of the decisions cited above we do not see any difficulty in following the Rule laid down by Mr. Justice Sale and followed in the subsequent cases that the holders of decrees of inferior Courts whose execution had been stopped by the superior Court under s 63, are entitled to rateable distribution under that section read with s. 73 without any further applications. The decree of the inferior Courts were transferred to the superior Court to which applications for rateable distribution

(4) 26 Ind Cas. 209; 41 C. 825.
(5) 29 C. 548.
(6) 2 C. W. N. 126.
(7) 63 Ind. Cas. 11; 25 C. W. N. 740.

were made in writing in the Cases Nos. 754 and 1016. The Rule laid down by Mr. Justice Sale was followed by Mr. Justice Ghose and Mr. Justice O'Kinealy, and it seems that no further application before the superior Court was thought necessary.

In the result, therefore, we vary the order of the learned Subordinate Judge with respect to the sum of Rs. 85 and the petitioner is entitled to share in the rateable distribution not only of Rs. 40 but also of Rs. 125, the entire proceeds of the property No. 4. Under the circumstances we make no order as to costs. This judgment governs the application also.

Greaves, J.—I agree.

Z. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 860 OF 1923.

January 2, 1925.

Present:—Mr. Justice Mukerji.

SAT NARAIN SAHU—DEFENDANT—APPELLANT

versus

BINDESRI PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Reversioner recognising life-tenant as absolute owner—Alienation by life-tenant—Estoppel.

Where a Hindu reversioner enters into an agreement with a female life-tenant whereby he recognizes the latter as the absolute owner of the property and entitled to deal with it as she pleases, he is estopped from subsequently questioning her power to alienate the property or the title of a transferee from her.

Kanhai Lal v. *Brij Lal*, 47 Ind. Cas. 207; 40 A. 487; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 I. A. 118 (P. C.), *Bahadur Singh* v. *Ram Bahadur*, 71 Ind. Cas. 405; 21 A. L. J. 140; (1923) A. I. R. (A.) 204; 45 A. 277, *Fateh Singh* v. *Thakur Rukmini Rawanji*, 72 Ind. Cas. 8; 21 A. L. J. 235; 45 A. 239; (1923) A. I. R. (A.) 387, followed.

Second appeal against a decree of the District Judge, Benares, dated the 19th March 1923.

Mr. *S. N. Gupta*, for the Appellant.

Dr. *S. N. Sen* and Mr. *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.—The sole question to be determined in this appeal is one of law and arises under the following circumstances. The property now in suit is a piece of land on which originally stood a house. The house and other properties belonged to one Gayadin. He was succeeded by his wife *Musammat* Parbati. *Musammat* Parbati died and her daughter *Musammat* Rajwanti succeeded to a life-estate. The appellant in this appeal is a male agnate of Gayadin and is the actual reversioner to his estate on the death of *Musammat* Rajwanti which happened before the institution of the suit, out of which this appeal has arisen. On the 20th of September 1915, *Musammat* Rajwanti and the appellant entered into an agreement by which *Musammat* Rajwanti was declared to be the absolute owner of the house and it was definitely stated that she could do anything she liked with the property. *Musammat* Rajwanti, before her death, on the 16th of January 1922 disposed of the house by way of sale in favour of the present respondent. The present respondent instituted the suit to obtain a declaration that he was the owner of the site by virtue of his purchase.

The appellant contended, *inter alia*, that *Musammat* Rajwanti had only a life-interest and she could not make a valid alienation. To this the respondent replied that the appellant having himself been a party to the agreement of the 20th of September 1915, he could not reprobate the contract and is estopped from denying the plaintiff's title.

The respondent's contention on this point has found favour with the Courts below and the only question to be determined is whether the appellant is not estopped from contending that *Musammat* Rajwanti was the absolute owner of the property and could sell it.

There is a vast amount of literature on the question of estoppel in cases arising under circumstances, more or less similar to the present ones. No useful purpose would be served by examining all the cases on the point. Each case was decided on the peculiar facts under which it arose. The principle, however, was definitely laid down in the Privy Council case of *Kanhai Lal* v. *Brij Lal* (1). The principle therein laid down was that where a man, who became ultimately a reversioner, had entered into a compromise in the life-time of a

(1) 47 Ind Cas. 207; 40 A. 487; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459, 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 I. A. 118 (P. C.).

holder of life-interest, he was precluded from disputing the validity of the compromise. This case was followed in this Court in the case of *Bahadur Singh* v. *Ram Bahadur* (2). A similar view was taken in Full Bench case of *Fateh Singh* v. *Thakur Rukmini Rawan* (3). In my opinion the principle applies with full force to the case before me and I am clear that the Courts below were right in holding that the appellant was estopped from denying the plaintiff's title.

The appeal fails and it is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

(2) 71 Ind. Cas. 405; 21 A. L. J. 140; (1923) A. I. R. (A.) 204; 45 A. 277.

(3) 72 Ind. Cas. 8; 21 A. L. J. 235; 45 A. 339; (1923) A. I. R. (A.) 387.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1155 OF 1922.

November 13, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

RADHIKAPRASAD DATTA—DEFENDANT No. 4—APPELLANT

versus

PANCHANAN CHOUDHURY AND ANOTHER—PLAINTIFFS AND OTHERS—DEFENDANTS Nos. 1-3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VIII, r. 6—Contribution, suit for—Defendant, also entitled to contribution—Set-off, whether can be allowed.

Plaintiff and defendant were joint owners of a *zemindari*. The *zemindari* was let out in *patni* and was brought to sale by the *zemindars* for arrears of *patni* rent and was purchased by a third party. The sale was subsequently set aside at the suit of the *patnidars* and the *zemindars* were held liable for the costs of the *patnidars* and the *patnidars* recovered these costs from the plaintiff The defendant was compelled to pay the costs of the auction-purchaser in the *patnidar's* suit. Plaintiff brought a suit against the defendant for contribution in respect of the costs which had been paid by the plaintiff:

Held, that the defendant was entitled to set-off against the plaintiff's claim the amount which he had paid to the auction-purchaser to the extent to which it represented the liability of the plaintiff in respect of the auction-purchaser's costs.

Appeal against a decree of the Additional District Judge, Murshidabad, dated the 14th February 1922, affirming that of the Munsif, First Court, Berhampore, dated the 27th January 1921.

Babus *Tarak Chandra Chakravarti* and *Prafulla Chandra Chakravarty*, for the Appellant.

Babu *Kanaidhone Dutta*, for the Respondents.

JUDGMENT.—This is an appeal by defendant No. 4 against a decision of the District Judge of Murshidabad confirming a decision of the Munsif. The facts shortly stated are as follows. The plaintiffs and the defendants were joint owners of a *zemindari*. The *zemindari* was let out in *patni* and was brought to sale by the *zemindars* for arrears of *putni* rent and it was purchased by a third party. The *patnidars* sued to set aside the *patni* sale and the sale was set aside and the *zemindars* were held liable for the costs of the *patnidars* and the *patnidars* recovered these costs from some of the *zemindars* who are the plaintiffs in the present suit and the present suit was brought against defendant No. 4 and the other defendants for contribution in respect of the costs which had been paid by the plaintiffs. Defendant No. 4 had been compelled to pay the costs of the auction-purchaser in the *putnidar's* suit and accordingly he contended in these proceedings that he was entitled to set-off as against the claim for contribution the sum which he had paid for the costs of the auction-purchaser. The Munsif disallowed the claim for a set-off for reasons which are not very clear but which apparently are related to some question which arose and as to which there is not a definite finding with regard to the withdrawal of the balance of the amount deposited by the auction-purchaser at the time when he purchased the *patni*. The lower Appellate Court has agreed with the Munsif's decision and has refused to allow the set-off which defendant No. 4 claims. Hence this appeal.

Now, in our opinion, defendant No. 4 is clearly entitled to set-off as against the plaintiffs' claim the amount which he has paid to the auction-purchaser which represents the liability of the plaintiffs in respect of the auction-purchaser's costs and we do not see how this claim of defendant No. 4 can be resisted. No doubt defendant No. 4 put his claim too high. He is only entitled to a set-off in respect of the actual liability of the present plaintiffs for the costs of the auction-purchaser.

The appeal is allowed, the decree of the lower Appellate Court is set aside and the case is sent back to the Munsif in order that he may ascertain the amount to be set-off that is the amount which defendant No. 4 is entitled to set off against the claim in suit upon the lines indicated in this judgment.

The appellant will be entitled to his costs of this appeal in proportion to his success.

Z. K. *Appeal allowed*; *Case sent back.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 892 OF 1923.

January 16, 1925.

Present:—Mr. Justice Sulaiman.

GANGA—DEFENDANT—APPELLANT

versus

Musammat MAHMUD-UN-NISSA BEGAM —PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Agra Tenancy Act (II of 1901), s. 51—Res judicata—*Decision on question of law—Ejectment suit.*

A decision on a point of law does not operate as *res juzicata* if the cause of action in the subsequent suit is different from that in the former suit, as often happens in cases of recurring liability or even in ejectment suits. On the other hand if the cause of action is the same the decision would operate as *res judicata*.

Param Hansman Tewari v. *Dasrathman Tewari*, 60 Ind. Cas. 770; 19 A. L. J. 992; 43 A. 445, relied on.

The right to eject a tenant accrues afresh every year and a previous decision in an ejectment suit between the parties that the suit is not maintainable in a Revenue Court does not operate as *res judicata* in a subsequent suit, it being open to the Revenue Court in a subsequent suit to say that on a correct view of the law it has jurisdiction to entertain the suit.

Second appeal against a decree of the District Judge, Bulandshahr, dated the 23rd March 1923.

Mr. *Gulzari Lal*, for the Appellant.

JUDGMENT.—This is a defendant's appeal arising out of a suit for ejectment. Previous to this litigation in 1910 a suit for ejectment in respect of this very plot was fought out between the parties. It was dismissed on the ground that such a suit was not maintainable in a Revenue Court. That decision was based on certain rulings of the Board of Revenue which were then in force. Subsequent to this it appears that the Allahabad High Court in the case of *Param Hansman Tewari* v. *Dasrathman Tewari* (1) has taken a view that a suit under s. 58 would be maintainable in a Revenue Court. This ruling has since been followed by the Board of Revenue. The result is that under the rulings which are now in force the suit is maintainable. The learned Advocate for the appellant concedes this.

The Court of first instance, however, dismissed the suit holding that it was barred by the principle of *res judicata*. It remarked that although the present conception of the law may be different nevertheless as between the parties the ruling that the suit was not maintainable was final.

The learned District Judge has taken a contrary view. He has held that the principle of *res judicata* cannot apply to this case. It is obvious that if the plaintiff were to go to the Civil Court her suit would be thrown out by the Civil Court on the ground that she ought to go to the Revenue Court. The Civil Court will, of course, not be bound by the previous Revenue Court decision and would naturally follow the view of this High Court.

The decision in the previous case turned entirely on an incorrect view of the law. It is true that an issue of law may be *res judicata* in certain circumstances. The rulings on the point are numerous and some of them are not easily reconcilable, but it may be laid down broadly that a decision on a point of law does not operate as *res judicata* if the cause of action in a subsequent suit is different from that in the former suit as often happens in the cases of recurring liability, such as maintenance allowance or even ejectment suits. On the other hand if the cause of action is the same the decision would be *res judicata*. This was clearly laid down in the case of *Alemunnissa Chowdhurani* v. *Shama Charan Roy* (2). In the present case the right to eject a tenant accrues afresh every year. Following the Calcutta ruling I, therefore, hold that the previous decision that a suit of this kind was not maintainable in a Revenue Court cannot operate as *res judicata*. It is open to the Revenue Court to say that in the correct view of the law which now prevails it has jurisdiction to entertain it.

(1) 60 Ind. Cas. 770; 19 A. L. J. 992; 43 A. 445.
(2) 32 C. 749; 9 C. W. N. 466; 1 C. L. J. 176.

In these circumstances the suit was rightly decreed. The appeal is accordingly dismissed but without any order as to costs as no one appears for the respondent.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1492 OF 1922.

January 16, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

AMAR KRISHNA DE—PLAINTIFF—APPELLANT

versus

RAJENDRA KUMAR DE—DEFENDANT—RESPONDENT.

Hindu Law—Widow—Alienation by widow and next reversioner, effect of—Reversioner, whether can challenge alienation—Estoppel—Transfer of Property Act (IV of 1882), s. 43.

Where a Hindu widow and the next reversioner join in conveying a property by which they transfer the absolute interest in the property, the reversioner is estopped, after he comes into possession, from challenging the transaction. [p. 791, col. 1.]

There is no distinction between the reversioner giving consent to a transfer by a widow and the reversioner joining the widow in the transfer. There is not much difference, for practical purposes, between a consent given by word of mouth or conduct or by attestation of a document and by joining in the conveyance with the widow which is sufficient evidence of consent. [p. 791, col. 2.]

Appeal against a decree of the District Judge, Noakhali, dated the 31st May 1922, modifying that of the Munsif, Additional Court, Sudharam, dated the 26th July 1920.

Dr. *Sarat Chandra Basak* and Babu *Gopal Chandra Das*, for the Appellant.

Babu *Bhagirath Chandra Das*, for the Respondent.

JUDGMENT.

Suhrawardy, J.—The suit which gave rise to this appeal was brought by the plaintiff for recovery of *khas* possession of the land of the site of a hut described in the schedule to the plaint after establishment of the plaintiff's *raiyati* title to it. The plaintiff's case is that the property in suit is included within a holding which belonged to Tarini Charan the father of the respondent. He died leaving a widow Raj Kumari and a son the present respondent. The mother and the son jointly executed a deed of sale in favour of the plaintiff on the 21st *Baisakh* 1324, and it was agreed thereunder that the hut would be removed by the defendants within 15 days. They having failed to do so the plaintiff instituted the present suit against both Raj Kumari and Rajendra the respondent. After the institution of the suit Raj Kumari died and Raj Kumar was the sole defendant on the record as the heir and successor of his father. The First Court gave a decree to the plaintiff holding that the respondent is estopped by the transaction as shown by the *kobala* of the 21st *Baisakh* 1324, from denying the plaintiff's title. On appeal the learned District Judge has taken a different view and has held that under s. 6 of the Transfer of Property Act the reversionary interest of the respondent who was then a mere reversioner could not be transferred and so the plaintiff purchased nothing more than the eight-annas share which had accrued to the respondent on his father's death and that his claim in respect of the widow's limited interest in the remaining eight-annas share ought to fail. I should mention that Tarini left a widow Raj Kumari and two sons one of the sons died in the lifetime of the mother who inherited his share in the property left by Tarini and had a Hindu widow's estate in it.

The sole question, therefore, which arises and which has been ably argued on both sides before us is whether the respondent is estopped from challenging the sale to which he was a party. The learned Advocate for the appellant contends that the respondent is estopped from denying the validity of the sale and has relied upon a decision of the Allahabad High Court in the case of *Mahdeo Prosad Singh* v. *Mata Prasad* (1). In that case in a very considered judgment the learned Judge on facts similar to the present case held that the reversioner was affected by the doctrine of estoppel and was not entitled to challenge the validity of the deed to which he was a party. There the widow and the reversioner jointly executed a deed of gift in favour of the defendant. It was held that the plaintiff was estopped from challenging the transaction. Apparently a contrary view has been taken in the case of *Bai Parvati* v. *Dayabhai Manchharam* (2). In that case the widow and one of the reversioners jointly

(1) 63 Ind. Cas. 721; 44 A. 44; 19 A. L. J. 799; 3 U. P. L. R. (A.) 134; (1922) A. I. R. (A.) 297.

(2) 58 Ind. Cas. 266; 44 B. 488; 22 Bom. L. R. 704.

executed a deed of gift. It was held by the learned Judges that the deed was good only as regards the life-estate of the widow and was bad as regards the reversioner's chance of succession under s. 6, Transfer of Property Act. There being a conflict between these two cases it is necessary to examine them carefully. In the Allahabad case almost all the cases bearing on this point were considered and on a consideration of those cases the learned Judges came to the conclusion that the weight of authority was entirely in support of the view that where the widow and the next reversioner joined in conveying a property by which they transferred the absolute interest in it the reversioner cannot after he comes into possession challenge the transaction under the rule of estoppel. The learned Judges considered the case of Bai Parvati and attempted to distinguish it though I do not personally think that there is any real distinction in principle between these two cases. The learned Judges of the Allahabad High Court expressed themselves with reference to the Bombay case that "if it was intended to lay down the general proposition that in no case a reversioner can by his act or conduct estop himself from challenging a transfer after he had succeeded to the estate, then we would not agree with the decision." As at present advised, I am inclined to follow the Allahabad decision in preference to the Bombay case. In the Bombay case the learned Judges proceeded simply upon s. 6, Transfer of Property Act, on the rule of non-transferability of *spes successionis*. They have not considered the question of estoppel. It was case of gift and the question of change of position of the donee by the act or conduct of the donor would not have arisen. The present case is not a case of this description. It is a case of sale for consideration. I am not, therefore, called upon in this case to express any opinion as to whether in a case of gift the law of estoppel applies as in the case of transfer for consideration. In the Allahabad case, too, though there was a gift the learned Judges in the course of judgment observe that there was a lease previous to the gift for which a sum of Rs. 2,000 was paid as *salami* and, therefore, it could not be said that the gift was wholly without consideration.

It has been argued before us by the respondent that there is a distinction between a reversioner giving consent to a transfer by a widow and a reversioner joining a widow in the transfer. It is said that in one case the widow transfers the absolute interest and the reversioner sanctions it by giving his assent. In the other case the transfer is nothing more than of her life-interest and the reversioner joins in the conveyance in transferring the reversionary interest which under the law he is not competent to do. To my mind there does not seem to be much distinction; at any rate that distinction cannot be applied to the facts of this case. In either case it cannot be said that the widow has any absolute interest and the purchaser cannot purchase the absolute interest from the widow but with the consent of the reversioner. There is not much difference for practical purposes between a consent given by word of mouth or conduct or by attestation of the document and by joining in the conveyance with the widow which is sufficient evidence of his consent.

This brings us to the next contention of the learned Vakil for the respondent *viz.*, that the consent of the reversioner to a transaction by the widow clothes it with validity only in a case where the transfer is made ostensibly for legal necessity; in other words, if the widow transfers the property in which she has a life-estate for legal necessity and the reversioner assents to the transfer his conduct presumes that there was legal necessity; and in support of this contention numerous cases have been cited; but it is not necessary to deal with this point as it has been settled beyond controversy: *Rangasami Gounden* v. *Nachiapa Gounden* (3). The cases which have laid down that view including the Full Bench case of *Debi Prasad Chowdhry* v. *Golap Bhagat* (4) have proceeded on a rule of evidence holding that the conduct of the reversioner in assenting to the transfer affords sufficient evidence of the existence of legal necessity unless it is rebutted by more cogent proof. In these cases, therefore, the question of estoppel did not arise and was not considered. It may also be remarked in this connection that in the cases which have been placed before us the transaction to which the reversioner

(3) 50 Ind. Cas. 498; 46 I. A. 72; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536, 2.) C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 252; 26 M. L. T. 5; 10 L. W. 105; 1 U. P. L. R. (P. C.) 66 (P. C.).

(4) 19 Ind. Cas. 273; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499.

assented has been challenged by some one other than the assenting reversioner, who succeeded to the property on the death of the widow.

The third point raised by the learned Vakil for the respondent is that there can be no estoppel on a point of law and that by operation of the rule one cannot be held to be bound by a transaction which under the law he is not competent to enter into. Before dealing with this question it is necessary to consider the tenor of the *kobala* executed by the respondent and his mother in favour of the plaintiff. It recites how the right accrued to the vendors. They stated that on the death of Tarini Charan (father) and Gobinda Kumar (son), Raj Kumari for her life and Rajendra as his heir and reversionary heir became the *malik* in possession of the *maliki* share in the properties mentioned in the schedule. It is further stated, "Accordingly we do execute this out and out deed of sale in respect of our interest in the *raiyati jama*.....In lieu of the said sum of money (Rs. 2,000) we sell to you by means of this *kobala* the immoveable properties mentioned in the schedule below free from incumbrances owned and held by us..... what right, title and interest we had in the same do accrue to you from to-day..... we and our other heirs have or will have no right, title or interest or claim in connection with the same." Reading the document as a whole it is not disputed, and it appears to be, that what the parties intended to dispose of was the interest of Tarini in the *raiyati* which was then in the possession of the widow in life-estate to the extent of eight-annas and to which the son has had a reversionary title. The plaintiff purchased the entire interest in the property by payment of proper consideration for it and the executants sold the entire interest held at that time by these two persons. From this transaction it is clear that one party intended to purchase and the other to part with the absolute ownership of the property. In my opinion it does not lie in the mouth of Raj Kumar now to turn round and say 'though I intended to sell to you whatever interest I had in the property and received proper consideration for it, the sale so far as my interest was concerned was bad in law and I am entitled to re-gain possession of it'. That is a position which is not defensible in law or in equity and the rule of estoppel is clearly applicable to such a case. It should be noted that the deed recites that the property was sold to pay off certain debts of and decrees against the respondent.

The question with regard to the effect of the assent of the reversioner to a transfer by a widow not for legal necessity came up for consideration in this Court in the case of *Raj Bullubh Sen* v. *Oomesh Chander Rooz* (5). There a Hindu widow with the consent of the then reversioner transferred a property by a deed of gift. It was argued that the validity of an alienation by a widow depends upon legal necessity and the consent of the next heir is of value not as validating the alienation but as the strongest evidence of the necessity. The defendant in that case was the heir of the reversioner who had assented to the gift but died after the death of the widow. Jackson, J., observed as follows: "I would hold the defendant to be concluded not on the ground that he is bound by the act or consent of his father ..... but upon this ground, that the act of the widow sanctioned by the concurrence of the then next heir and reversioner, was in itself a valid ground."

In this connection reference may also be made to s. 43, Transfer of Property Act, the principle of which to my mind applies to this case. The respondent, no doubt, did not claim any right other than what he possessed at that time, but what he purported to sell was the interest he has or would have in the property and which he was competent to sell after the right to the property had accrued to him, after the death of the mother. He cannot now turn round and assert that when he sold the property he had not the right to do so. The principle of estoppel as embodied in s. 43 Transfer of Property Act, was applied by this Court in a case which went up in appeal to the Privy Council, and the judgment of the Judicial Committee is reported as *Gur Narayan* v. *Sheo Lal Singh* (6). Their Lordships reversed the decision of this Court not on the ground that s. 43, Transfer of Property Act, and s. 115 of the Evidence Act did not apply to the facts similar in principle to those of the present case but on the ground

(5) 5 C. 44; 4 Ind. Jur. 455; 3 C. L. R. 384; 2 Shome L. R. 184; 2 Ind. Dec. (N. S.) 640.

(6) 49 Ind. Cas. 1; 46 C. 566; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1; 12 Bur. L. T. 122; 46 I. A. 1 (P. C.).

that in that case s. 43 Transfer of Property Act, and s. 115 of the Evidence Act did not apply as they held on the evidence that it was not proved that the vendee was induced to alter his position in consequence of the representation contained in the deed of conveyance by the reversioner. I accordingly hold that the respondent is estopped from denying the plaintiff's title to the land in suit and in this view I will allow the appeal.

The result is that this appeal is allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored with costs in all the Courts.

Cuming, J.—I agree.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 121 OF 1924.

March 18, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

R. K. MODY & CO.—DEFENDANTS—APPELLANTS

versus

MAHOMEDBHAI ABDOOL HOOSSEIN & CO.—PLAINTIFFS—RESPONDENTS.

Bombay Rent (War Restrictions) Act (II of 1918), s. 10A—Proceedings for restoration and compensation—Expiration of Act, effect of—Proceedings, whether can be continued—Temporary Statute, expiration of, effect of, on pending proceedings.

Civil proceedings which only arise by virtue of a temporary Statute cannot be continued after the expiration of the Statute. [p. 794, cols. 1 & 2.]

Proceedings which it is permissible for a tenant to take under s. 10A of the Bombay Rent (War Restrictions) Act, are not primarily proceedings to recover either an ascertained sum or liquidated damages. They must be instituted in the first instance for the purposes of getting an order for restoration from the Court, and it is only when the Court is of opinion not only that the tenant in the circumstances of the case is entitled to restoration but also that the landlord has not acted *bona fide*, that the Court can direct the payment of compensation to be made to the tenant by the landlord. [p. 794, col. 2.]

Where, during the pendency of proceedings under s. 10A of the Bombay Rent (War Restrictions) Act, for restoration to possession and compensation the Act expired:

Held, that the proceedings could not be continued and were *ipso facto* determined. [*ibid.*]

Appeal against the decision of Mr. Justice Pratt.

Mr. *B. J. Desai*, for the Appellants.

Mr. *Kanga*, Advocate-General, (with him Mr. *Khan*), for the Respondents.

JUDGMENT.

Macleod, C. J.—Plaintiffs filed Suit No. 2244 of 1923 on June 14, 1923, to evict two defendants from the two shops in Nagdevi Street on the ground that they had given them notice to quit as the plaintiffs wanted the premises for their own use and requirements. On the faith of this requisition the defendants agreed to vacate under a consent-decree passed on August 24, 1923, by which they agreed to give possession by January 31, 1924.

On August 20, 1924, defendants took out a notice of motion asking the Court to pass an order not only for the restoration of the premises to the defendants on the ground that the plaintiffs' requisition had not been fulfilled, but also for damages on the ground that the requisition on which they were evicted was *mala fide*.

The learned Judge found that the requisition on which the plaint proceeded was a false requisition, and the occupation of the plaintiffs was a pretence. It was not, therefore, *bona fide* and in the ordinary circumstances the defendants would have been entitled on the notice of motion to an order for restoration, and also for an order for payment of such compensation as the Court might think fit. But unfortunately for the defendants the Bombay Rent (War Restrictions) Act (No. II of 1918) with reference to business premises expired on August 31, 1924, and no order on the motion had been made before that date.

The question would arise then, whether the defendants' right to apply to the Court for restoration, and for payment of compensation, would survive the expiration of the Act. That must depend, as the Act was a temporary one upon the construction of the Act itself, because s. 7 of the Bombay General Clauses Act will not apply to temporary Statutes. The proviso to the first section of the Rent Act is as follows:—

"Provided that the expiration of this Act shall not render recoverable any rent which during the continuance thereof was irrecoverable or affect the right of a tenant to recover any sum which during the continuance thereof was under this Act recoverable by him."

That proviso originally was clearly intended to apply to the provisions of ss. 3 and 12. The learned Judge remarks:—

"The proviso, therefore, refers to two

cases: (1) proceedings taken by a landlord and (2) proceedings taken by a tenant. The reference to proceedings taken by a landlord is evidently to s. 3 of the Act, and the restriction on the recovery of rent in excess of the standard rent is continued after the expiration of the Act in respect of rent accruing during the continuance of the Act. Then with reference to the proceedings taken by a tenant, the reference is evidently to s. 12 of the Act, which enacts that where a tenant has paid any sum on account of rent in excess of what is recoverable in case of standard rent he has a right to recover that sum from his landlord."

It has been argued that that proviso would also include the right of a tenant to ask the Court for payment of compensation under the provisions of s. 10A. Now s. 10A was inserted by Bombay Act XIV of 1920, s. 2, and it was argued by the respondents in support of the judgment, that if it had been intended to reserve the rights of the tenant to ask the Court for payment of compensation under s. 10A after the expiration of the Act, the proviso to s. 1 would have been amended. It seems most probable that the question whether the rights of a tenant under s. 10A survived the expiration of the Act was not considered by the Legislature.

But even if that question was not considered, the defendants might still succeed if they could bring themselves within the proviso to s. 1. Before I deal with that question, I will deal with the question whether when proceedings have commenced before the expiration of the Act, they can be competent after the expiration of the Act in spite of their not coming within any proviso reserving the rights of a tenant to continue proceedings then pending. Reference has been made to a passage in Halsbury's Laws of England, Vol. XXVII, page 158, para. 301, where it is stated that if proceedings taken under a temporary Statute are not terminated before the period of the Statute expires, then on the expiration of the Statute the proceedings *ipso facto* are determined. Various authorities are quoted for that proposition, the earliest being *Miller's case* (1) and no case has been cited to us in which civil proceedings of this nature, which only arise by virtue of a temporary Statute, have been held competent to be continued after the expiration of the Statute.

The fact, therefore, that these proceedings were commenced on August 20, 1924, before the expiration of the Statute, will not by itself avail the defendants. They must come, if at all, within the proviso. It has been contended that as this is a suit for an unliquidated sum to be ascertained as compensation for the plaintiff's want of *bona fides*, it cannot, in any event, come within the proviso, which only applies to any sum recoverable by the tenants under the Act during the continuance thereof. I doubt very much whether it can be said that an action by a tenant to recover rent, which should not have been paid under the provisions of s. 12, would be a suit for an ascertained sum, because although he might mention the amount of the claim in suit, the actual amount due could only be ascertained by means of an enquiry. However, I quite agree that such an action would be of a different character from an action for unliquidated damages and I think the answer to the appellants' case lies in the fact that proceedings which it is permissible for a tenant to take under s. 10A are not primarily proceedings to recover either an ascertained sum or liquidated damages. They must be instituted in the first instance for the purposes of getting an order for restoration from the Court, and, it is only when the Court is of opinion not only that the defendant in the circumstances of the case is entitled to restoration, but also that the plaintiff has not acted *bona fide*, that the Court can direct payment of compensation to be made to the tenant by the londlord. If the appellants' contention were correct, then even after the expiration of the Act, the defendants on proving want of *bona fides* on behalf of the landlord in turning them out, would be entitled to ask the Court to grant them compensation, although there would be no jurisdiction in the Court to restore the defendants to the premises. But it is perfectly clear that no right is given to the tenant to apply to the Court for compensation only, irrespective of whether he can get restoration or not.

We think, therefore, this particular question was not in the mind of the Legislature when s. 10A was inserted in the original Act, and that the rights of a tenant to recover compensation under the section after the expiration of the Act

(1) (1764) 1 Black. W. 451; 96 E. R. 259.

were not reserved. The appeal, therefore, will be dismissed with costs.

Coyajee, J.—I agree.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 54 OF 1924.

June 12, 1924.

Present:—Mr Cecil Henry Walsh, Acting Chief Justice, and Mr. Justice Ryves.

TAWASSUL HUSAIN—APPLICANT —APPELLANT

versus

WAJID ALI AND ANOTHER—OPPOSITE PARTIES—RESPONDENTS.

Lunacy Act (IV of 1912), s. 62—"Residing", meaning of—Actual stay, whether necessary.

If a person has a private house to which he may resort in a certain town he has a residence there, and therefore "resides" there within the meaning of s. 62 of the Lunacy Act even if he goes there only occasionally. For the purposes of this section a person may have several residences and may be residing in more places than one.

First appeal from an order of the Additional District Judge, Cawnpore.

Mr. *M. N. Raina*, for the Applicant-Appellant.

Mr. *Majid Ali*, for the Opposite Parties-Respondents

JUDGMENT.—We think that there has possibly been a miscarriage of justice in this case and that we must remit the matter for a hearing in the lower Court. It is entirely the fault of the applicant, or rather his misfortune, because at the critical moment he was absent through illness. The Judge did not believe that he was ill, because he said, that there was only the statement of the Pleader to support it. The Judge does not say why he thinks, a man should keep away from an important appointment of this kind which he himself had started, unless there was some insuperable obstacle which prevented his attendance. As the matter was only a miscellaneous case and could be disposed of on any convenient day the learned Judge ought to have adjourned it to another day or dismissed it altogether for default. Instead of that he did just the worst thing he could have done. He started a kind of enquiry on imperfect material. We must, therefore return it to the learned Judge to find as a fact whether Billhaur in Cawnpore, was on the 25th September 1923 a residence of the lady in question. People do not always realise the true meaning of the word "residing" for the purpose of jurisdiction. In this case s. 62 requires the Court to be the District Court within whose jurisdiction such person is residing. That does not necessarily mean that she slept the night on the particular day when the application was filed in the jurisdiction. A person may have several residences and may be residing in more than one place for the purpose of jurisdiction. If a person has a private house to which he may resort in Calcutta, he has a residence there, and, therefore, resides there even if he only goes there once in five years. He may have a residence in Kashmir which he prefers to Calcutta. The word used by the Legislature to get over that difficulty when it desires to specify one place only as the place of service, or for establishing jurisdiction, is the word "ordinarily," that is to say, the place where a person ordinarily resides. Then that confines the Court to the duty of ascertaining the ordinary residence. Here it is sufficient if she had any residence even although she was not staying at the time. Now the evidence on the record throws a heavy burden on the party objecting, not to show that she had a residence elsewhere, but to show that she had no sort of residence in Cawnpore. A sale-deed alleged to be executed by her only one month before the application, namely, the sale-deed, dated 18th August 1923, describes her as a resident of Billhaur in Cawnpore, at present in Kanauj. Unless the Judge comes to the conclusion that, by a curious but true coincidence, there has been a complete abandonment of this residence between the 18th of Augnst, and 25th of September, the lady is really estopped from denying that this place is not a residence of hers within the jurisdiction. It is a question of fact, on which the evidence appears to us to be all one way, even though she may also have a residence in Kanauj. We, therefore, remit the case to the learned Judge to hear and determine on these facts as to whether this residence in the sale-deed is a residence of her in Cawnpore and, if it is, to dispose of the application. The Judge will listen to any further evidence that may be tendered by either party on this question.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 1350 OF 1924.
January 2, 1924.
Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.
MESSRS. HURSUK DAS-THAKUR DAS—
—APPLICANTS—PETITIONERS
versus
GOURI CHARAN LAW AND ANOTHER
—OPPOSITE PARTIES.

Calcutta Rent Act (III of 1920), s. 15—Application for fixing standard rent—Premises originally let as part of larger premises—Rent Collector, power of, to make enquiry determining proportionate rent of premises in dispute.

Where an application is made for fixing the standard rent in respect of premises which were originally let as part of larger premises, the Rent Collector has power to make an enquiry as to what portion of the rent originally payable in respect of the entire premises can be allocated to the premises in respect of which the application is made, so as to determine the question whether he has jurisdiction to entertain the application at all.

Rule against an order of the Court of the Controller of Rents, Calcutta, in Standard Rent Case No. 237 of 1924.

Babus *Mohendra Nath Roy, Sitaram Banerjee* and *Sudhansu Kumar Sen*, for the Petitioners.

Babu *Susil Chandra Ghose*, for the Opposite Parties.

JUDGMENT.—This Rule was granted calling upon the Rent Controller to show cause why a certain order of the 22nd September 1924 dismissing the petitioners' application for standardisation of rent in respect of premises No. 26 Khangrapatty Road should not be set aside and the Rent Controller directed to deal with the application on its merits. The petitioners took a lease for 10 years of premises Nos. 23, 23-1, 24, 25 and 26 Khangrapatty Street at a rental of Rs. 325 a month. The petitioners let out four of these premises in November 1918 at a rental of Rs. 266 and used premises No. 26 for residental purposes. On the expiry of the lease on the 1st of February 1924 the landlord who is the opposite party before us took possession of premises Nos. 23, 23-1, 24 and 25 Khangrapatty Street and demanded rent at Rs. 250 a month for premises No. 26. The petitioners thereupon applied before the Rent Controller for fixing of standard rent for premises No. 26. The Rent Controller dismissed the application on the 22nd September last holding that he had no jurisdiction to deal with the matter as the whole of the premises were let out on the 1st of November 1918 at a rent exceeding Rs. 250 a month and that by virtue of the last amending Rent Act premises, the rent of which exceeded Rs. 250 a month on the 1st of November 1918, were excluded from the further operation of the Calcutta Rent Act. We think that this view is incorrect. It may, for the purpose of fixing of standard rent, be necessary for him to decide what portion of the rent of premises in excess of Rs. 250 a month was to be allocated in respect of premises No. 26. But even so we do not think that the last amending Calcutta Rent Act precludes him from making any such enquiry if it is necessary for the determination of a question such as arises on the present petition. Premises No. 26 were let out at a rental of Rs. 250. These would clearly fall within the provisions of the Calcutta Rent Act as now subsisting and this it seems to us gives the Rent Controller jurisdiction to deal with the matter.

We accordingly make the Rule absolute and the Rent Controller will deal with the application on its merits.

We make no order as to costs.

Z. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 178 OF 1924.
January 22, 1925.
Present:—Mr. Justice Ryves.
SUNDER KHATIK—DEFENDANT—
—APPLICANT
versus
MAHADEO PANDE—PLAINTIFF—
OPPOSITE PARTY.

Negotiable Instruments Act (XXVI of 1881), ss. 13, 87—Pro-note payable to specified person, whether negotiable instrument—Material alteration in pro-note after execution, effect of.

A promissory-note payable to a specified person only is a negotiable instrument within the meaning of s. 13 of the Negotiable Instruments Act and is subject to the provisions of s. 87 of the Act. Where, therefore, a material alteration is made in a promissory-note after its execution without the knowledge or consent of the executant the note becomes void.

Makhdum Bakhsh v. *Shaukat Ali*, 29 Ind. Cas. 1008; 13 A. L. J. 683, distinguished.

Civil revision from an order of the Subordinate Judge, Mirzapur, dated the 11th of July 1924.

Mr. *Saila Nath Mukerji*, for the Applicant.

Mr. *Hamid Hasan*, for the Opposite Party.

JUDGMENT.—The plaintiff brought the suit out of which this application arises to recover Rs. 300 principal and Rs. 186 interest due on a promissory-note executed by the defendant.

It has been found by both Courts and it is indeed apparent on the face of the document itself that originally there was no agreement to pay interest and that the agreement to pay interest at Rs. 2 per cent. per mensem was interpolated after the note was written. Both Courts have found that this was done without the knowledge or consent of the defendant. The Courts, however, have held that s. 87 of the Negotiable Instruments Act which renders a negotiable instrument absolutely void where a material alteration has been made in it does not apply, because this particular note "is not" a "negotiable instrument for it makes the payment due to a specified person only." This finding is opposed to the Negotiable Instruments Act, s. 13 as amended by Act VIII of 1919. This document is clearly a negotiable instrument within the meaning of Explanation I to s. 13 as amended by Act VIII of 1919. Reliance has been placed by the learned Counsel for the opposite party on the case of *Makhdum Bakhsh* v. *Shaukat Ali* (1). That was a decision of 1915 before the Act was amended.

It seems to me that as the law now stands the Court had no option but to dismiss the suit on its finding that the promissory-note sued upon had been materially altered.

I, therefore, allow this application, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout.

Z. K. *Application allowed.*

(1) 29 Ind. Cas. 1008; 13 A. L. J. 683.

ALLAHABAD HIGH COURT.

MISCELLANEOUS CASE No. 403 OF 1924.

December 8, 1924.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

FIRM RAM GOPAL-MOOL CHAND—PETITIONER—APPLICANT

versus

THE INCOME-TAX COMMISSIONER—OPPOSITE PARTY.

Income Tax Act (XI of 1922), s. 66 (6)—Application to High Court for order directing Commissioner to state case—Costs, award of—Discretion of Court—Procedure.

Under s. 66 (6) of the Income Tax Act costs are in the discretion of the Court and once the Court has exercised its discretion it is *functus officio* and cannot re-open the matter. [p. 798, col. 1.]

All questions relating to costs and all submissions in which costs are involved must be argued and decided at the time of the hearing and before a final order is drawn up. [*ibid.*]

Miscellaneous application under s. 66 (3) of the Income Tax Act.

Mr. *G. Agarwala*, for the Applicant.

JUDGMENT.—In this case notice was issued to the Income Tax Commissioner to show cause why he should not state a case. The order was made *ex parte* on the application of the applicant. In future when the new rules come into force the applicant will have to establish a good ground on a point of law before the Court to whom he applies, before notice is issued to the Income Tax Commissioner at all. The result of the procedure was that the Commissioner had to show cause on the merits and to instruct the Government Advocate for that purpose, and the hearing was really such as would have taken place if the Commissioner had been required to state a case. In fact, the matter was gone into as though a case had been stated in order to ascertain whether there was a point on which a case could be stated. In the result the application was dismissed on the ground that it was impossible to frame a question of law on which a case could be stated, and on the application of the Government Advocate the Court hearing the matter directed the applicant to pay the costs of the application including the fees certified by the Government Advocate. The Court did that after hearing both parties for reasons which it considered adequate at the time.

An application is now made to us to reduce the amount after issuing notice to the Government Advocate on a sort of re-

hearing. We cannot do that. By s. 66 (6) costs are in the discretion of the Court. The Court having exercised its discretion is *functus officio* and cannot re-open the matter. All questions relating to costs and all submissions in which costs are involved must be argued and decided at the time of the hearing and before a final order is drawn up.

The learned Counsel suggested that there was a special ground for exercising the discretion because under s. 66 (2) his client had been compelled by the Act to deposit another sum of Rs. 100 at an earlier stage when he required the Commissioner to refer the question of law to the High Court. The High Court has no jurisdiction, of course, over this sum of Rs. 100 which the Commissioner has received. He has, no doubt, full power to deal with it in his own way and in accordance with the rules of his office. Any application *in misericordiam* must be made to the Income Tax Commissioner if any rebate of this sum is desired. No doubt, in the exercise of its discretion under s. 66 (6) the High Court could take into account the fact that the assessee had had to pay Rs. 100 to the Income Tax Commissioner, but in the great majority of cases it would appear to be quite irrelevant to the question of the costs of disposing of the matter by the High Court as it relates to something antecedent and the effect of taking it into account would really be indirectly to reduce the fee which the Government Advocate may have certified or which is really payable to him under the Act and Rules. We see no reason to interfere and dismiss the application.

Z. K. *Application dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1335 OF 1922.

January 28, 1925.

Present:—Mr. Justice Suhrawardy and Mr Justice Cuming.

ASWINI KUMAR GUPTA AND OTHERS—DEFENDANTS NOS. 3 TO 5—
—APPELLANTS

versus

KAMINI KUMAR DE, *alias* MANOO, AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 3 (3)—Landlord and tenant—Failure to pay rent—Tenant, whether becomes owner.

It is possible for a *raiyat* to hold lands without paying rent to the landlord but he does not thereby become the proprietor of the soil. He may be a tenant under s. 3 (3), Bengal Tenancy Act, and yet under a special contract may not pay rent to the landlord. [p. 799, cols. 1 & 2.]

Appeal against a decree of the Subordinate Judge, First Court, Tipperah, dated the 3rd March 1922, modifying that of the Munsif First Court at Kasba, dated the 29th March 1921.

Babu *Hemendra Kumar Das*, for the Appellant.

Babus *Brojolal Chakrabarty* and *Upendra Kumar Roy*, for the Respondent.

Babu *Biraj Mohun Mazumdar*, for the Deputy Registrar.

JUDGMENT.

Suhrawardy, J.—Defendants Nos. 3 to 5 appeal and take two exceptions to the decree as passed by the lower Appellate Court.

The first is that that Court ought not to have modified the decree of the Munsif by giving the plaintiffs a decree for the lands in suit. The plaintiffs claimed the tank and its banks as belonging to *Khatian* No. 1296, whereas the defendants alleged that they belonged to their *Khatian* No. 1268. The learned Munsif found that the *khatian* as a matter of fact supported the plaintiff's case and that it showed that the tank and its banks belonged to *Dag* No 1269. But in the Settlement map the figure 1268 has been placed in such a way as may be said to cover one of the banks of the tank. He has, therefore, passed a decree in the following terms: "Plaintiffs' rent-free *raiyati* right to *Dag* No. 1269 of the *khatian* (Ex. 5) will be declared and the plaintiffs will recover *khas* possession thereof." He has not exactly found what lands *Dag* No. 1269 covers in but he has referred to the *khatian* which will clearly lay down that it covered the tank and its banks. The decree should not have been passed in this form leaving that question as to the extent of *Dag* No. 1269 undermined though reference was made to the *khatian*. The point was taken before the learned Subordinate Judge in appeal and the issue arising out of the arguments addressed before him was "whether the plaintiffs have their alleged title to the disputed tank and its banks"? and his conclusion on this issue was that the disputed tank and its banks belonged to the plaint-

iffs' predecessor and that the disputed tanks and its banks were recorded in the Settlement Record of Rights in the name of Gurudas' widow Kalitara who held it in possession by right of inheritance. He further observed that the plaintiffs and their predecessors were clearly in possession of the tank for about 50 years. On these findings he came to the conclusion that the tank and its banks belonged to the plaintiffs as covered by *Dag* No. 1269. It is contended on behalf of the appellants that the plaintiffs' Pleader gave the Court to understand that they claimed *Dag* No. 1269 and nothing more and, therefore, they did not adduce sufficient evidence to show that the banks did not cover *Dag* No. 1269. This objection does not appear to have been substantiated by the record. Both the parties adduced evidence in support of their respective cases and the issue was whether the tank with its banks was included in the plaintiffs' *dag* or in the defendants' *dag*. The learned Subordinate Judge found that they were included in the plaintiffs' *dag* though he did not say so in so many words. We do not think that the decree as passed by the lower Appellate Court on this point is incorrect. This objection fails.

The next objection taken is that the learned Subordinate Judge was wrong in modifying the decree of the Munsif with regard to the status of the plaintiffs with reference to the land in suit. The Munsif found that the plaintiffs held the land rent free. But relying on the evidence and the fact that their predecessor was recorded banks rent free he declared the plaintiffs' right as *niskar raiyati* that in his view, the plaintiffs have required a *niskar* or rather a *lakheraj* title to the disputed tank", and if that be so, he does not think that the tenancy can still be held to be a *raiyati* holding. The reasoning is not quite clear, but it appears that what the learned Judge meant is that if a person holds a land free for a number of years, he does not acquire a *raiyati* right but an absolute title to the land. But in the present case the plaintiffs' predecessor has been recorded in the Settlement record as a settled *raiyat* of the village holding the tank with its banks rent-free. The plaintiffs themselves admit in their plaint that their predecessors held the land of the *taluk* in which the defendants are some of the landlords. It is possible for a *raiyat* to hold lands without paying rent to the landlord but he does not thereby become the proprietor of the soil. He may be a tenant in accordance with the definition of 'tenant' as given in s. 3 (3) Bengal Tenancy Act, and still under a special contract does not pay rent to the landlord. The learned Judge has not referred to any evidence on the point which has induced him to hold that that the presumption arising from the Record of Rights has been rebutted. In this view we are of opinion that the decree assessed by the Munsif relating to the status of the plaintiffs is correct and should be maintained.

The result is that the decree passed by the lower Appellate Court should be modified declaring the plaintiffs' right to the tank and its banks as *niskar raiyati* right. With this modification the decree of the lower Appellate Court is upheld and this appeal dismissed. We make no order as to costs.

Cuming, J.—I agree.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 192 OF 1923.

January 15, 1925.

Present:—Mr. Justice Stuart and Mr. Justice Ryves.

DIP NARAIN RAI—PLAINTIFF—APPELLANT

versus

LACHHMAN UPADHIYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4, O. XXXIV, rr. 2, 3—Foreclosure suit—Preliminary decree—Death of judgment-debtor—Substitution of representative of judgment-debtor—Final decree—Co-representative of judgment-debtor, whether entitled to redeem.

Where in a foreclosure suit the judgment-debtor dies between the passing of the preliminary decree and before the final decree and the decree-holder honestly substitutes in his place the person whom he believes to be his sole representative and that person accepts the position and a final decree for foreclosure is passed, any other person who has a right to be a co-representative of the judgment-debtor's estate and has, as such, a right to redeem the property, cannot enforce such right after the passing of the final decree. [p. 800, col. 2.]

Kadir Mohideen Marakkayar v. *Muthukrishna Ayyar*, 26 M. 230; 12 M. L. J. 368, and *Khiarajmal* v. *Daim*, 32 C. 296 at p. 313; 9 C. W. N. 201; 2 A. L. J.

71; 7 Bom. L. R. 1; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.), referred to.

Second appeal from a decree of the District Judge, Ghazipur, dated the 6th December 1922.

Messrs. *U. S. Bajpai* and *Janaki Prasad*, for the Appellant.

Dr. *M. L. Agarwala* and Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—It is necessary to state the following facts:—In November 1861 Ghumraj Rai executed a mortgage by conditional sale of certain property in the village of Pipra Kalan in the Ballia District in favour of Sheo Saran Upadhiya. In 1915 the mortgagor was represented by Sukhdeo Rai and the mortgagee was represented by a certain Lachhman. Lachhman instituted a suit for foreclosure against Sukhdeo Rai. A preliminary decree was passed on the 15th of July 1915 by consent of parties under the terms of which Sukhdeo Rai was given six months within which to pay Rs. 1,104-15-0, and in default of such payment the land mortgaged was to pass to Lachhman. No application was made for a final decree and in 1918 Sukhdeo Rai died. It is suggested that the reason why no application was made for a final decree was because Lachhman had already obtained possession of the property by a private arrangement with Sukhdeo Rai. After the death of Sukhdeo Rai certain people claimed to be his heirs in respect of this property, Lachhman then applied for the preparation of a final decree. He had to ascertain who was the legal representative of Sukhdeo Rai. This was clearly not an easy task for many persons had put themselves forward as the heirs of Sukhdeo Rai. Sukhdeo Rai belonged to the Rudra Rai branch of the family and he was the sole survivor of that branch, and his heirs had to be found in the Dina Nath Rai branch of the family. To any person acquainted with the circumstances of the Ballia District it will be seen that Lachhman was in a position of real difficulty in discovering who Sukhdeo Rai's heirs would be. He finally put forward Mahadeo Rai as Sukhdeo Rai's successor. Mahadeo Rai did not contest the position that he was the representative and a final decree was passed on the 12th of April 1919. On the 10th of May 1921, a certain Dip Narain Rai instituted a suit in the Court of the Subordinate Judge of Ghazipur for possession of this property as of right or in the alternative for possession of this property by redemption of the mortgage on the ground that he had succeeded to a portion of the property of Sukhdéo Rai. The Subordinate Judge decided that he was not an heir and dismissed his suit. An appeal was then filed before the District Judge who found that Dip Narain Rai was an heir but that his suit must fail as the proceedings were finally concluded by the final decree of the 12th April 1919. Dip Narain Rai has preferred this second appeal.

The point for decision is briefly as follows:—When a judgment-debtor under a preliminary decree for foreclosure has died between the passing of the preliminary decree and the final decree and the decree-holder has honestly substituted the person whom he believes to be the sole representative of the judgment-debtor and that person has accepted the position, and when a final decree for foreclosure has subsequently been passed, can a person who had a right to be a co-representative of the judgment debtor's estate and had as such a right to redeem the property enforce a right to redeem subsequent to the passing of the final decree? There is no direct authority upon this point. In order to decide it we have to examine certain considerations. The law as to the representation of a deceased defendant before the passing of a decree is contained in O. XXII, r. 4 of the C. P. C. This rule reproduces with no change of principle s. 368 of the old Code as amended in 1888 The law in respect of substitution of the representative of a deceased defendant may be shortly stated as this. It is in the first instance for the plaintiff to bring the representative of a deceased defendant upon the record. If he does not do so within 90 days of the date of the death his suit abates under the provisions of Art. 177, Sch. I of the Indian Limitation Act as amended in 1920. While it is obligatory upon the plaintiff to discharge this duty in so far as he is capable of doing so, any person who has not been so substituted by the plaintiff who claims to be interested as a representative of the deceased defendant has a right to come before the Court and claim to be substituted as such representative. It has been held in particular instances that, when the plaintiff has, in such circumstances, made an honest and intelligent endeavour to secure such representation the estate is or-

dinarily sufficiently represented for certain purposes.

There is nothing in the Code or in the Orders which explicitly covers the case of the substitution of the representative of a deceased judgment-debtor but the principles already enunciated undoubtedly govern such substitution. When a mortgagor judgment-debtor dies during the period that elapses between a preliminary decree for foreclosure and a final decree for foreclosure it may well happen that a person who claims to be his representative and has not been made his representative, may have a grievance. It may be that through no fault of his he is deprived of the knowledge that such a decree exists. This is practically the position taken up by the appellant in this appeal. Against this it may be said that on the principles which we have already enunciated it is open to the representative of a deceased judgment-debtor, whose name has been inadvertently omitted from the array of parties to come forward and to apply that his name should be added. Dip Narain Rai does not seem to have suggested that he had no knowledge of the proceedings. He says that he was very ill at the time they took place. The District Judge does not believe him on this point.

There is no direct authority upon the subject but two decisions have been quoted to us by the learned Counsel for the respondents which have a bearing upon the point. The earlier of these decisions is contained in *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (1). The Bench which decided this appeal upheld the validity of a transfer of a sale made under a final decree on a mortgage. The mortgagor was a man called Kadir. He died before the passing of the decree. One of his sons was substituted as his heir on the application of the plaintiff and the decree was passed against that son as sole defendant. That son's name appeared alone as defendant both in the proceedings up to the prel minary decree and in the proceedings up to the final decree. It was subsequently found that there was a second son who ought also with others to have been named as a representative of the deceased Kadir. But the Bench held that it was not open for the second son or his representatives or successors to question the validity of the transfer in any way as the estate of the deceased had been sufficiently represented for the purposes of the suit and in the absence of any fraud or collusion the decree bound the estate. The Bench was of opinion that this son had sufficient remedy in the power to apply to be joined as a representative.

In a subsequent decision of their Lordships of the Privy Council in *Khairajmal* v. *Daim* (2) their Lordships held that when a Muhammadan had died and three out of four of his legal representatives had been brought on the record in his place while the name of the fourth had been inadvertently omitted, the estate was sufficiently represented for the purposes of the suit and that no right of redemption remained.

After consideration accepting the principles laid down in the above decisions we decide this appeal as follows :—

We consider that the proceedings for substitution of the name of the deceased Sukhdeo Rai were honest and correct, that the decree-holder legitimately did all what he could be properly expected to do and that the decree of the 12th of April 1919 concludes the matter.

We, therefore, dismiss the appeal with costs which will include fees on the higher scale.

Z. K. *Appeal dismissed.*

(2) 32 C. 296 at p. 313; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.).

(1) 26 M. 230; 12 M. L. J. 368.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 42 OF 1923.

November 25, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

BHIMSANGJI CHHATRASANGJI—PLAINTIFF—APPELLANT

versus

DOLATSANGJI HAMIRSANGJI—DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (ii), (iv) (c)—Suits Valuation Act (VII of 1887), s. 8—Suit for declaration as to ownership of annuity, valuation of—Court-fee payable—Value for purposes of jurisdiction.

A suit for a declaration that the plaintiff is the owner of the Toda Giras Hak, as the heir of a deceased recipient of the Hak, and is as such entitled to recover it, falls within the purview of s. 7 *(iv)* (*c*) of the Court Fees Act, and not within s. 7 *(ii)* of the Act, and Court-fee thereon is payable according to the amount at which the relief sought is valued in the plaint. In such a suit the value for purposes of jurisdiction is

under s. 8 of the Suits Valuation Act, the same as for Court-fees.

Appeal against an order passed by the District Judge, Broach, in Appeal No. 56 of 1920, ordering the plaint to be returned to the proper Court, in Civil Suit No. 79 of 1919, decided by the Second Class Subordinate Judge at Ankleshwar.

Mr. *H. V. Divatia*, for the Appellant.

Mr. *M. T. Telivalla*, for heir No. 1 of the Respondent.

JUDGMENT.—The plaintiff sued, *inter alia*, for a declaration that he was the owner of the Toda Giras Hak of Rs. 500 received by Bai Surajkuvar as her heir and as such entitled to recover the same. The total claim was valued for Court-fees at Rs. 2,143-5-8 and also for jurisdiction. The suit was tried by the Second Class Subordinate Judge at Ankleshwar who passed a decree in favour of the plaintiff.

On appeal to the District Judge, an issue was raised whether the Court had jurisdiction to entertain the suit. The District Judge held that the suit was not within the jurisdiction of the Subordinate Judge of the Second Class at Ankleshwar, and ordered the plaint to be returned for presentation to the proper Court under r. 10 of O. VII of the C. P. C.

We think that that order was wrong. It depends, in the first place, upon what value should be placed on the first relief claimed, namely, the declaration that the plaintiff was the owner of the Toda Giras Hak of Rs. 500. The District Judge thought the claim was for payment of an annuity, and the value for the purposes of the Court-fee under s. 7 (*ii*) would then be ten times the amount claimed to be payable for one year. We do not think it can be said that the plaintiff was claiming payment of an annuity, the suit really comes within s. 7 (*iv*) (*c*) "to obtain a declaratory decree or order where consequential relief is prayed." All that the plaintiff was seeking was a declaration that he was entitled to an annuity which was enjoyed by Bai Suraj, and having got that declaration, he would be entitled to go to the official whose duty it was to pay the annuity, and demand payment according to the decree of the Court. The Court-fee stamp would be according to the amount at which the relief sought was valued in the plaint, namely, Rs. 500.

The next question is what would be the value of the suit for the purposes of jurisdiction. Under s. 8 of the Suits Valuation Act, the value as determinable for the computation of Court-fees in suits other than those referred to in the Court Fees Act, 1870, s 7, paras *v*, *vi*, *ix* and para. *x*, cl. (*d*) is the same for purposes of jurisdiction.

Accordingly the appeal will be allowed and the appeal will be sent back to the District Judge for being heard on its merits. The appellant will be entitled to his costs of the appeal.

Z. K. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 103 OF 1924.

June 24, 1924.

Present:—Mr. Rupchand Bilaram, A. J. C.

GOBINDRAM UTTAMCHAND—PLAINTIFF—APPELLANT

versus

MAHOMED HUSSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Lease—Premises used as brothel - Overdue rent, whether can be recovered—Tenants, ejectment of—Landlord, right of, to proceed against sub-tenant—Transfer of Property Act (IV of 1882), s. 108 (j).

If a landlord lets premises with the knowledge that they would be used as a brothel, the lease is void on the ground of public policy and the landlord cannot under those circumstances recover the overdue rent, but he can recover possession of the premises occupied by the tenant under a void lease. [p. 803, col. 1.]

Choga Lal v. *Piari*, 1 Ind. Cas. 52; 6 A. L. J. 7; 5 M. L. T. 55; 31 A. 58 and *Gas Light & Coke Co.* v. *Turner*, (1839) 5 Bing. (N. C.) 666 at p. 678; 7 Scott 779; 9 L. J. C. P. 75; 132 E. R. 1257; 54 R. R. 808, relied upon.

Section 108, cl. (*j*) of the Transfer of Propery Act preserves the right of the lessor to proceed against the tenant who transfers the tenancy but does not take away the lessor's right to proceed against the transferee. He is at liberty to proceed against both of them provided he can have execution only against one of them. [p. 803, col. 2.]

Kunhanujan v. *Anjalu*, 17 M. 296; 9 Ind. Dec. (N. S.) 205, followed.

Mr. *Lunidaram T. Bolkani*, for the Appellant.

Messrs. *Isardas Oodharam* and *Thawerdas Rahumal*, for the Respondents.

JUDGMENT.—This is a suit by the landlord for ejectment and arrears of rent of certain premises which are at present used as a brothel. A part of these premises is in the occupation of the pimp Lal Mahomed, defendant No. 3 who lives in it with the prostitute Kaima. The other part is in the occupation of the defendant No. 4 Kio, a Japanese prostitute. Some years ago the plaintiff gave these premises on rent

to defendant No. 1. He instituted Suit No. 423 of 1923 of this Court for ejectment and for rent against defendant No. 1. This suit was, however, dismissed on several grounds, one of the defences raised in the suit and relied on by the learned Judge in his judgment being that the defendant No. 1 had ceased to be a tenant of the plaintiff about two or three years prior to the suit and that the plaintiff had agreed to recover the rent from defendants Nos. 2 and 3. The plaintiff thereupon instituted this suit impleading defendants Nos. 2 and 3, and subsequently joined defendant No. 4 as being the person in occupation of a part of the premises.

Several pleas have been raised by the different defendants. So far as the relief for ejectment goes, there can be no question that the plaintiff is entitled to a decree. The premises are being used as a brothel. The rent is admittedly in arrears both defendants Nos. 1 and 2 have denied the tenancy, defendants Nos. 3 and 4 according to their showing are occupying the premises as sub-tenants either of defendant No. 1 or defendant No. 2. If the plaintiff let the premises to defendant No. 1 or defendant No. 2 with the knowledge that they would be used as a brothel, then the lease was void on the ground of public policy, and though on the one hand he could not under those circumstances recover the overdue rent (Halsbury's Laws of England, Vol. VII, para. 810), *Choga Lal* v. *Piari* (1), on the other hand he could recover possession of the premises occupied by the defendants under a void lease: (Per Tindal, C. J., in *Gas Light and Coke Co.*, v. *Turner* (2)... If, on the other hand, the plaintiff had no knowledge that the premises were used as a brothel, he is equally entitled to recover possession on the ground that his tenants have denied the tenancy, have failed to pay the rent due to him and have sublet it to prostitutes or pimps as a brothel.

With regard to the claim for rent, defendant No. 1 has admitted that he took the premises on rent for a *bona fide* sugarcane business which he stopped carrying on when on account of the war the working of the Badin Railway was stopped. Defendants Nos. 2 and 3 have denied having attorned to the plaintiff and have offered no evidence to show that the plaintiff knew at the time he gave the premises on rent that they would be used as brothel. There is no legal bar to the plaintiff's claim for recovery of rent on the ground of public policy. The plaintiff has, however, given up his claim for rent, if any, against defendants Nos. 1 and 2 and has confined his claim to defendants Nos. 3 and 4 who are in active occupation of the premises. Though there is no privity of contract between the plaintiff and defendants Nos. 3 and 4, there is a privity of contract between them and the plaintiff is entitled to recover rent from them as the person in occupation of the premises provided they have not already paid rent to the person from whom they took the premises on rent. Section 108, cl. (*j*) of the Transfer of Property Act preserves the right of the lessor to proceed against the tenant who transferred the tenancy but does not take away the lessor's right to proceed against the transferee. He is at liberty to proceed against both of them provided he can have execution only against one of them: *Kunhanujan* v. *Anjelu* (3). Defendant No. 3 admits that he has not paid the rent either to defendant No. 1 or to defendant No. 2 subsequent to May 1923. He is, therefore, liable to pay rent to the plaintiff from 1st June 1923 upto the date of ejectment. The rent of the portion in his occupation is Rs. 12-7-0 per mensem as shown in the certificate given by the Controller and should, therefore, account to the plaintiff for rent at that rate. Defendant No. 4 was paying Rs. 30 per mensem as rent to defendant No. 2. She pleads payment of rent upto the 2nd of May 1924: She has deposited Rs. 30 as rent for the current month in Court; the rent payable by her according to the Controller's certificate is Rs. 11-7-0 per month. She should account to the plaintiff for rent at the rate of Rs. 11-7-0 per mensem from 2nd May 1924 upto the date of possession.

I, therefore, pass a decree in favour of the plaintiff for ejectment against defendants Nos. 3 and 4 and also for rent against defendant No. 3 at the rate of Rs. 12-7-0 per mensem from 1st June 1923 upto the date of possession, and for half the costs of the suit, and against defendant No. 4 for rent at the rate of Rs. 11-7-0 per mensem from 2nd May 1924, upto the date of possession. Defendants Nos. 1, 2 and 4 should

(1) 1 Ind. Ind. 52: 6 A. L. J. 7; 5 M. L. T. 55; 31 A. 58.

(2) (1839) 5 Bing. (N. C.) 666 at p. 678; 7 Scott 779; 9 L. J. C. P. 75; 132 E. R. 1257; 54 R. R. 808.

(3) 17 M. 296; 6 Ind. Dec. (N. S.) 205.

bear their own costs. Out of the amount deposited in Court by defendant No. 4, such amount as is due to the plaintiff for rent by her should be paid to the plaintiff and the balance, if any, returned to the defendant No. 4.

K. S. D. *Suit decreed.*

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 69 OF 1923.

November 11, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

RAMCHANDRA HANMANT DESHPANDE AND OTHERS—DEFENDANTS—APPELLANTS

versus

KASHINATH LAXMAN DESHPANDE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Deed executed by manager of joint Hindu family—Members of family, whether parties to deed.

Where a Hindu father, as manager of a joint family, executes a deed of transfer of family property as representing all the members of the family who are joint with him, such other members must be treated as parties to the document within the meaning of s. 92 of the Evidence Act.

Appeal from an order of the District Judge, Dharwar, in Appeal No. 156 of 1921, reversing a decree passed by and remanding the suit to the Subordinate Judge, F. C., at Dharwar, in Civil Suit No. 65 of 1920.

Mr. *R. A. Jahagirdar*, for the Appellants.

Mr. *H. B. Gumaste*, for Respondent No. 1.

JUDGMENT.—The plaintiff filed this action in 1920 asking for a declaration that the sale-deed, Ex. 27, was of the nature of a mortgage, and prayed that the amount due under it to the mortgagees might be ascertained. The document was passed on May 27, 1902, and even if the previous decision of this Court that agriculturists in this District were not entitled to take advantage of s. 10A of the Dekkan Agriculturists' Relief Act had been set aside since the case was heard in the Trial Court as ss. 2 and 20 of the Act were only extended to this District from January 21, 1903, the plaintiff could not take advantage of that extension. After the suit was dismissed in the Trial Court, the District Judge in appeal made an order that the suit should be remanded to the lower Court under O. XLI, r. 23, C. P. C., for trial on the other issues which had been framed.

Now in 1902 the plaintiff and his father were joint. The father had sold the property as manager of the joint family. It is not suggested in this case that the father was exceeding the powers he had as such manager. The real question is whether the son can dispute the transaction of his father by seeking to call evidence to show that the document, although on the face of it a sale, was in reality a mortgage. It was contended in both the lower Courts that the real question then was whether the plaintiff was a representative-in-interest of his father. If he was not, he could lead evidence and prove Ex. 27 to be a mortgage under s. 99 of the Indian Evidence Act. The proper question to be considered was whether the plaintiff was a party to the document of 1902 so that he would be excluded from calling the evidence which he sought to adduce under s. 92 of the Indian Evidence Act. It is clear that if a father as one of the joint owners sells, as representing all the other members joint with him, those other members must be treated as parties to the document. Otherwise most disastrous results would follow if the members of a joint family were enabled to dispute the transaction effected by the manager of the family, not on the ground that the manager had no power to effect the transaction, but on the ground that the transaction was really a different one from what it appeared to be on the face of the document. That is the real point in dispute, and we are of opinion that as the plaintiff was joint with his father at the time of the transaction of 1902, clearly he must be considered as a party thereto, and he cannot, therefore, seek to show by calling oral evidence that the sale-deed was a mortgage. The appeal, therefore, must be allowed and the decree of the Trial Court restored with costs throughout.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 872 OF 1923.

January 16, 1925.

Present:—Mr. Justice Sulaiman.

RAM NARAIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

NIHAL SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Res judicata—*Cross-appeals—Two decrees—Appeal*

against one decree, whether competent in absence of appeal from other decree—Vendor and purchaser—Portion of sale consideration left in hands of vendee for payment to other person—Failure of vendee to make payment—Suit for damages—Limitation—Limitation Act (IX of 1908), s. 23, Sch. I, Art. 115.

Where there are two decrees arising out of two appeals to a Subordinate Appellate Court and only one of such decrees is brought up in second appeal and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of *res judicata* or at all by reason of the failure of the appellant to appeal from the decree which does not prejudice him. [p. 805, col. 2; p. 806, col. 1.]

Ghansham Singh v. *Bhola Singh*, 74 Ind. Cas. 411; 21 A. L. J. 465; (1923) A. I. R. (A.) 490; 45 A. 506, followed.

A suit to recover damages for a period of six years was decreed by the Court of first instance in respect of a period of five years. Both parties appealed, the defendant claiming in appeal that the whole suit ought to have been dismissed as time-barred and the plaintiff claiming that his suit with regard to the sixth year should also have been decreed. The two appeals were heard together and were disposed of by one judgment by which it was held that the plaintiff was entitled to claim damages for the sixth year and that no part of his claim was barred by time, but the rate of damages allowed by the First Court was reduced and the net result was that the decree which had been passed by the First Court in favour of the plaintiff was reduced in amount. Two separate decrees were prepared in the two appeals. The defendant filed a second appeal in the High Court only from the decree in the appeal filed by him in the lower Appellate Court in which his objection, that the whole suit ought to have been dismissed, was not allowed. It was objected by the plaintiff that the decree in the other appeal having become final, operated as *res judicata* and that the defendant's appeal was not, therefore, competent:

Held, that the decree in the other appeal, which had not been appealed from by the defendant, being substantially in his favour, the second appeal preferred by them was not barred by the fact that no formal appeal had been preferred from the decree in the other appeal. [p. 806, col. 1.]

Where a vendee is aware that a portion of the property which he is trying to purchase cannot be purchased by him under the provisions of the law and nevertheless enters into the contract with his eyes open in violation of the express provisions of the law, he cannot subsequently refuse to pay that portion of the sale consideration which is left in his hands at the time of the sale on the ground that the vendor has failed to fulfil his part of the contract in respect of that portion of the property which was not legally transferable in favour of the vendee. [p. 806, col. 2.]

Where a certain portion of the sale consideration in respect of a sale of immoveable property is left in the hands of the vendee for payment to a third person, no time being fixed for the payment, and the vendee fails to make the payment, the breach is committed by the vendee on the date when the sale-deed was executed and limitation for a suit to recover damages from the vendee for the breach commences from that date. In such a case there is no continuing breach within the meaning of s. 23 of the Limitation Act, nor successive breaches within the meaning of Art. 115 of Sch. I to the Act. [p. 807, col. 1.]

Second appeal from a decree of the Judge, Small Cause Court, exercising the powers of a Subordinate Judge, Agra, dated the 19th February 1923.

Mr. *P. L. Banerji*, for the Appellants.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—This is a defendants' appeal arising out of a suit for damages for Rs. 525. The Court of first instance decreed the claim for Rs. 349-11-6 on account of a period of five years. The defendants appealed to the Judge and their appeal was numbered as Civil Appeal No. 482 of 1921. In this they claimed that the whole suit ought to have been dismissed. The plaintiffs also appealed and their appeal was numbered as Civil Appeal No. 484 of 1921. In this they claimed damages for one year extra which had been disallowed by the Court of first instance. The learned Judge heard the two appeals together and disposed of them by practically one judgment. The result was that he held that the plaintiffs were entitled to claim damages for six years no part of which was barred by time, but he thought that the rate of damages allowed by the First Court was excessive. The net result of his finding was that the decree which had been passed by the First Court in favour of the plaintiffs was reduced in amount. There were two separate decrees prepared in two separate appeals. The defendants have come up to this Court and have filed an appeal only from the decree in appeal filed by them in which their objection that the whole suit ought to have been dismissed was not allowed. They have preferred no appeal from the decree in the plaintiffs' appeal.

There is a preliminary objection on behalf of the respondents that the present appeal is barred by the principle of *res judicata*. The law on this question is laid down in the Full Bench case of *Ghansham Singh* v. *Bhola Singh* (1). At page 469* it was remarked: "Where there are two decrees arising out of two appeals to a Subordinate Appellate Court, and only one of such decrees is brought up in second appeal and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal

(1) 74 Ind. Cas. 411; 21 A. L. J. 465; (1923) A. I. R. (A.) 490; 45 A. 506.

*Page of 21 A. L. J.—[*Ed.*]

which he has brought succeeds, the right of appeal is not barred either by the rule of *res judicata* or at all by reason of his failure to appeal from the decree which does not prejudice him."

I have already stated that the result of the findings of the learned Judge was that the amount decreed to the plaintiffs by the First Court was actually reduced. In substance, therefore, the plaintiffs' appeal in which they had claimed a larger sum was really not allowed at all, nor was the question of their right to get any amount decided in it which was not raised in the other appeal. The present appeal is preferred from the main appeal in which the question as to whether the entire claim ought or ought not to have been dismissed was raised. In view of the pronouncement in the Full Bench case I am bound to hold that the hearing of this appeal is not barred by the fact that no formal appeal has been preferred from the decree in the other appeal which really was in favour of the defendants.

The learned Vakil for the appellants has not pressed grounds Nos. 1 and 2 taken in the memorandum of appeal. Only two points have been pressed, (1) that the plaintiffs not having delivered possession of certain *sir* lands were not entitled to sue for damages and (2) that the entire claim was barred by limitation.

As to the first point it may be mentioned at the outset that there was no specific ground to that effect raised in the grounds of appeal before the lower Appellate Court. That question in a quite different form was raised in point No. 4 mentioned in the lower Appellate Court's judgment. I am, however, of opinion that there is no force in this contention. In 1910 there was a usufructuary mortgage of about 36 *bighas* of land by the plaintiffs in favour of Inder Lal and Sham Lal. Under s. 10, sub-cl. (2) of the Tenancy Act ex-proprietary rights were created in respect thereof. According to the *rubkar* recorded by the Court of first instance the plaintiffs became ex-proprietary tenants of their previous *sir* lands and entered into possession as such. Subsequently on the 29th of May 1924 the defendants obtained a sale-deed from the plaintiffs of 10 *bighas* out of the mortgaged lands. In this they included the ex-proprietary lands of the plaintiffs and called them both *sir* and ex-proprietary lands. Part of the sale consideration was left in the hands of the vendees for payment to the prior mortgagees. It is obvious that the sale of ex-proprietary rights to the defendants was altogether illegal and invalid. Such a transfer could never be enforced in law. The mere fact that in spite of the supposed sale the plaintiffs have not delivered possession of their ex-proprietary holdings to the defendants cannot be availed of by the latter or justify their non-payment of the amount due to the prior mortgagees. They must be presumed to have known that what they were trying to purchase could not be purchased by them. They entered into the contract with their eyes open and in violation of the express provisions of the law and they cannot take advantage if they find themselves unable to compel the plaintiffs to fulfil their illegal contract. The defendants vendees kept in their hands part of the sale consideration and it was their duty to pay this sum to the mortgagees. Had they paid it to the prior mortgagees the result would have been that the entire 36 *bighas* of land would have been redeemed, the plaintiffs obtaining possession of 26 *bighas* and the defendants of the remaining 10 *bighas*.

The real question in the case is whether the plaintiffs' claim as brought in 1921 was barred by limitation. The Court of first instance held that it was barred by limitation with regard to the first year. The lower Appellate Court has taken the view that it is not at all barred by time because the breach was a continuous breach and no question of limitation really arose.

In the sale-deed there was no time fixed within which the defendants vendees were to pay off the prior mortgage. The ordinary presumption would be that they were to pay the amount on the date of the execution of the sale-deed in their favour. If they failed to make the payment they did commit a breach of the implied covenant in the sale-deed. The question is whether that breach is a continuing one that is to say whether as every day passes the defendants are continuously committing a breach of the covenant to pay off the mortgage or whether they committed the breach when they did not pay off either on the date of the execution of the sale-deed or at any rate within a reasonable time of it. In the case of *Raghubar Rai* v. *Jaij Rai* (2), a Division Bench of this

(2) 14 Ind. Cas. 244; 34 A. 429; 9 A. L. J. 534.

Court laid down very clearly that upon failure to pay money due by a vendor to a third party which the vendee agreed to pay and no time was fixed for payment, the breach was committed on the date when the sale-deed was executed and there was no continuing breach within the meaning of s. 23 of the Limitation Act, nor successive breaches within the meaning of Art. 115. That ruling of the Division Bench is binding upon me as a Single Judge. I am, therefore, bound to hold that the failure by the defendants to pay the mortgage-money to the prior mortgagees was a breach of their covenant which took place once and for all and that there was no continuing breach which would give successive causes of action to the plaintiffs to sue. It is true that on the facts there is a slight difference between the present case and the reported case. In the present case the mortgage was a usufructuary one. The loss to the plaintiffs consists in their not getting the profits out of the mortgaged lands owing to the delay in redemption. In the reported case the loss to the plaintiffs consisted in the continual accrual of interest on the mortgage-money. In one case there is an actual loss by non-receipt of profits day after day and in the other there is a loss by a continual enhancement of liability. But the principle underlying both the cases seems to me to be identical.

In the reported case there are certain observations at pages 432 and 433* suggesting that even if subsequently the plaintiffs have themselves to pay off the mortgage-money and redeem the property they may not have a fresh cause of action to recover the amount from the defendants. Those observations, however are mere *obiter dicta* and they were not necessary for the purposes of that case inasmuch as there the suit had been brought before the plaintiffs had actually made any payment. It is, therefore, possible that in this case even though the present claim is to be held to be barred by time the plaintiff's remedy may be either for recovery of the amount treating it as their unpaid purchase-money with a charge on the property transferred, or for recovery of damages after they have themselves redeemed the property by payment of the mortgage-money. But in view of the reported case mentioned above I am bound to hold that the present claim brought more than six years after the sale-deed for recovery of damages for failure to pay to the mortgagees the amount left in the hands of the vendees for such payment, is barred by limitation.

The result, therefore, is that this appeal must be allowed and the decrees of the Courts below set aside and the plaintiffs' suit dismissed. As, however, the plaintiffs have obviously suffered considerable loss owing to the deliberate default of the defendants to pay off the amount left in their hands for payment to the mortgagees I think this is a fit case in which the parties must be ordered to pay their own costs in all Courts.

In the view which I have taken of the case the cross-objection must be dismissed, the parties bearing their own costs.

Z. K. *Appeal allowed.*

*Pages 34 A.- [*Ed.*]

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 658 OF 1924.

November 13, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

AMBUBAI HANMANTRAO—DEFENDANT—APPELLANT

versus

SHANKARSA NAGOSA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit with liberty to bring fresh suit—Order directing payment of costs, non-compliance with, effect of—Fresh suit, dismissal of, as non-maintainable—Third suit, whether maintainable.

Where a plaintiff is allowed to withdraw a suit with liberty to bring a fresh suit on condition that before instituting a fresh suit he pays the costs of the defendant, and he institutes a fresh suit without complying with the condition and that suit is dismissed as non-maintainable, he has no further right to bring a suit after payment of costs to the defendant, for the permission granted in the first suit would only extend to the filing of one fresh suit and not to the filing of any number of fresh suits which might be dismissed each in its turn without any trial on the actual merits of the case between the parties, for failure of the plaintiff to pay the costs of the first suit.

Second appeal from the decision of the District Judge, Dharwar, confirming a decree of the Subordinate Judge, Hubli, in Suit No. 455 of 1920.

Mr. *Y. N. Nadkarni*, for the Appellant.

Mr. *H. B. Gumaste*, for Respondent No. 1

JUDGMENT.—The plaintiff filed Suit No. 143 of 1917 in the Subordinate Judge's Court of Hubli on a certain cause of action. He withdrew that suit with permission of the Court under O. XXIII, r. 1, alleging that on account of the misreading of one of the issues framed by the Court he was not ready with his evidence on the day fixed for trial of the case. The Court made the following order:—

"On condition that plaintiff pays defendants' costs and bears his own costs and pays defendants' costs before filing a fresh suit, he is under the circumstances mentioned in this application, permitted to withdraw with permission to file a fresh suit."

Therefore, the condition precedent to his being allowed to file a fresh suit was that he should pay defendants' costs. However, without paying the defendants' costs, he filed fresh Suit No. 92 of 1919. He paid the costs three days before the day fixed for the hearing of the evidence in the case. The Court dismissed the suit on the ground that the suit being filed without previous costs having been paid was bad *ab initio*. This order was confirmed in appeal. The plaintiff, however, considering that the permission given him by the Court in Suit No. 143 of 1917 was still surviving in spite of the second suit being dismissed, filed this third suit on the same cause of action.

It was argued that the dismissal of the previous suit amounted to *res judicata*, and if that argument did not succeed, it amounted to a withdrawal without permission under para. 1 of O. XXIII, r. 1, C. P. C. Both these arguments failed to convince the Subordinate Judge who held that the present suit was maintainable, and dealing with the further issues, passed a decree in favour of the plaintiff for possession.

In appeal the decree was confirmed.

We think that both these decisions were wrong on this very simple ground that the permission granted by the Court in the original suit would only extend to the filing of one fresh suit, and not to the filing of any number of fresh suits, which might be dismissed each in its turn, without any trial on the actual merits of the case between the parties, for failure to pay the costs of the suit. When the plaintiff had refused to comply with the condition on which alone he could file a second suit, he could not avail himself of the original permission of the Court for filing a third suit. That permission no longer remained in force. If we were to accede to the argument of respondent No. 1 and uphold the decision of the lower Courts, we would be illegally extending the provisions of O. XXIII, r. 1, in favour of the plaintiff, who would thus be allowed to harass the defendants with a succession of suits. The appeal must be allowed and the suit must be dismissed with costs throughout.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 1 OF 1925.

January 13, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

Moulvi NURUDDIN AHMED, RECEIVER —DEFENDANT No. 13—PETITIONER— —APPELLANT

versus

SUBODH CHANDRA MITRA, BY HIS MOTHER AND GUARDIAN *Srimati* PROVASHNALINI DASI—OPPOSITE PARTY—RESPONDENT.

Receiver appointed by High Court—Subordinate Court, power of, to restrain Receiver from performing his duties—Procedure.

It is not competent to a Subordinate Court to restrain a Receiver appointed by the High Court from performing his duties as a Receiver.

Where a Receiver is appointed in a suit pending on the Original Side of the High Court and is given permission to sell certain property, any person who desires to prevent the sale of the property by the Receiver must apply on the Original Side in the suit on notice to the Receiver asking the Court to direct the Receiver not to sell the property.

Appeal against an order of the Subordinate Judge, Second Court, 24-Perganas, dated the 26th of September 1924.

Babus *Surendra Nath Guha* and *Amiruddin Ahmad*, for the Appellant.

Babu *Manindra Nath Banerji*, for the Respondent.

JUDGMENT.—This is an appeal by a Receiver appointed in Suit No. 930 of 1911 instituted on the Original Side of this Court. The suit was one for administration and partition and the order appointing the Receiver was in the usual form. On the 31st January 1917 an order was passed by the Original Side of this Court giving liberty to the appellant to sell certain of the premises of which he had been appointed Receiver, namely, 203 Lower Circular Road

for the purpose of paying off the mortgage that existed on the property. I understand that since the date of that order the mortgage referred to in the order of the 31st January 1917 has been paid off. Subsequent to the appointment of the Receiver the parties who were interested in the properties mortgaged their interest in those properties to the respondent before us. The mortgagee under that mortgage commenced a suit in the Court of the Subordinate Judge of the 24-Perganas to enforce his mortgage and apparently having heard that the Receiver was contemplating selling the properties for the purpose of paying costs and commission be applied to the Subordinate Judge to restrain the sale by the Receiver. The Receiver opposed the application for injunction but ultimately the injunction was passed. This is the order against which this appeal is directed and, in my opinion, the order of the Subordinate Judge was clearly wrong. It was not competent for him to restrain the Receiver, performing his duties as a Receiver and the proper course is for the parties, if they desire to prevent the sale by the Receiver, to apply on the Original Side in the suit on notice to the Receiver, asking the Court to direct the Receiver not to sell the property and offering if they are so advised to pay any sum that may be due either for costs or commission payable by the Receiver. The order of the Subordinate Judge of the 26th September 1924, restraining the Receiver is, in my opinion, wrong and misconceived and accordingly, we set aside the order of the Subordinate Judge of the 26th September 1924.

The respondent has mistaken his remedy and must pay the costs of this appeal. We assess the hearing-fee at two gold *mohurs*.

Z. K. *Order set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 129 OF 1923.

November 29, 1924.

Present:—Mr. Baker, J. C.

MOTILAL—DEFENDANT—APPELLANT

versus

HAJIMAL—PLAINTIFF—RESPONDENT.

Hindu Law—Mitakshara—Property acquired jointly, whether joint family property—Presumption—Intention.

Under the Hindu Law where the members of a joint family acquire property by or with the assistance of joint family funds or by their joint labour, such property is the joint property of the persons who have acquired it, whether it is an increment to ancestral property or whether it has arisen without any nucleus of descended property. [p. 810, col. 1.]

If a single individual acquires a fortune by his own exertion, without any assistance from ancestral property, his issue would take no interest in such property. Where, however, several brothers acquire property by their joint exertions in the absence of any indication of an intention to the contrary, the property would be owned by them as joint family property, and in that case their male issue would necessarily acquire a right in it by birth, for under the Mitakshara system there can be no joint family property in respect of which the male issue of the joint owners do not take a share by birth. If there is satisfactory evidence of an intention to treat the property not as joint family property but as joint property only, *i. e.*, as the joint self-acquisition of the acquirers, such intention will be given effect to. But the presumption is in favour of its being regarded as joint family property. [p. 810, col. 2.]

Karsondas Dharamsey v. *Gangabai*, 32 B. 479 at p. 492; 10 Bom. L. R. 184, *Lakshman Mayaram* v. *Jamnabai*, 6 B. 225; 6 Ind. Jur. 369; 3 Ind. Dec. (N. S.) 608, *Sudarsanam* v. *Narasimhulu*, 25 M. 149 at p. 155; 11 M. L. J. 353 and *Muniswami Chetty* v. *Maruthammal*, 7 Ind. Cas. 176; 34 M. 211 at p. 213; (1910) M. W. N. 233; 8 M. L. T. 124; 20 M. L. J. 687, referred to.

Appeal against a decree of the District Judge, Nimar, dated the 11th December 1922, in Civil Appeal No. 146 of 1922.

Mr. *M. Gupta*, for the Appellant.

Dr. *H. S. Gour*, for the Respondent.

JUDGMENT.—The plaintiff-respondent is the father of the defendant-appellant and sued to eject him from a portion of the house in suit, claiming that it was his self-acquired property. The defendant pleaded that it was joint family property. The First Court dismissed the plaintiff's suit. On appeal the District Judge, Nimar, reversed the decision, holding that the property was self-acquired. Defendant makes this second appeal.

The history of the family is given in the judgment of the lower Appellate Court. The appellant has raised three points in this appeal.

First it is contended that there is an admitted nucleus of joint family property in Rajputana, whence the family comes, consisting of 100 acres of land, and, therefore, the presumption is that the suit property was acquired by the aid of the nucleus. Reference is made to Mayne's Hindu Law, 9th Edition, pages 375 and 379, to *Karsondas Dharamsey* v. *Gangabai* (1),

(1) 32 B. 479 at p. 492; 10 Bom. L. R. 184.

and to *Lakshman Mayaram* v. *Jamnabai* (2).

It is argued that the property in Rajputana is admittedly still undivided and so plaintiff has an interest in it. The burden is on the plaintiff to prove that no assistance was taken from the ancestral property. He admitted in his written statement in the partition suit that the suit house was joint.

On this point the learned District Judge has recorded a finding of fact that no assistance was taken from the nucleus in acquiring this property. He holds on the evidence for the plaintiff that the nucleus was not touched in the acquisition of certain property later.

This is a finding of fact behind which this Court cannot go in second appeal.

It is next contended that if the business is a joint family business any property acquired must be joint. The defendant carried on joint business as there is evidence that he used to work in the shop, though he lived separately owing to the usual family disputes.

P. W. No. 2, plaintiff's brother Ghisalal, says the defendant was working in the joint firm of the three brothers when he reached years of discretion. Reference is made to Mayne's Hindu Law, 9th Edition, page 359, para. 277, where it is laid down that where the members of a joint family acquire property by or with the assistance of a joint family funds or by their joint labour such property is the joint property of the persons who have acquired it, whether it is an increment to ancestral property, or whether it has arisen without any nucleus of descended property.

The learned District Judge holds that the evidence only amounts to the defendant having been in the shop in his boyhood and early youth.

It is to be noted that the plaintiff himself admits that his other son has an interest and share in the house in suit as he has worked under him and as he is his son. In the face of this admission and of the admission of the P. W. No. 2, plaintiff's brother, it is difficult to see why the defendant should be excluded.

It is further contended that if defendant's father and uncles all carried on business jointly, defendant would acquire an interest in it by birth. This subject is dealt with in the paragraph of Mayne's Hindu Law quoted above, at page 360 where it is stated that if a single individual acquired a fortune by his own exertions, without any assistance from ancestral property, his issue would certainly take no interest in it. If several brothers did the same, the property would, in the absence of any indication of an intention to the contrary, be owned by them as joint family property, and in that case their male issue would necessarily acquire a right in it by birth, for under the Mitkshara system there can be no joint family property in respect of which the male issue of the joint owners do not take a share by birth. If there is a satisfactory evidence of an intention to treat the property not as joint family property, but as joint property only, *i. e.*, as the joint self-acquisition of the acquirers, it will be given effect to. But the presumption is in favour of its being regarded as joint family property. Reference is made to *Sudarsanam* v. *Narasimhulu* (3) and *Muniswami Chetty* v. *Muruthammal* (4).

In the present case the property was acquired jointly by the three brothers and in view of the admission by the plaintiff that his other son has an interest in it because he has worked in the shop and because he is his son, I am of opinion that the property must be regarded as joint family property in which the defendant takes an interest by birth.

The only reason for the plaintiff differentiating between the defendant and his other son appears to be that he is on bad terms with defendant.

Apart from the question of nucleus the view of the lower Appellate Court appears to me to be against the ordinary presumption of Hindu Law, and I cannot accept it.

The decree of the lower Appellate Court is consequently set aside and that of the First Court restored with costs throughout on the plaintiff.

Z. K. *Decree set aside.*

(2) 6 B. 225; 6 Ind. Jur. 369; 3 Ind. Dec. (N. S.)-608.

(3) 25 M. 149 at p. 155; 11 M. L. J. 353.

(4) 7 Ind Cas. 176; 34 M. 211 at p. 213; (1910) M. W. N. 233; 8 M. L. T. 124; 20 M. L. J. 687.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 829 OF 1922.

December 15, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

RAJENDRA NATH DUTTA—PLAINTIFF—APPELLANT

versus

Srimati BHABINI DASI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Mixed question of fact and law—Question of title.*

A judgment operates as *res judicata* with regard to all the findings that are necessary and essential to the judgment. [p. 812, col. 1.]

Dwijendra Narayan v. *Jogesh Chandra*, 79 Ind. Cas. 520; 39 C. L. J. 40; (1924) A. I. R. (C.) 600, followed.

A finding on a mixed issue of law and fact stands on the same footing as a decision on a question of fact and operates as *res judicata*. [*ibid.*]

Aghore Nath Mukherjee v. *Kamini Debi*, 6 Ind. Cas. 554; 11 C. L. J. 461, followed.

Plaintiff brought a suit for declaration of his title to and recovery of possession of two plots of land, on the allegation that he had purchased the plots in dispute, along with other lands, from a co-sharer of the defendant. His title was declared but it was held that he could not recover possession from a co-sharer and that his remedy lay in a suit for partition. He subsequently brought a suit for partition of the plots which were in dispute in the previous suit and some others, having been deprived of possession by the defendant:

Held, that the question of the plaintiff's title to the plots in dispute in the subsequent suit must be held to be *res judicata* by virtue of the decision in the previous suit, inasmuch as in order to decide that suit it was necessary to decide his title to the whole of the land purchased by him from the co-sharer of the defendant. [p. 812, cols. 1 & 2.]

Appeal against a decree of the Subordinate Judge, Burdwan, dated the 16th of February 1922, reversing that of the Munsif, Third Court at that place, dated the 4th of September 1923.

Babus *Brojo Lal Chakrabarty, Mrityunjoy. Chatterjee* and *Sudhi Ranjan Roy Choudhury*, for the Appellant.

Babus *Surendra Chandra Sen* and *Surendra Nath Basu* (Senior), for the Respondents.

JUDGMENT.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiff sued for the partition of certain properties. His case was that the properties in suit belonged to one Srimanta. Srimanta left three sons and three daughters. The sons were Nitai Makhan and Ram Lal. Two of the sons Makhan and Nitai died unmarried after the death of Srimanta. Their mother Prasanna Moyi, therefore, inherited their share of the property. Plaintiff purchased this share from Prasanna Moyi. Plaintiff's case is that he has in a previous Suit No. 670 of 1916 established his title to these lands and that as he has been dispossessed of some of the lands he has brought this suit for partition. Defendant No. 1 is the widow of Rakhal son of Prem Moyi one of the daughters of Prosanna Moyi. Her case was that plots Nos. 2, 3, 7 and part of plot No. 4 were purchased from Ram Lal the husband of Hira Moni defendant No. 2 and that the plaintiff has no claim to partition.

The Trial Court decreed the suit of the plaintiff. He ordered that the title of the plaintiff be declared to a two-thirds share of the land in dispute and that of defendant No. 2 to a one-third share less the lands that had been conveyed by Ex. A which would go to the defendant No. 1.

On appeal the Appellate Court found that the suit for partition did not lie. That the previous Suit No. 670 of 1916 did not operate as *res judicata*, that the lands had been amicably partitioned before between the plaintiff and the defendants excluding the lands that were in possession of defendant No. 2 and totally dismissed the suit of the plaintiff.

In appeal to this Court it has been contended on behalf of the appellant that the decision in the Suit No. 670 does operate as *res judicata*. That this suit determined the title of the plaintiff to the lands in dispute and it also determined the question of the adverse possession of the defendants which it decided against them.

We think that this contention is correct.

In that suit it was determined that the plaintiff had title to the share that he claimed in plots Nos. 4 and 7. To determine this point it was necessary to determine the title of the plaintiff to his share in the whole of the lands that had been left by Srimanta. The lower Appellate Court has held that this decision was based on an erroneous view of the law and hence did not operate as *res judicata*. In support of his decision he has referred to two authorities one reported as *Alimonnessa Chowdhurani* v. *Shama Charan Roy* (1) and the other in *Parthasaradi Aiyyangar* v. *Chinnakrishna Ayyangar* (2).

In the case reported as *Alimonnessa Chowdhurani* v. *Shama Charan Roy* (1), it was held that an erroneous decision on a pure

(1) 1 C. L. J. 176; 9 C. W. N. 466; 32 C. 749.
(2) 5 M. 304; 2 Ind. Dec. (N. S.) 211.

question of law did not operate as *res judicata* in a subsequent suit between the same parties where the cause of action in the two suits is not identical. The same view was taken in the Madras case above referred to.

The appellant has referred us to the case of *Aghore Nath Mukherjee* v. *Kamini Debi* (3). There it was held that a finding on a mixed issue of law and fact stood on the same footing as a decision on a question of fact and operated as *res judicata*.

In the case of *Dwijendra Narayan* v. *Jogesh Chandra* (4), a case to which one of us was a party it was held that a judgment operates as *res judicata* with regard to all the findings that are necessary and essential to the judgment.

It is not easy to see how the decision in the previous suit proceeded on a pure question of law. It would seem to depend on two questions of fact, *viz.*, whether the plaintiff had purchased the lands in suit and if he had done so whether his title had been extinguished by adverse possession. In the previous suit it does not appear that the defendant did contend that the title of the present appellant had been extinguished by adverse possession. The decision in that suit did not proceed on a pure question of law but as far as can be seen on a question of fact or mixed law and fact.

Moreover as far as can be seen the cause of action in the two suits is the same. In the first suit the plaintiff sued for a declaration of his title and recovery of possession of two plots, 4 and half of 7. His title was declared to these plots but it was held that he could not recover possession in that suit from a co-sharer but that his remedy lay in a suit for partition.

In this suit he is suing for partition of these plots and some others having been deprived of possession by the defendants. It has been contended that in the first suit the plaintiff did not sue for the declaration of his title to plots Nos. 2 and 3.

That, no doubt, is correct. But in order to decide that suit it was necessary to decide his title to the whole two-thirds share in the whole property left by Srimanta. Applying then the principle enunicated in the case of *Dwijendra Narayan* v. *Jogesh Chandra* (4), the question of the plaintiff's title to these plots also must be held to be *res judicata* as between the parties. It will be observed that the parties to the two suits were the same.

The decision in the Suit No. 670 operates as *res judicata* between the parties in this suit. That being so it was not open to the lower Court to go into the question whether previous to the title suit there had been a partition between the parties.

The plaintiffs must, therefore, be held to have title as claimed to the two-thirds share.

The result is that the order of the lower Appellate Court must be set aside and the order of the Trial Court restored. The appellant is entitled to his costs in all the Courts.

Suhrawardy, J.—I agree.

Z. K. *Appeal allowed.*

(3) 6 Ind. Cas. 554; 11 C. L. J. 461.
(4) 79 Ind. Cas. 520; 39 C. L. J. 40; (1924) A. I. R. (C.) 600.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 163 OF 1922.
November 27, 1924.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

DHANAJI JHELAJI—PLAINTIFF—APPELLANT
versus
GULABCHAND PANA—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 253, 254—Partnership—Assignment of his share by partner, effect of—Assignee, position of—Suit for accounts by assignee, whether maintainable—Release of his rights by a partner before assignment, effect of—Transfer of Property Act (IV of 1882), s. 6 (e)*—Right to sue to set aside release, whether can be transferred.*

An assignment by one of the partners in a firm of his share in the partnership, without the consent of the other partners, does not cause an immediate dissolution of the partnership, nor does the assignment give the assignee a right to an account of the profits. He must accept the account of the profits as agreed to by the partners. It is only when dissolution occurs that the right of the assignee arises to claim an account as from the date of the dissolution. [p. 814, cols. 1 & 2.]

It is only a partner who can file a suit against the other partners for dissolution. Consequently, an assignment by one partner in favour of an outsider merely gives a right of action to the other partners to ask the Court to dissolve the partnership. [p. 814, col. 2.]

Plaintiff filed a suit for accounts of a partnership on the allegation that defendants Nos. 1 to 5 constituted a partnership together with defendant No. 6 whose right, title and interest in the partnership had been purchased by the plaintiff. Defendants Nos. 1 to 5 set up a release executed by defendant No. 6 before the assignment in favour of the plaintiff. Defendant

No. 6 urged that the release was obtained from him by fraud and misrepresentation:

Held, (1) that if the release executed by defendant No. 6 in favour of the other defendants was valid, defendant No. 6 had ceased to have any right of action against his co-partners and that there was nothing left in him which he could have assigned to the plaintiff; [p. 814, col. 2.]

(2) that if the release executed by the defendant No 6 was not binding on him on the ground that it had been obtained from him by misrepresentation or fraud, defendant No. 6 would have a right to have the release set aside, but that such a right, being a mere right to sue, could not be transferred to the plaintiff; [*ibid.*]

(3) that assuming that the defendant No. 6 succeeded in having the release set aside, the partnership would still be existing between defendants Nos. 1 to 5 and the plaintiff, as assignee of defendant No. 6, who was one of the partners, would have no right to sue for an account of the profits of the partnership; [*ibid.*]

(4) that in either view of the case the plaintiff's suit was liable to be dismissed. [*ibid.*]

First appeal from the decision of the First Class Subordinate Judge, Thana, in Civil Suit No. 250 of 1919.

Mr. *G. N. Thakor* (with him Mr. *P. B. Shingne*), for the Appellant.

Mr. *H. C. Coyajee* (with him Mr. *W. B. Pradhan*), for Respondents Nos. 1 to 4.

Mr. *V. B. Virkar*, for Respondent No. 5.

JUDGMENT.—The plaintiff filed this suit, alleging that defendant No. 1 and his sons defendants Nos. 2 to 5 together with defendant No. 6 were trading in partnership in the name and style of Pana Nathaji, that plaintiff purchased the right, title and interest of defendant No. 6 in the partnership on March 20, 1918, that notice to render accounts was given to defendant No. 1 on March 21, when defendant No. 1 replied that the defendant No. 6 had passed a release on settlement of his right on April 3, 1918. Accordingly he prayed for a declaration that he was the owner of the 2¼ anna-share of defendant No. 6 in the shop and that the moveable and immoveable property of the shop should be divided and accounts taken of the shop.

Defendants Nos. 1, 2 and 4 pleaded *inter alia* that defendant No. 6 had passed a release in their favour on February 17, 1918.

Defendant No. 6 alleged that the release was obtained by fraud and misrepresentation, but that plaintiff purchased his right, title and interest with knowledge of the real facts relating to the release and that the assignment was passed on the express understanding that defendant No. 6 was not to be liable to the plaintiff.

The plaintiff had also sued in the alternative for the recovery of Rs. 5,999 and interest as the consideration paid to defendant No. 6 for the assignment in case it was held that defendant No. 6 had no right.

The Trial Judge held *inter alia* (1) that the release was not obtained from defendant No. 6 by fraud by the other defendants.

(2) That the sale-deed of the plaintiff was not fraudulent or without consideration.

(3) That the plaintiff had no right to claim the share of defendant No. 6 in the partnership.

(4) Nor could he claim the amount of the consideration from defendant No. 6.

Consequently the plaintiff's suit was dismissed. The plaintiff has appealed to this Court. The release having been executed before the assignment, even assuming that the plaintiff was entitled to sue to set it aside on the ground of fraud, his suit was bound to be dismissed as there was nothing left in defendant No. 6 after the release which he could assign.

But assuming that the release could not be avoided an important question arises with regard to the right of an assignee in a share in a partnership.

If one partner assigns his share to an outsider without the consent of his partners during the existence of the partnership, no immediate rights accrue to the assignee as against the other partners, the assignee only having a right against his assignor. If, at the time of the assignment, the partnership has already been dissolved, then the further question would arise whether the assignee would have any right at all against the other partners, and whether he would be entitled to file a suit for an account.

The sixth defendant might be entitled to file a suit against the other partners for a declaration that the *farkhat* was not binding on him on the ground that he had been induced to sign it by misrepresentation or by fraud or on any ground on which a party is entitled to ask the Court to set aside a document he has signed. But whatever rights the sixth defendant may have had to ask the Court to set aside the document, he could not assign such a right to a third party. That would be a transfer merely of a right to sue which

cannot be allowed under the provisions of s. 6 of the Transfer of Property Act.

So it was suggested by the plaintiff that the assignment operated as a dissolution of the partnership and entitled the assignee to sue. There is authority for that proposition in *Juggut Chunder Dutt* v. *Rada Nath Dhur* (1). The head-note runs:—

"The effect of cl. (6) of s. 253 of the Contract Act is not to render an assignment of a share in a partnership concern illegal or void as between the parties to the assignment, but only so far void as between those parties and the other partners as to cause an immediate dissolution of the partnership."

With due respect it is difficult to see how that construction can be placed on s. 253, sub-cl. (6) of the Indian Contract Act which merely states that no person can introduce a new partner into a firm without the consent of all the partners.

The common law with regard to the position of an assignee of a partner has now been codified by s. 31 of the English Partnership Act, 1890, as follows:—

"(1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

Therefore at common law the assignment by one of the partners of his share in the partnership without the consent of the other partners did not cause an immediate dissolution of the partnership. It did not give the assignee a right to an account of the profits. He had to accept the account of the profits as agreed to by the partners. And that must obviously be according to the principles of common sense, because when there is a contract of partnership, one partner cannot by his action introduce a third party without the consent of the other partners, so as to give the third party a right to interfere in the management of the business or to ask for an account. It is only when dissolution occurs that the right of the assignee arises to take action in the same way as his assignor could have done to claim an account as from the date of the dissolution.

That this also is the law in India appears from the following provisions of s. 254 (3) which apparently was not noticed by the Court in the case of *Juggut Chunder Dutt* v. *Rada Nath Dhur* (1): "At the suit of a partner the Court may dissolve the partnership in the following cases: (3) when a partner, other than the partner suing, has done any act by which the whole interest of such partner is legally transferred to a third person." Consequently the assignment by one partner merely gives a right of action to the other partners to ask the Court to dissolve the partnership. The plaintiff then in this case was placed in this dilemma. If the *farkhat* was a valid release by defendant No. 6 of his interest in the partnership, he ceased to have any right of action against his late partners, and there was nothing left in him to assign to a third party. Defendant No. 6 could have brought an action to set aside the *farkhat* on the ground that it was induced by misrepresentation or fraud. He could not assign his right to sue to a third party. Then supposing on either of those grounds defendant No. 6 succeeded, and the *farkhat* was set aside, the partnership would still be existing between the partners, and the assignee from one of them would have no right of action. It is only a partner who can file a suit against the other partners for dissolution. Even assuming, as we are asked to believe that the sixth defendant was excluded from the partnership after he had signed the *farkhat*, that by itself would not effect a dissolution. It would only give a right of action to sue for a dissolution under s. 254 (5) of the Indian Contract Act "when

(1) 10 C. 699; 8 Ind. Jur. 619; 9 Ind. Dec. (N. S.) 450.

a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership or towards his partners." Therefore, if the office doors are closed against a partner, so that he is excluded from taking part in the partnership business, he can either treat the partnership as still existing, or he can file a suit for a declaration that the partnership is to be taken as dissolved from the date on which he proves misconduct towards him on the part of his partners. So that whichever way you look at the case, it is obvious that the plaintiff has no cause of action against defendants Nos. 1 to 5. He has joined with the cause of action against defendants Nos. 1 to 5, a cause of action against defendant No. 6, for the recovery of the money he had paid as consideration for the assignment passed in his favour by defendant No. 6. That was disallowed by the Trial Court in para. 29 of the judgment. It is, no doubt, open to a plaintiff to make an alternative claim even on inconsistent pleadings. But the Judge says "in the present case, however, the plaintiff purchased an actionable claim with full knowledge of the risk involved, and I do not think that he is entitled to any refund as on a failure of existing consideration, and I find on issue No. 4 accordingly." We agree, and as against defendants Nos. 1 to 5, the plaintiff purchased nothing but a right to sue which is not transferable.

The appeal, therefore, must be dismissed with costs. Costs to be given to respondents Nos. 1 to 4.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 1005 OF 1924.

January 19, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Mukerji.

ABDUL AZAHAR CHOWDHURY AND OTHERS—PETITIONERS

versus

THE COLLECTOR OF BACKERGANJ —OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), ss. 93, 99—Common manager, appointment of—Restoration of estate, when can be, refused.

The most essential condition requisite to justify a Judge in appointing a common manager of an estate under s. 93 of the Bengal Tenancy Act, is the existence of a dispute between the co-owners. When therefore, the question arises as to the restoration of the estate under s. 99 of the Act, and it is alleged that the dispute is no longer existing, what the Judge has to consider is whether it has been really and effectively settled in such a way that the management will be conducted by the co-owners without inconvenience to the public or injury to private rights. If he is satisfied that the dispute has been effectively settled he cannot refuse to make an order directing the restoration of the estate, merely because there is apprehension that the co-owners will oppress the tenants or that there will be a breach of the peace as the result of such oppression. [p. 816, col. 1.]

Rule against an order of the Court of the District Judge, Backerganj, in Miscellaneous Case No. 32 of 1924.

Mr. *S. R. Das* and Babu *Suresh Chandra Taluqdar*, for the Petitioners.

Babu *Surendra Nath Guha*, for the Opposite Party.

JUDGMENT.

Mukerji, J.—This Rule is directed against an order of the District Judge of Bakargunge refusing to restore the management of a certain estate named *mehal khontakhali* to the co-owners under the provisions of s. 99 of the Bengal Tenancy Act. There was an application made by one or some of the co-owners with regard to this estate in the year 1903 under the provisions of s. 93 of the Bengal Tenancy Act in consequence of which the learned District Judge appointed a common manager in respect thereof and afterwards it was placed under the management of the Court of Wards. The present application was made on behalf of the co-owners and the two material facts upon which this application was based were, firstly, that the co-owners had settled amongst themselves the dispute that had been in existence from before and secondly, that the costs of the management of the estate had become very heavy and that the co-owners were, as a matter of fact, satisfactorily managing another estate, a much bigger estate, in respect of which a similar order had been previously passed. The learned District Judge after taking into consideration the letter of the Collector and the report of the Manager of the Court of Wards in respect of this matter and after hearing the Pleader for the petitioners and the Local Government Pleader refused to restore the management of the estate to the co-owners. The grounds upon which the learned District Judge has made the order are mainly that from the report of the Manager, it would appear that the

tenants were afraid that they would be oppressed if the estate was released to the proprietors and that at least the release would probably lead to endless friction and to the danger of a breach of the peace. The report of the Manager or the letter of the Collector does not challenge the truth of the statement that the dispute has been settled, but opposes the restoration of the estate mainly on the ground that the tenants would be oppressed and harassed by enhancement of rent and eviction, and that the interests of the tenants would suffer and also that in consequence thereof there would be apprehension of a breach of the peace. Now the condition requisite for making an order under s. 93 of the Bengal Tenancy Act is that there should be a dispute existing between the co-owners of an estate or a tenure as to the management thereof and that in consequence of such dispute there ensues or is likely to ensue either inconvenience to the public or injury to private rights. When the estate is to be released under the provisions of s. 99 the Judge is to satisfy himself that the management will be conducted by the co-owners without inconvenience to the public or injury to private rights. It is clear upon consideration of the terms of s. 93 that the most essential condition requisite to justify a Judge in placing an estate under a common manager or the Court of Wards is the existence of a dispute between co-owners. Assuming for a moment that injury to private rights includes invasion of the rights of the tenants and not merely injury to the private rights of the co-owners, and assuming also that the injury apprehended by the tenants in the present case comes within that category, and granting further that the apprehension of a breach of the peace is well-founded, they would not be sufficient for the purposes of s. 93, if there is no dispute between co-owners to which such injury or apprehension is attributable. It follows, therefore, that when the question arises for restoration of the estate under s. 99 of the Act and it is alleged that the dispute is no longer existing what the Judge has to consider is whether it has been really or effectively settled in such a way that the management will be conducted by the co-owners without inconvenience to the public or injury to private rights. In the present case there has been no consideration of this matter and the order passed by the learned Judge is based upon matters wholly extraneous and irrelevant.

On a consideration of the whole of the circumstances, I am of opinion that there is no justification for an opposition to restore the management of the estate to the co-owners.

For the above reasons, I think that the order passed by the learned District Judge is without jurisdiction and that it should be set aside. The Rule is, accordingly, made absolute and the order of the District Judge is set aside and it is ordered that the estate be restored to the management of the co-owners under the provisions of s. 99 of the Bengal Tenaacy Act.

There will be no order as to costs in this Rule.

Greaves, J.—I agree.

Z. K. *Rule made absolute.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 114 OF 1923.

December 5, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

MANIKBAI VISHNUDAS GUJJAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOKULDAS RAMDAS KARADGI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption of married person—Succession—Daughter of adopted son, rights of.

Where a married Hindu, who has a daughter, and is the sole owner of ancestral property, is adopted, his daughter does not pass into the adoptive family along with her father and is entitled to succeed to the property of her father as his heir, as in such a case the property goes to the heirs of the person adopted, as he was the last male holder, and not to the heirs of his father or any other ancestor. [p. 818, col. 2.]

First appeal from the decision of the First Class Subordinate Judge at Bijapur, in Suit No. 327 of 1920.

Mr. *H. C. Coyajee* (with him Mr. *A. G. Desai*), for the Appellants.

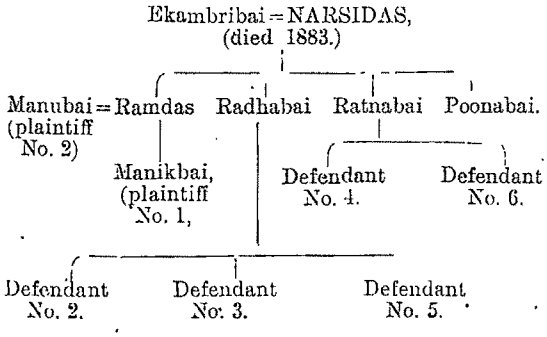
Mr. *Nilkanth Atmaram*, for the Respondents.

JUDGMENT.

Macleod, C. J.—The plaintiffs sued to recover possession of the plaint property

after a declaration that plaintiff No. 1 was an owner or in the alternative if plaintiff No. 1 was not an heir that plaintiff No. 2 should be declared the owner.

It was alleged that the property originally belonged to two brothers Narsidas and Shankerdas, but it has been found by the Court below, and that finding has not been disputed in this Court, that the brothers were not in union, and so the following pedigree will be sufficient for the purposes of this appeal.



The property was held jointly by Narsidas and his son Ramdas. Narsidas died in 1883. Ramdas was adopted in 1908 by one Bhagwandas, a first cousion of Narsidas. At the time of his adoption Ramdas had a wife plaintiff No. 2 and a daughter plaintiff No. 1.

The plaintiffs claim that they are entitled to the property originally owned jointly by Narsidas and Ramdas, as against the defendants who are the grand children of Narsidas by his daughters Radhabai and Ratnabai.

It was decided in *Kalgauda Tavanappa* v. *Somappa Tammangauda* (1) that when a married Hindu having a son is given in adoption, the son does not like his father lose the *gotra* and right of inheritance in the family of his birth, and does not acquire the *gotra* and right of succession to the property of the family into which his father is adopted. It was also held that when a married Hindu is given in adoption his wife passes with him into the adoptive family because according to the Shastras husband and wife form one body. The second plaintiff, therefore, can in no case succeed. But the rights of a daughter in the event of her father being adopted have, as far as we can ascertain, not been considered either in texts or reported cases, neither have they been discussed by any of the writers on Hindu Law. It is not surprising that the texts are silent on the question as in olden times the adoption of a married man having children would be repugnant to orthodox Hindu customs.

The Trial Judge has taken it for granted that the main issue was 'Who was the heir of Narsidas after the adoption of Ramdas'? and it cannot be disputed that the defendants were nearer heirs to Narsidas than plaintiff No. 1.

Paragraph 12 of the judgment says: "After Ramdas left the family by adoption Ekambribai was the heir of Narsidas to whom the property belonged and she lived in the house till her death which took place on September 12, 1912"; and para. 75 says: "the property in dispute belonged to Narsidas. Defendants Nos. 1, 2, 3, 4 and 6 are sons of the daughters of Narsidas and are his heirs preferably to plaintiff No. 1 or plaintiff No. 2." He had some justification for so holding. As in *Ramchandra* v. *Manubai* (2), Ramdas attempted to execute a decree obtained by his father. The case came up to the High Court when it was held that Ramdas by his adoption lost all rights in his father's estate which thereafter went to the heirs of Narsidas. The judgment-debtor was the only other party to the proceedings, and the rights of the present plaintiff No. 1 as daughter of Ramdas were never taken into consideration. It would have been sufficient for the Court to decide that Ramdas was incompetent to execute the decree without going on to say in whom the right to execute lay. In any event plaintiff No. 1 is entitled to raise the point in the present suit, the question is not *res judicata*, and the *dictum* of the High Court being *obiter* must at the best be treated with the respect usually attached to such *dicta*. The Trial Judge says: 'By his adoption Ramdas lost all rights of inheritance in his natural family as completely as if he was never born in it. Inheritance must be traced from the previous male-holders.'

It is true that his right to the property of his adoptive family accrued as if he had been born in it, and it is equally true that he lost all rights to the property of his natural family. But I think the Judge is led into a fallacy by using the words 'right of inheritance' without regard to the varying circumstances which may exist in

(1) 3 Ind. Cas. 809; 33 B. 669; 11 Bom. L. R. 797.

(2) 52 Ind. Cas. 695; 43 B. 774; 21 Bom. L. R. 776.

different cases. If Narsidas had been alive in 1908 Ramdas would have lost all rights to the family property which he had as co-parcener, and all rights to succeed to any self-acquired property of Narsidas. The adoption would have put an end to those rights in the same way as if he had died, but it is quite unnecessary to add a further fiction 'as if he had never been born in the family.'

It is unfortunate that when we get within the realm of fiction the ordinary rules of logic no longer apply. If the adopted son is to be considered as having been born in his adoptive family, the ordinary result should follow that he takes the whole of his family then in existence into the adoptive family, but as I have pointed out above he does not take his sons with him, and presumably his unmarried daughters are left behind as well. There can be no difficulty with regard to the rights of the son in his father's property. If father and son are joint the son on his father's adoption succeeds by survivorship. If there are other co-parceners the result is the same. If there is a daughter unmarried she is entitled to maintenance and marriage expenses. The difficulty arises when the adopted son is the sole owner of ancestral property as Ramdas was. If he is to be treated as having civilly died in the natural family when he was adopted, the property should go to his heirs, as he was the last male-holder and not to the heirs of his fathers. If in 1908 he had died a natural death, undoubtedly, plaintiff No. 1 would have been his heiress, and if he is to be treated as dead by a fiction, there can be no possible reason for departing from the ordinary rule of devolution of property under the Hindu Law. One result of tracing descent from the next generation above would be, that if Narsidas and his brother Shankardas had been joint, as the plaintiff contended, since Shankardas survived Narsidas the property would go to his heirs and not to the heirs of Narsidas, with the result that Ramdas would have become entitled to the property as son of Bhagwandas his adoptive father, first cousin of Shankardas, in preference to his brother's son's daughter or his brother's daughter's sons. The fallacy in the passage of the judgment under review lies in the failure to recognize that Ramdas had no right of inheritance to the property of Narsidas to lose. He had already acquired it by survivorship. In *Dattatraya* v. *Govind* (3), it was held on the authority of the text of Manu, Adhyaya 1, verse No. 142. that a Hindu, the sole owner of ancestral property lost his right to the suit property on adoption, but in the case of property acquired by partition it was held in *Mahableshwar* v. *Subramanya* (4) that the suit property was not the estate of the natural father within the meaning of the above-mentioned text, and, therefore, the son was not divested of it on adoption. Consequently the question who would succeed to it if he were divested did not arise. But I expressed the opinion that then the heir of the defendant at the time of his adoption would have had to be ascertained as if he were dead.

In *Dattatraya* v. *Govind* (3) also the question was not decided as the mother of the adopted son was the heir of her son and also of the father.

Thouh there is an objection to referring to an adopted son as civilly dead in his natural family (*cf.*, *Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row* (5), I cannot see myself that there is any reason in this case for holding that the property should go to the heirs of Narsidas and not to the heirs of Ramdas.

In my opinion, therefore, plaintiff No. 1 is entitled to succeed to her father's property. There will be a decree for possession and an inquiry as to mesne profits from date of suit with costs throughout.

Crump, J.—I agree.

Z. K. *Order accordingly.*

(3) 34 Ind. Cas. 423; 18 Bom. L. R. 258; 40 B. 429.
(4) 72 Ind. Cas. 309; 25 Bom. L. R. 274; 47 B. 542; (1923) A. I. R. (B.) 297.
(5) 29 M. 437; 16 M. L. J. 178.

CALCUTTA HIGH COURT.

CIVIL REVISION CASE No. 924 OF 1924.

January 16, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

MANUJENDRA DUTT CHOWDHURY AND OTHERS—PLAINTIFFS—PETITIONERS

versus

JNAN RANJAN SOMADDAR AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 10—Accounts, suit for—Preliminary decree—Death of defendant—Abatement.

The provisions of O. XXII, r. 4 of the C. P. C., are applicable as well before as after a preliminary decree in a suit for accounts. Therefore, where after a preliminary decree in a suit for accounts, one of the defendants dies and no application is made to bring his legal representatives on the record under O. XXII, r. 4, the suit abates.

Rule against an order of the Court of the District Judge, 24-Perganas (Alipur), dated the $\frac{11th}{17th}$ April 1924, in Miscellaneous Appeal No. 256 of 1923

Mr. *Debendra Nath Mondal* and Babu *Narayan Chandra Kar*, for the Petitioners.

Babus *Hiralal Chakravarti* and *Syamadas Battacharjee*, for the Opposite Parties.

JUDGMENT.

Greaves, J.—The question which arises on this Rule arises in the following manner. The petitioners before us who were plaintiffs in the suit brought a suit for accounts. On the 24th June a preliminary decree for accounts was passed in favour of the plaintiffs. The original defendant the father of the opposite parties appealed against the decree of the 24th June 1920 and on the 30th November in that year the District Judge made an order staying further proceedings pending the hearing of the appeal. The original defendant, the father of the opposite parties died on the 25th September 1921 and on the 21st February 1922 the fact of his death was brought to the notice of the Court. It is stated that the plaintiffs were not represented in those proceedings and that, accordingly, they could not come to know of the death at that time. On the 21st February 1922 an order was made that the appeal had abated and on the 3rd March 1922 the appeal was dismissed. On the 20th April 1923 records were returned to the lower Court. On the 25th May 1923 an order was made for a Commissioner to take the accounts. An order was also made at this time setting aside the abatement which was said to have occurred owing to the death of the original defendant. The learned Judge subsequently withdrew this order as he said that there was no statement in the petition as to the date of the defendant's death. At any rate on the 25th May 1923 the death of the defendant became known to the plaintiffs. On the 4th July 1923, an application for substitution of the heirs of the deceased defendant was made by the petitioners. But this was refused and subsequently this Rule was obtained. It seems to us, assuming that the death was not known to the plaintiffs until the 25th of May 1923, that they have not explained the delay that had occurred between that date and the 4th July 1923 and we think that the Court below was right in the order that it made refusing the application for substitution on the grounds which are stated in the order.

A further point, however, has been raised before us on this Rule, namely, that the case is governed by the provisions of O. XXII, r. 10 and that consequently no question of time arises and that an order should have been made setting aside the abatement. We were referred in support of this proposition to various cases reported under the old C. P. C. and under s. 368 to which corresponds O. XXII, r. 4 and to s. 372 to which corresponds O. XXII, r. 10. The case mostly relied on under the old Code was the case of *Surendra Keshub Roy* v. *Khetter Krishto Mitter* (1). In that suit it was decided on directions to take an account in a suit that the suit is still pending within the meaning of s. 372 of the C. P. C., until the final order on the taking of the account is made and that the right to apply in such a suit to have the death of a defendant recorded and the names of his heirs substituted on the record accrues from day to day and is not barred under Art. 171 of the Second Schedule of the Limitation Act and it was further decided that s. 368 which as we have stated corresponding to O. XXII, r. 4 has no application to a case like this. Under the old Code, therefore, it was held that where a preliminary decree had been passed and one of the parties subsequently died the matter fell not under s. 368 but under s. 372 and consequently we are asked to say that the present case falls not under the provisions of O. XXII, r. 4, but under the provisions of r. 10 of that Order. As against this we were referred on behalf of the opposite parties to the fact that in s. 368 of the old Code the words "before decree," occur and it is stated that the omission of these words from O. XXII, r. 4 shows that an alteration in the law was intended and that it was intended that the provisions of O. XXII, r. 4, should operate as well before as after a preliminary decree in a suit for accounts. Consequently it is argued that the provisions of O. XXII, r. 10 has no application and that the order passed by the Court below was correct and we were further referred, in support of this

(1) 30 C. 609; 7 C. W. N. 517.

contention, to the case of *Bhutnath Jana* v *Tarachand Jana* (2), where it was held by a Division Bench of this Court that although a mortgagee has three years to apply for making a preliminary decree final, if the judgment-debtor died within that period the mortgagee had to apply within six months (this now being 90 days) to have his heirs substituted and that O. XXII, r. 4, applied to a case of that kind. I was inclined to think at first that the contention of the petitioners was correct and that the first four rules of O. XXII, apply to deaths occurring before a preliminary decree had been passed and that the provisions of O. XXII, r. 10 apply to the cases of deaths after passing a preliminary decree. But I think that the omission of the words in the old s. 368 of 'before decree' is very significant and that it is not possible now to say that O. XXII, r 4 does not cover a case of this nature and I am not prepared to say that the decision in the case of *Bhutnath Jana* v. *Tarachand Jana* (2) is not correct. Consequently, we think that the order of the Court below should stand and that this Rule should be discharged.

We make no order as to costs.

Mukerji, J.—I agree.

Z. K. *Rule discharged.*

(1) 59 Ind. Cas. 177; 33 C. L. J. 115; 25 C. W. N. 595.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 2 OF 1924.

November 13, 1924.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

RAGHO LAXMAN LOHAR—PLAINTIFF —PETITIONER

versus

GOVIND VAMAN DHAPRE—DEFENDANT —RESPONDENT.

Procedure—Small Cause transferred to regular list —Re-transfer to Small Cause list, validity of.

A suit was originally filed as a Small Cause by the plaintiff. On the application of the defendant it was transferred to the regular list and became a regular suit until the record was closed. The Judge, however, without recording reasons re-transferred the case back to the Small Cause Court's list and eventually dismissed the suit on the merits:

Held, that there being an order by a competent Court that the suit may be tried as a regular suit and not as a Small Cause Court suit, the Judge had no power to set aside that order and to re-transfer the case back to the Small Cause Court's list.

Application against the decision of the First Class Subordinate Judge at Ratnagiri, in Small Cause Suit No. 212 of 1933.

Mr. *S. R. Parulekar*, for the Petitioner.

Mr. *G. B. Chitale*, for Opponent No. 1.

JUDGMENT.—This suit was originally filed as a Small Cause Court suit by the plaintiffs. On the application of the defendant it was transferred to the regular list and became a regular suit until the record was closed. For reasons which do not appear to have been stated in writing the Judge re-transferred the case back to the Small Cause Court list. He then found on the issues without giving any reasons and dismissed the suit with costs.

That procedure was clearly irregular. There having been an order by a competant Court that the suit should be tried as a regular suit and not as a Small Cause Court suit, the Court would have no power to set aside that order and transfer the case back to the Small Cause Court list. The decree, therefore, must be set aside and the case must be remanded to the Subordinate Judge to continue the hearing from the time when the wrong order was made transferring the suit to the Small Cause Court list. The Rule is made absolute with costs.

Z. K. *Rule made absolute.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 87 OF 1924.

January 27, 1925.

Present:—Mr. Baker, J C.

SITARAM—PLAINTIFF—APPELLANT

versus

LAXMANRAO AND ANOTHER—DEFENDANTS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Mortgage-decree, preliminary—Final decree, application for, whether maintainable—Application, whether must be in writing—Presumption—Suit to set aside decree, whether maintainable.

Where a Court has jurisdiction to decide a matter but in the exercise of such jurisdiction it acts illegally or with material irregularity, its judgment is voidable but not void and can be vacated in an appropriate proceeding by way of review, appeal or

revision. A separate suit to set aside the judgment is not maintainable. [p. 821, col 2.]

A judgment vitiated by fraud is void but a judgment affected by an illegality or irregularity is merely voidable. [*ibid.*]

An application under O. XXXIV, r. 5 of the C. P. C., to make a decree final is not required to be in writing. [*ibid.*]

Where the law does not require an application to be in writing an oral application satisfies its requirements, and where an order is such that the Court would not have made it without an application by the judgment-creditor, it may be presumed that due application had been made for it. [p. 822, col. 1.]

Where the parties agree by compromise to a decree being passed in the form of a preliminary mortgage-decree, an application under O. XXXIV, r. 5 of the C. P. C., will lie to make the decree final, irrespective of the fact that the preliminary decree was framed as a decree in a mortgage suit merely as a matter of convenience. [*ibid.*]

Appeal against a decree of the District Judge, Nagpur, dated the 21st December 1923, in Civil Appeal No. 135 of 1923.

Mr. *A. C. Roy*, for the Appellant.

Mr. *M. B. Niyogi*, for the Respondents.

JUDGMENT.—The facts are set out in the judgments of the Courts below. There is no dispute as to them. The plaintiff brought the present suit for a declaration that the final decree passed on 14th July 1917 (in Suit No. 144 of 1910) was null and void as it had been passed without any application from the defendants to have it made final. The First Court decided in the plaintiff's favour, but on appeal this was reversed by the District Judge, Nagpur, who dismissed the plaintiff's suit.

The plaintiff makes this second appeal and raises two points.

(1) That an oral application to make the decree final is not allowed by law, and

(2) supposing it to be allowed there is no evidence whatever that any such oral application was made by the decree-holders.

Before dealing with these two points, I will consider the point raised by the learned Pleader for the respondents that the present suit to set aside a decree on a ground other than fraud is not maintainable.

The basis of the present suit is that the final decree is void for irregularity as it was made without any application from the decree-holders.

No question of jurisdiction arises in the present case, and there is no allegation of fraud.

The allegations at most amount to irregularity or illegality in the conduct of the proceedings.

The proper remedy in such a case is by way of appeal and not by separate suit. No appeal has been made against the decree sought to be set aside, and an application for review was rejected. The respondents rely on *Pande Satdeo Narain* v. *Ramayan Tiwari* (1), where it was held that although a suit does not lie to set aside an *ex parte* decree and a sale in execution of such decree on the ground that none of the processes in the suit or in execution were served upon the defendants, such a suit is maintainable if the allegations in the plaint amount to an attack not on the regularity or sufficiency of the service of summons or the proceedings, but on the whole suit in which the *ex parte* decree was obtained as being a fraud from beginning to end. At page 345* of the ruling the distinction between a void and a voidable judgment is pointed out, an irregular judgment being a voidable not a void judgment. When the Court has jurisdiction but in the exercise of the jurisdiction the Court has acted illegally or with material irregularity, the judgment is voidable and it can be vacated in an appropriate proceeding either by the Court which rendered it, or under the Code by the Appellate Court either in appeal or revision.

In the present case the Court had jurisdiction; no question of fraud arises. The contention of plaintiff is that it exercised its jurisdiction in an erroneous or irregular manner. In view of the above ruling I am of opinion that the plaintiff had a remedy by way of appeal or revision, but that a separate suit to set aside the decree will not lie.

The respondents further rely on *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (2).

The present suit would further appear to be barred by limitation, being brought about six years after the date of the decree.

On the merits also the appellant has no case. The two local cases he relies on *Chunnilal* v. *Tikamdas* (3) and *Vinayakrao Krishnarao* v. *Baijnath Saligram* (4) only decide that an application for making a decree final under O. XXXIV, r. 5, C. P. C. is an application in the suit and not in execution.

(1) 71 Ind. Cas. 705; 2 Pat. 335; 4 P. L. T. 147; (1923) A. I. R. (Pat.) 242.

(2) 23 Ind. Cas. 337; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457.

(3) 39 Ind. Cas. 854; 13 N. L. R. 76.

(4) 48 Ind. Cas. 934; 15 N. L. R. 36

*Page of 2 Pat.—[*Ed.*]

The learned Pleader for the appellant has not shown by what law an application under O. XXXIV, r. 5, C. P. C., is required to be in writing, and as stated in *Trimbak Bapuji* v. *Kashinath Vidyadhar* (5), where the law does not require a writing an oral application satisfies its requirements, and where the order is such that the Court would not have made it without an application by the judgment-creditor, it may be presumed that due application had been made for it.

It is not at all probable that the Judge would have made the decree final without an application by the decree-holders' agent who was present.

It would further appear from the cases quoted by the District Judge that the matter is *res judicata*.

It is contended on behalf of the respondents that O. XXXIV, r. 5, does not apply to the decree in suit which was a consent decree, and that the form of a mortgage-decree was merely used for convenience. They rely on *Hemendra Lal Singh Deo* v. *Fakir Chandra Datta* (6) and on *Sital Singh* v. *Baijnath Prasad* (7). In view however of the fact that the parties accepted the decree as under O. XXXIV, r. 5, C. P. C., I do not think this position can be maintained.

In view of the findings in the previous part of this judgment that the suit will not lie, the question of *res judicata* is not of importance. No suit will lie to set aside the decree and no appeal has been preferred against it.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(5) 22 B. 722; 11 Ind. Dec. (N. S.) 1064.

(6) 74 Ind. Cas. 929; 50 C. 650 at p. 656; 27 C. W. N. 621; (1923) A. I. R. (C.) 626.

(7) 75 Ind. Cas 485; 44 A. 668; 20 A. L. J. 602; (1922) A. I. R. (A.) 383.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 29 OF 1924.

January 30, 1925.

Present:—Mr. Denials, J. C.

ABDUL GHAFOOR—PLAINTIFF—APPELLANT

versus

RAM SEWAK AND OTHERS—DEFENDANTS—RESPONDENTS.

Practice—Pleadings—Variance between pleadings and proof—Duty of Court.

As a general rule a Court ought not to set up on behalf of a party a new case which has not been pleaded by him. Where, however, neither party in his pleadings discloses the entire truth and the findings adduced disclose a set of facts which is either midway between, or, at any rate, different from the case which either party has set up in his pleadings, the Court is bound to take notice of the true state of facts as proved by the evidence and to give effect to the legal rights which arise on that state of facts. [p. 823, col. 1.]

Appeal against a decree of the Additional Subordinate Judge, Sultanpur, dated the 3rd December 1923, reversing that of the Munsif, Sultanpur, dated the 20th May 1922.

Mr. *Naim Ullah* for Mr. *Niamat Ullah*, for the Appellant.

Messrs. *Radha Krishan Srivastava* for Mr. *Haider Husain* and *Ali. Muhammad*, for the Respondent No. 1.

Mr. *S. M. Ahmad*, for the Respondents Nos. 2 to 5.

JUDGMENT.—This, as is now admitted, was a suit for possession by partition of a half share in a house. I mention the fact of plaintiff being out of possession because this fact appears to have been slurred over at the time when the question of Court-fees was discussed prior to the admission of the appeal. The plaintiff purchased the half share he claims under a sale-deed executed by Jaggu. The common ancestor of Jaggu and the answering defendant Ram Sewak was named Sital. Sital had two sons Jaggu and Hanuman. Jaggu is the plaintiff's vendor. Hanuman was the grandfather of the answering defendant Ram Sewak. The plaintiff's case is that though the family has admittedly now separated this property remained common property of which the answering defendant and Jaggu are tenants-in-common and that Jaggu, therefore, owned an undivided half share which he was entitled to transfer to the plaintiff. The defendants' case was that Jaggu separated from the rest of the family in the lifetime of Sital and went to live in Ismailpur in another house also said to have belonged to the family, that Hanuman alone came into possession of the house in suit; that the original house which had belonged to Sital fell down altogether; and that the present house was built by Hanuman on its site with his own money.

The Court below had dismissed the suit. The main plea in appeal is that the learned Subordinate Judge has made out a new case for the defendant which he himsef did not set up and has erred in law in doing so.

There is also a question of limitation which has been decided against the plaintiff, but this question is intimately connected with the main question whether the plaintiff is a co-owner of the suit property or not.

The scope of the principle that a Court ought not to set up on behalf of a party a new case which has never been pleaded by him is well illustrated by two cases which have been cited by appellant's learned Counsel in support of his argument. The first is the case of *Babu Ram* v. *Babu Ram* (1). In this case the issue was one of priority between two charges on the same property, namely, a mortgage and a *takavi* advance. The Court below held in favour of the mortgage on the ground that the *takavi* advance was not given for the benefit of the property on which it was secured. It had never even been suggested by the defendant that the *takavi* had not been given for the benefit of this property, and this Court held that the lower Court had no right to dismiss the suit on that ground. The other case is *Sheo Charan Das* v. *Baij Nath Singh* (2). This was an application for restoration of a case on the ground that the defendant was absent looking for his Pleader when the case was called on and dismissed. The summons had been served on the defendant's *chela* and the defendant did not dispute that this was a sufficient service. The lower Court restored the suit, not on the ground pleaded by the defendant but on the ground that the service had never been properly served on him a ground which he himself never took up.

On the other hand there is another well-defined class of cases to which the principle does not apply. It frequently happens that neither party in his pleadings discloses the entire truth. It may happen that the evidence adduced discloses a set of facts which is either midway between, or at any rate different from, the case which either party has set up in his pleadings. In such cases the Court is obviously bound to take notice of the true state of facts as proved by the evidence, and to give effect to the legal rights which arise on that state of facts. This is what has happened in the present case. The finding of fact of the Court below, based, it may be noted, mainly on evidence led by the plaintiff himself, is as follows. The original house which stood on this site consisted of two portions, a front portion occupied after separation by Hanuman and his descendants and a back portion originally occupied by Jaggu. The site of the house does not belong to the parties but is *nazul*. About 25 years ago Jaggu's portion of the house entirely fell down and ceased to exist. Jaggu himself went to live in Ismailpur in a house belonging to his father-in-law. Hanuman subsequently built a new back portion to the house and that portion has been occupied by himself and his descendants ever since. It is further found that there is no other property belonging to the family which would necessitate any formal partition. It may be noted that even in the sale-deed on which the plaintiff's case is founded a separate portion of the house purports to be transferred, as the boundary of the share sold is given as the eastern portion of the house occupied by the vendor's nephew Sheo Shankar. Sheo Shankar is the son of Hanuman and the uncle of the answering defendant. Under these circumstances the learned Subordinate Judge drew the inference, as he was entitled to do, that although there was no formal partition either through the Court or through arbitrators the parties did from the time of separation occupy the front and back portions of the house respectively in separate and adverse possession, and that the half share of the house now claimed was built after the separation by Hanuman with his own funds and in his own separate property. From this finding the dismissal of the plaintiff's suit naturally followed. The decree of the Court below is correct and is not liable to be set aside. The appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 66 Ind. Cas. 620: 8 O. L. J. 343.
(2) 57 Ind. Cas. 563; 23 O. C. 104.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 26 OF 1924
November 27, 1924.

Present:—Mr. Baker, J. C.

MAHAMAD NIYAJUDDIN KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
JETHU—DEFENDANT—RESPONDENT.

C. P. Tenancy Act (I of 1920), Sch. II—Landlord

and tenant—Surrender—Licensee from tenant, position of—Suit by fresh grantee to eject licensee of former tenant—Limitation, Commencement of.

On the surrender of a tenancy a license granted by the former tenant expires and the licensee becomes a trespasser from the date of the surrender, and his possession becomes adverse to a fresh grantee of the tenancy rights from the *zemindar*, from the date of the grant, and limitation for a suit to eject the licensee by such grantee begins to run from the date of the grant under Sch. II of the C. P. Tenancy Act. [p. 824, cols. 1 & 2.]

Appeal against a decree of the Additional District Judge, Nagpur, dated the 29th November 1923, in Civil Appeal No. 28 of 1923.

Mr. *J. C. Ghosh*, for the Appellants.

Sir *B. K. Bose* and Mr. *P. N. Rudra*, for the Respondent.

JUDGMENT.—The facts of this case are apparently simple, but raise a difficult question of law. The disposal of this case also affects a number of people, and it will, therefore, be necessary to set up the facts in detail.

In the famine of 1913 a number of people of Balaghat came to Nagpur to earn their livelihood. One Mr. Bhide, who was an occupancy tenant of certain lands near Nagpur, gave these people the plot in dispute on a permanent lease for the purpose of building houses and they settled on it. Subsequently, Bhide being in financial difficulties surrendered his holding to the *Malguzar*, the Raja of Nagpur, and it was granted in perpetuity to the appellants. The area occupied by the defendant and his fellows is about 2 acres out of 69.70 acres. The appellants have started a farm on the holding and erected a large bungalow and they wish to get rid of the Balaghat people who have built a village on a portion of the land.

It is stated that some persons have vacated, but the defendant, who presumably represents his fellow squatters, has resisted the plaintiffs' claim. The suit of the plaintiffs has been dismissed by the lower Courts on the ground that it is barred by limitation under Sch. II of the Tenancy Act of 1920, read with s. 104, having been brought more than two years after the grant of the lease to the plaintiffs. The date of the lease is October 1919, and the suit was brought in August 1922.

It is undisputed law that on the surrender of a tenancy the license granted by the former tenant expires. The defendant, therefore, ceased to be Bhide's licensee from the date of his surrender, which is 2nd October 1919, and is a trespasser.

It is contended on behalf of the plaintiffs that no adverse possession on the part of the defendant arose until he refused their request to quit the land, which was within two years of the present suit. Schedule II of the Tenancy Act provides two years' limitation for possession of a holding by a tenant from which he has been dispossessed or excluded from possession by any person, the period beginning from the date of dispossession or exclusion.

We are not here concerned with the question of dispossession, but as a portion of the holding is actually occupied by the defendant's house, it is obvious that the plaintiffs are excluded from that portion of the holding, and the question then is whether the exclusion begins from the date on which the plaintiffs became entitled to possession or from the date on which the plaintiffs asked the defendant to quit.

It is not the plaintiffs' case that the defendant is his licensee. On reading the plaint and the pleadings it appears that the plaintiffs do not set up any case that the defendant was on the land with their permission, and, therefore, no question of the grant of a fresh license, either express or implied, arises. The position of the defendant is that of a trespasser from the date on which Bhide surrendered the land. It has been held in *Karelal* v. *Badriprasad* (1) that when the grantor of a license with respect to immoveable property dies, his heir is competent to treat the licensee as a trespasser without giving notice of revocation. This case is based on two English cases *Wallis* v. *Harrison* (2) and *Coleman* v. *Foster* (3) in both of which it was held that on the termination of the license the licensees were liable in trespass to the transferees, the license being of a personal character not merely as regards the grantee, but also as regards the grantor. In the absence, therefore, of any fresh license by the plaintiffs the defendant was a trespasser from the date of Bhide's surrender, and therefore, it would appear that his possession must be regarded as adverse to the plaintiffs from the date of the lease to them.

(1) 68 Ind. Cas. 107; 18 N. L. R. 76; (1922) A. I. R. (N.) 162.

(2) (1838) 51 R. R. 715; 4 M. & W. 538; 8 L. J. (N. S.) Ex. 44; 1 H. & H. 405; 2 Jur. 1019; 150 E. R. 1543.

(3) (1856) 108 R. R. 442; 1 H. & N. 37; 4 W. R. 489; 156 E. R. 1108.

I have been unable to find a case exactly on all fours with the present case, nor have Counsel on either side been able to quote one. But there can be no doubt that the plaintiffs' right to recover the whole of the land as tenants accrued on the date of acquiring the lease of the holding in October 1919 and that they were excluded by the defendant from that date. The date of the exclusion, therefore, was in October 1919, and the only way in which the plaintiffs could avoid the provisions of Sch. II would be by showing that they granted a fresh license to the defendant, or by an agreement between them, the defendant was allowed to remain on the land, which comes to the same thing. But in the plaint and in the pleadings the plaintiffs have not set up any case of this character, although they say in the plaint that the defendant did not quit when asked to do so. It appears, therefore, that in October 1919 the license granted to the defendant ceased and he became a trespasser as regards the plaintiffs from that date. His possession, therefore, was adverse to the plaintiffs, who were excluded from possession of a portion of the holding by him and, therefore, the suit to eject him should have been brought within two years from October 1919.

In these circumstances I agree with the view of the Courts below that the suit is barred by limitation, and the appeal, therefore, will be dismissed with costs. It is not necessary to go into the other contentions which had been raised by the defendant and were not dealt with by the lower Appellate Court.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 696 OF 1923.

October 24, 1924.

Present:—Mr. Justice Srinivasa Iyengar.

DIVI DWARKACHARYULU—PETITIONER

versus

KOTHAPALLI SRIKRISHNAN—RESPONDENT.

Madras Local Boards Act (XIV of 1920), as amended by Madras Act II of 1922, Sch. X, r. 15, sub-cl. (3) —Local Board Oath of allegiance, failure of members to take -Election of President by such members, validity of -Meeting for election of President -Adjournment Election at adjourned meeting, legality of

Under the Madras Local Boards Act of 1920 as amended by Madras Act II of 1922 every person appointed or elected to be a member of a Local Board is bound to take the oath of allegiance before he takes his seat, that is to say, before he enters upon the rights and duties of his office.

The election of a President by members who have not taken their oaths of allegiance is an election not by members of the Union Board at all, and is invalid.

Under sub-cl. (3), r. 15 of the Transitory Provisions in Sch. X of the Act, the power to elect a President is conferred only on a meeting called by the President on the date and at the time fixed by him.

Where a meeting called for such a purpose is adjourned, an election of a President held at the adjourned meeting is invalid.

Petition, under s 115 of Act V of 1908, praying the High Court to revise the judgment and decree, dated the 10th February 1923, in O. S. No. 137 of 1922, on the file of the District Court, Kistna at Masulipatam.

Mr. *B. Jagannadha Doss*, for the Petitioner.

Mr. *P. Somasundaram*, for the Respondent.

JUDGMENT.—In this petition, I am asked to revise an order passed by the District Court of Kistna setting aside the election of the petitioner as President of a Union Board.

The two grounds on which the learned District Judge set aside the election are (1) that the members of the Union Board had not taken their oaths of allegiance before the alleged election was held and (2) that the meeting at which the election of the President took place was a meeting not held on the day and at the time fixed by the President of the Taluk Board as required by sub-cl. (3) of r. 15 of the Transitory Provisions contained in Sch. X of the Local Boards Act, but on subsequent date to which the meeting originally called was adjourned by the President of the meeting because there was no quorum present on the first occasion. I think the decision of the learned District Judge on both these points was correct.

As regards the first contention, the Act required that the oath should be taken by every member before he takes his seat. That undoubtedly means before he enters upon the rights and duties of his office. As the right to elect a President is part of the rights which accrue to him only as a member of the Union Board and as the terms of the section prevent him from taking his seat, that is to say, from exercising any rights of his office before he takes his

oath of allegiance, it is clear that the election of a President by members who had not so taken their oaths of allegiance was an election not by the members of the Union Board at all but by some irresponsible body.

With regard to the second question, if the words of the rule were that a meeting shall be called by the Taluk Board President for the purpose of the election of the President of the Union Board and that the President of the Union Board shall be elected at such meeting, then it may be open to the contention that though there was no quorum for the meeting originally called by the Taluq Board President, the adjourned meeting was really a continuation of the same meeting and that, therefore, the election of the President was at such meeting. But the words of the rule are that the meeting shall be held on a day and at a time fixed by the President of the Taluq Board for the election of the President to the Union Board. Therefore, the power to elect a President is conferred only on a meeting called by the President on the date and at the time fixed by him. From the evidence it is clear that the meeting at which the election took place was not such a meeting.

The petition, therefore, fails on both the grounds. It is, therefore, unnecessary for me to consider the question whether if the decision of the lower Court on both these grounds was wrong, I have or have no jurisdiction to interfere with the order made by him.

The petition is dismissed with costs.

Petition dismissed.

V. N. V.

Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 311 OF 1923.

November 20, 1924.

Present:—Mr. Hallifax, A. J. C.

TIJAU—DEFENDANT—APPELLANT

versus

GOPI—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (I of 1920), ss. 12 (1) (ii), 13—Occupancy tenant—Transfer of holding—Ejectment suit—Jurisdiction of Civil Court—Test.

Where the transfer of an occupancy tenant right would be valid between the parties thereto except for the prohibition contained in s. 12 of the C. P. Tenancy Act, 1920, it can only be avoided in the manner and to the extent provided by s. 13 thereof. No suit to avoid it can be maintained in the Civil Court. [p. 828, col. 1.]

In other words no landlord can sue in a Civil Court to evict a person to whom an occupancy tenant has made over his holding unless that person is one of those persons mentioned in s. 12 (1) (*ii*) of the C. P. Tenancy Act of 1920 or holds under a lease for not more than one agricultural year granted not more than two months before the beginning of that year, without any covenant to renew being attached to it; in all other cases he must apply to a Revenue Officer under s. 13 of the Act. [p. 829, col. 1.]

Case-law discussed.

Appeal against a decree of the Additional District Judge, Raipur, dated the 13th April 1923, in Civil Appeal No. 24 of 1923.

Mr. *J. C. Ghosh*, for the Appellant.

Dr. *H. S. Gour*, for the Respondent.

JUDGMENT.—Stripped of irrelevancies the facts with which we are concerned are only that one Man Singh, an occupancy tenant of land belonging to the plaintiff Gopi, transferred his occupancy holding by sale to the defendant Tijau on the 17th of February 1922, executing a deed as evidence of the transfer, and that Tijau is not the landlord or even one of the landlords of the holding nor a person who, if he survived Man Singh without nearer heirs, would inherit his occupancy right, nor was he co-tenant of the holding. The landlord Gopi sued in the Court of the Subordinate Judge for the ejectment of Tijau as a trespasser and was given a decree for possession of the holding, which was confirmed on appeal.

On these facts, which are really all the facts with which we have concern, it seems clear enough that Man Singh transferred his right in his holding to Tijau in contravention of s. 12 of the Tenancy Act, 1920. Consequently the landlord Gopi could apply to a Revenue Officer under s. 13 of the Act, and by s. 14, the Revenue Officer is empowered to set aside the transfer and put him in possession of the holding on certain terms. Under s. 105 of the same Act, therefore, no Civil Court can entertain the present suit by Gopi to set aside the transfer or declare it void and put him in possession, and the suit ought to have been dismissed, or rather the plaint ought to have been rejected as disclosing no cause of action triable by a Civil Court.

To understand the decisions of the Courts below and the arguments put forward in support of them it is necessary to state a few other facts and pleadings. The

defendant pleaded that he was a fractional landlord of the holding, but it is now admitted that he comes no nearer to that than being the owner of another *patti* in the same village as Gopi's *patti* in which the holding lies; that gives him no more rights in the holding than being owner of a neighbouring or even distant village would. The deed executed by Man Singh, however, untruly described Tijau as landlord of the holding and called itself a surrender, and by reason of these recitals it was admitted to registration. That was in direct contravention of s. 12 (4) of the Tenancy Act, and it has been correctly held that the document must be regarded as unregistered.

The learned Additional District Judge, as I understand his judgment, has held that a Civil Court has jurisdiction in the case because the transfer was void for want of registration of the document by which it was made and was, therefore, not a transfer in contravention of the provisions of s. 12 of the Tenancy Act. In this view he purports to follow the ruling of Stanyon, A. J. C., in *Ganeshdas* v. *Shankar* (1), and finds himself unable to follow that of the Hon'ble the Financial Commissioner in *Moolchand* v. *Munney* (2). It is very commonly supposed that there is a conflict between these two rulings and that the former supports the view here taken, following that set out by Ismay, J. C., in *Chamru Sao* v. *Tulsidin Singh* (3) and *Daji Vithal* v. *Moreshwar* (4) in which Sir Stanley Ismay dissented from that taken by Drake-Brockman, A. J. C., in *Dayaram* v. *Shaligram* (5). The fallacies in the reasoning seem to me almost too obvious to need refutation. It is, however, by no means uncommonly accepted, though it is certainly not supported by any of the judgments mentioned.

The latest published ruling on the point is that of Stanyon, A. J. C., in *Ganeshdas* v. *Shankar* (1). Where by mistake or otherwise divergent judgments of Single Judges have been included in the official publication of rulings of this Court, I am bound to follow the latest of them, unless I feel sufficient doubt of its correctness to refer the question to a Bench, which could overrule it. Here, however, am respectfully and entirely in agreement with the views expressed, and, therefore, far from being in agreement with the misinterpretation of those views which is so lamentably common and will be discussed later. Those views are clearly explained by the Hon'ble the Financial Commissioner. in *Moolchand* v. *Munney* (2), where the ruling is followed, though it is generally supposed, as it was by the learned Additional District Judge in this case, that the two rulings are directly contradictory.

It is advisable to examine the published rulings on this point in chronological order. The first is that of Drake-Brockman, A. J. C., in *Dayaram* v. *Shaligram* (5). About that there is no doubt; in circumstances exactly similar to those of the present case it was held that the landlord had a remedy by application to the Revenue Officer, which barred his suit in the Civil Court. In that case the fact that the deed of transfer was registered in 1899, when registration was forbidden by the Tenancy Act then in force just as it is now, is mentioned, but the nullity of that registration is not. The learned Judge doubtless regarded the matter as having no bearing whatever on the case, which certainly seems the correct view of it.

The second and third cases are those of *Chamru Sao* v. *Tulsidin Singh* (3) and *Daji Vithal* v. *Moreshwar* (4) in which Ismay, J. C., affirmed the view set out in *Dayaram* v. *Shaligram* (5), but distinguished the case in a way that I cannot but regard as fallacious. My respect for Sir Stanley Ismay is such that I have reached this conclusion with reluctance and even now express it with diffidence, but it seems to me inevitable. The first case is distinguished by the fact that the transfer deed in it was not registered though the consideration was more than Rs. 100, and the second by the fact that though the formalities of registration had been gone through, the deed must still be treated as unregistered, whereas that in *Dayaram* v. *Shaligram* (5) had to be treated as unregistered in the same way and for the same reasons as that in the second case and in the same way as that in the first case. Anyhow, even if both the rulings are correct, they cannot be any authority for the view in support of which they are so often quoted, that the jurisdiction of the Civil Court is restored by the fact

(1) 13 Ind. Cas. 909; 8 N. L. R. 22.
(2) C. P. R. R. 24.
(3) 17 C. P. L. R 49.
(4) 1 N. L. R 112.
(5) 16 C. P. L. R. 135.

that the formalities of registration have been gone through, because they had not been gone through in the first and were held to be of no effect in the second.

The head-note in *Ganeshdas* v. *Shankar* (1), with which as I have said I am in entire and respectful agreement, altered in its references to the Statute to fit that now in force, would read as follows: "Where the transfer of an occupancy tenant right would be valid between the parties thereto except for the prohibition contained in s. 12 of the C. P. Tenancy Act, 1920, it can only be avoided in the manner and to the extent provided by s. 13 thereof. No suit to avoid it can be maintained in the Civil Court." This is often taken to mean, as has been done in this case, that where the document has been actually though wrongly and even fraudulently registered, the transfer would be valid between the parties in spite of the provisions of s. 12 of the Tenancy Act 1920, and would be invalidated only by the lack of proper registration. Again I have to say that the fallacies involved in this view of the matter appear to me so obvious that I find some difficulty in refuting them as I cannot discover on what they are based.

One not uncommon reason for this misreading of the judgment in *Ganeshdas* v. *Shankar* (1) is, as I have found, a misreading of the fourth of the five instances given at the very end of the judgment of cases in which a Revenue Officer would not have jurisdiction and a Civil Court, therefore, would. That is a case "where the transfer is made by an instrument compulsorily registrable but not registered." To hold that this refers to such a transfer as was made in the present case is to accuse the learned Judge of contradicting the whole of a long judgment by a casual explanatory remark at the end, and also of using the term "compulsorily registrable" of a document which is compulsorily non-registrable. The reference is obviously to a transfer to one of the persons to whom an occupancy tenant is allowed by the Tenancy Act to transfer his holding, that is to say a transfer which is not invalid because of the provisions of s. 46 or s. 70 of the C. P. Tenancy Act, 1898, as those provisions prohibit neither the making of such a transfer nor registration of the document by which it is made, and the necessity for registration of that document is, therefore, governed by the ordinary law.

I have never yet been able to see how the subsequent addition of one more void or fraudulent or meaningless formality in the making of the transfer of his holding by an occupancy tenant could make that transfer any less or any more void or voidable, or make it any less a transfer that is voidable by reason of being in contravention of the provisions of s. 12 of the Tenancy Act, if it was so before the document was registered. But even if the transfer were void or voidable only for want of registration of the deed of transfer, it is still so only because of one of the provisions of s. 12 of the Tenancy Act. If the document is in fact registered, that registration would be valid except for the provisions of s. 12, and it has to be treated as unregistered only because of the last of them. Similarly if it is not registered at all, that is only because of the same provision prohibiting registration. And anyhow there is an obvious and glaring inconsistency in saying both that the document was registered and, therefore, the Civil Court has jurisdiction and also that the document was not registered (though the forms of registration were carried out) and, therefore, the transfer is void.

Another almost equally impossible argument very frequently used in this connection and put forward in this appeal on behalf of the respondent, of which traces are visible in the judgment of the lower Appellate Court, is this. Section 13 of the Tenancy Act says that the Revenue Officer can interfere only when "an occupancy tenant transfers his right in his holding or any portion thereof in contravention of the provisions of s. 12", which means only when he makes a valid transfer of his holding, and the Revenue Officer has no jurisdiction in respect of a void attempt to transfer. This was stated as follows by another learned Judge in a case recently before me: "There is no transfer of right in the holding where the deed is not validly registered, and s. 13 of the Tenancy Act requires as the preliminary to exercise of powers (by the Revenue Officer) that there must be a transfer of the right in the holding."

This, as far as I can understand it, is a repetition of the fallacies already mentioned, with the addition of others. As no deed transferring an occupancy right in contravention of the provisions of s. 12 of the Tenancy Act can be validly

registered, the argument implies that we must insert the word *validly* before the word *transfers* in s. 13, thereby reducing the whole section to a meaningless nullity, as was explained in *Moolchand* v. *Munney* (2). There is no possible justification for accusing the Legislature of the perpetration of such an absurdity as "a valid transfer in contravention of the provisions of s. 12."

It is hard if not impossible to state the law more clearly than it is already stated in the Tenancy Act and explained in *Ganeshdas* v. *Shankar* (1) and *Moolchand* v. *Munney* (2). It may perhaps be better understood if I say that no landlord can sue in a Civil Court to evict a person to whom an occupancy tenant has made over his holding unless that person is one of those mentioned in s. 12 (1) (*ii*) of the Tenancy Act, 1920, or holds under a lease for not more than one agricultural year granted not more than two months before the beginning of that year, without any covenant to renew being attached to it; in all other cases he must apply to a Revenue Officer under s. 13 of the Act. The decree of the lower Appellate Court, being one that that Court had no jurisdiction to pass, will be set aside and the plaintiff's suit will be dismissed. Each party ought obviously to bear its own costs in all three Courts, and it will be so ordered.

G. R. D.
Z. K. *Suit dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 72 OF 1923.
April 6, 1925.
Present:—Mr. Dalal, J. C., and
Mr. Wazir Hasan, A. J. C.
JAGANNATH SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
JAG JIWAN DAS—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Transfer of Property Act (IV of 1882), s. 72—Execution of decree—Sale of mortgaged property—Mortgagee, whether entitled to apply to set aside sale on deposit—Deposit, amount of, whether can be added to mortgage-money.

The question whether a person holds an interest in property sold in execution of a decree by virtue of a title acquired before such sale, within the meaning of r. 89 of O. XXI, of the C. P. C., is not one of pure law but must always be decided with reference to the particular circumstances of each case. [p. 831, col. 1.]

Where a mortgaged property is sold in execution of a decree against the mortgagor with merely a note at the foot of the proclamation that the property is incumbered with a charge up to a certain amount, the mortgagee is a person holding an interest in the property by virtue of a title acquired before the sale within the meaning of r. 89 of O. XXI of the C. P. C., and is entitled to make an application under that rule to set aside the sale, and by virtue of s. 72 of the Transfer of Property Act is entitled to add the amount of the deposit to his mortgage-money with interest at the rate payable on the principal amount of the mortgage. [p. 831, cols. 1 2.]

Appeal against the judgment and decree of the Subordinate Judge, Fyzabad, dated the 10th August 1923.

Messrs. *Niamatullah* and *M. Wasim*, for the Appellants.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Respondents.

JUDGMENT.—This is an appeal from the decree dated the 10th August 1923 of the Subordinate Judge of Fyzabad. The defendants to the suit, out of which this appeal arises, are the appellants. The plaintiff-respondent has also filed cross-objections in respect of the same decree.

A 12 annas $1\frac{1}{3}$ pies share in *Mouza* Nasrullahpur and the entire village Hashimpur situate in Pargana Tanda, District Fyzabad, are owned by the defendants. Their predecessors made several mortgages in respect of these villages in favour of the plaintiff's predecessor-in-interest. All these mortgages were effected prior to the year 1917. The majority of them were mortgages simple in character and the rest were possessory mortgages. Under the mortgages of the latter description the mortgagee entered into possession of the villages mentioned above and has admittedly been in possession all along.

On the 30th May 1917 the defendants executed a mortgage in respect of the same property in favour of one Balramdas. This mortgage was a simple mortgage and was made in consideration of a loan of Rs.20,000. The ostensible object of this mortgage was to raise money to satisfy the mortgages, presumably simple, standing in favour of the plaintiff's predecessor-in-interest (Ex. 15). It is admitted that this object recited in the deed of mortgage was not fulfilled. On the 7th January 1918 Balramdas instituted a suit against the defendants for the realization of the mortgage-money due to him under the deed of the 30th May 1917. The relief he asked

for was the sale of the villages in question (Ex. 16). To this suit the plaintiff or his predecessor-in-interest was not made a party. The suit ended in a compromise between the parties (Ex. A-1) and a preliminary decree for sale was passed on the 8th April 1918 (Ex. A-2). The decree was made absolute on the 1st March 1919 (Ex. A-3). In pursuance of the last-mentioned decree proceedings were taken by Balramdas for the sale of the property mentioned above. The property being ancestral the sale was conducted by the Collector of the District. Finally the villages were sold by public-auction on the 20th August 1920 and purchased by one Abdul Wajid for a sum of Rs. 60,000 (Ex. A-6). On the 13th September 1920 the plaintiff's predecessor-in-interest Thakur Ram Sahu, deposited in the Court of the sale officer the sum of Rs. 29,246-6-0. This sum represented the amount of Balramdas's decree, Rs. 26,122-6-0, for payment to the decree-holder and 5 per cent. of the purchase-money, Rs. 3,000, for payment to the purchaser and a further sum of Rs. 124 for the auction-sale charges (Ex. 11). Along with this deposit he presented an application to the sale officer, asking for an order setting aside the sale in terms of O. XXI, r. 89, of the C. P. C. In this application Thakur Ram Sahu stated that he had been in possession of the property for about 27 years under a usufructuary mortgage and held several other mortgages in respect of the same. It was further stated that the sale proclamation omitted to mention the fact of the applicant's possession (Ex. 21). The sale officer accepted the deposit and directed notices to issue both to the judgment-debtors and the auction-purchaser (Ex. 19). On the 9th October 1920 protests were lodged by the judgment-debtors and also by Abdul Wajid, the purchaser, by separate applications (Exs. A-9 and A-10). The judgment-debtors said that Thakur Ram Sahu had no right to make the deposit under O. XXI, r. 89, of the C. P. C., and that the sale be confirmed. The purchaser Abdul Wajid, stated that according to the allegation of Thakur Ram Sahu himself the latter's possession had been under a usufructuary mortgage for a long time and that in the circumstances the former had purchased only the right of redemption. He asked that Thakur Ram Sahu's application under O. XXI, r. 89, of the C. P. C., be dismissed. On the 13th October 1920 the sale officer considered Thakur Ram Sahu's application and the two objections relating thereto and came to the conclusion that the applicant "held an interest" in the property sold in execution of Balramdas's decree and was consequently entitled to make the deposit which he had made and to have the sale set aside under r. 89 of O. XXI, of the C. P. C. He accordingly made a recommendation for an order to set aside the sale (Ex. A-11). His recommendation was accepted by the Collector of the District in a well-considered judgment, dated the 26th October 1920 and accordingly the order of the sale officer setting aside the sale was confirmed (Ex. A-12). The judgment-debtors preferred an appeal from the Collector's order to the Commissioner of the Division. The appeal was dismissed on the 1st August 1921 (Ex. A-13). From a perusal of the Commissioner's judgment it appears that the argument advanced before him on behalf of the appellants was that inasmuch as only the equity of redemption was sold and in that equity the applicant Thakur Ram Sahu, being a prior mortgagee, had no interest, he had no *locus standi* to apply for setting aside the sale under O. XXI, r. 89, of the C. P. C. To this argument the learned Commissioner gives the following answer in his judgment:—

"I consider that in this case the decision must turn upon the sale notification. Here the whole property was put to sale with the remark that it was subject to a mortgage. It is difficult, therefore, to say that only the equity of redemption was put up to sale."

On the 25th September 1922 the suit out of which this appeal arises was instituted by the plaintiff-respondent for the recovery of the money which he had deposited on the 13th September 1920 in the circumstances already mentioned together with interest thereon at the rate of 12 per cent. per annum. The first relief for which he asks is the sale of the 12 annas $1\frac{1}{3}$ pies share in *Mouza* Nasrullahpur and the entire village Hashimpur including Manjha Hashimpur. In the alternative he asks for a money-decree against the defendants. To this suit several defences were raised and in view of those defences the learned Subordinate Judge framed four issues for decision. These issues will be

found stated in his judgment and it is not necessary to repeat them here.

The learned Subordinate Judge refused to give either a decree for sale or a simple money-decree. He, however, granted a declaration in favour of the plaintiff to the effect that he was "entitled to add on to his own mortgage-money Rs. 29,246 and to recover it along with his own mortgage-money with interest as above stated (that is at the rate provided in his own mortgage." He refused to award any costs to the plaintiff on the ground that according to him his conduct had not been fair.

Taking the appeal and the cross-objections together, we have to decide only two points in the case. Is the plaintiff entitled to the declaration which has been granted to him by the lower Court and in the alternative, is he entitled to a money-decree as against the defendants? We have come to the conclusion that, in the circumstances of this particular case, the decree passed by the lower Court should be maintained as it is.

The argument in the appeal is exactly the same as was advanced before the Commissioner and to which we have already made a reference in a preceding portion of this judgment. It is argued that the plaintiff-respondent had no 'interest' within the meaning of r. 89 of O. XXI of the C. P. C., to make the deposit which he did and that consequently the deposit was altogether an officious act. We are unable to accept this argument. Having regard to the entries in the sale proclamation (Ex. 23) it is impossible to say that the plaintiff was not a "person.....holding an interest therein by virtue of a title acquired before such sale." In our opinion the question is not of pure law but it must always be decided with reference to the particular circumstances of each case. The sale proclamation nowhere mentioned that the bare right to redeem was the subject-matter of the contemplated sale. In that proclamation the property to be sold was stated to be the 12-annas $1\frac{1}{3}$-pies share of *Mouza* Nasrulahpur and the 16-annas share of *Mouza* Hashimpur. At the foot of the proclamation a note was made that "the property sought to be sold is encumbered with the mortgage charge of Rs. 68,195-11-6." Neither the dates of the mortgages nor the names of the mortgagees were mentioned anywhere in the proclamation. The fact that on an inquiry being held as to the dates of the mortgages it would appear that they had all priority over the mortgage in respect of which the decree in execution of which the sale was to take place was passed and the further fact that by applying the law the result would have been reached that only the right to redeem could have been sold are, in our judgment, no relevant consideration for determining the question as to what, as a matter of fact, was intended to be and was sold.

It is obvious that the decree which the learned Subordinate Judge has granted to the plaintiff is founded upon the provisions of s. 72 of the Transfer of Property Act, 1882. It is argued on behalf of the appellants that that section is not applicable to the case before us. The relevant portion of s. 72 is cl. (*b*) and when that section is read only in relation to that clause it will stand as follows:—"When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary for its preservation from destruction, forfeiture or sale." The argument is that the sale contemplated by the section is only such a sale as would imperil the mortgagee's security and in the present case the sale being in respect of the equity of redemption alone there was no question of imperilling the security of the plaintiff's mortgage. Broadly speaking, the argument may be correct but here again we think that it is always a question of fact or at least a mixed question of fact and law as to what is 'necessary' and what in fact was to be sold. These questions must be decided with reference to the particular circumstances of each case. What those circumstances are in the case before us we have already stated. We, therefore, think that the plaintiff acted within his rights as provided by s. 72 of the Transfer of Property Act, 1882 in obtaining the order setting aside the sale by making the deposit under r. 89 of O. XXI of the C. P. C. According to the same section there being no contract to the contrary he is entitled to add the amount of the deposit to his own mortgage-money with interest at the rate payable on the principal amount of his mortgage. The learned Subordinate Judge has done no more than merely granting a declaration as to such rights of the plaintiff as he is entitled to in law.

The appeal, therefore, fails and is dismissed with costs.

In the appeal we have held that the relief to which the plaintiff is entitled in the circumstances of this case is provided by s. 72 of the Transfer of Property Act, 1882, it follows that he is not entitled to a simple money-decree. The cross-objections are also dismissed with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 111 OF 1924.

November 24, 1924.

Present:—Mr. Baker, J. C.

MOTIRAM—DEFENDANT—APPLICANT

versus

GAMBHIR PRASAD—PLAINTIFF—NON-APPLICANT.

Limitation Act (IX of 1908), Sch. I, Art. 85—Employee engaged on annual salary—Advances taken from time to time—Suit for recovery of excess drawings—Limitation applicable.

A suit for the recovery of excess drawings by an employee who was engaged on an annual salary and used to draw advances against such salary is governed by Art. 85 of Sch. I, to the Limitation Act, and limitation begins to run from the end of the year in which the last item is entered in the accounts.

Pandurang v. *Kalludas*, 65 Ind. Cas. 881, relied on.

Lakshmayya v. *Jagannatham*, 10 M. 199; 3 Ind. Dec. (N. S.) 891, referred to.

It is not necessary for the applicability of Art. 85 of Sch. I to the Limitation Act that the accounts should give rise to independent obligations or mutual demands or that the balance should shift from one side to the other, it is sufficient if the amount to the credit of the plaintiff varies from day to day and might exceed the amount due by him.

Madhav v. *Jairam*, 63 Ind. Cas. 950; 23 Bom. L. R. 540 and *Satappa* v. *Annapa*, 76 Ind. Cas. 115; 47 B. 128; 24 Bom. L. R. 1284; (1923) A. I. R. (B.) 82, relied on.

Application for revision of the decree of the Small Cause Court Judge, Nagpur, dated the 31st January 1924, in C. S. No. 1357 of 1923.

Mr. *R. N. Padhye*, for the Applicant.

Mr. *M. R. Bobde*, for the Non-Applicant.

ORDER.—The only question in this application is whether the suit falls under Art. 85 of the Limitation Act or not. The defendant was in the employment of plaintiff and drew advances against his salary from time to time. The plaintiff sued to recover the excess drawn by the defendant over the salary due to him. The defendant left the plaintiff's service on 10th May 1920 and the suit was brought on 15th May 1923. The defendant contended that the claim was barred by limitation. The Judge of the Small Cause Court, Nagpur, held that Art. 85 applied and limition began to run from 11th November 1920 the end of the year in which the last item is entered in the accounts. Defendant applies in revision.

The case of master and servant is covered by authority. No doubt *Lakshmayya* v. *Jagannatham* (1) is a case of principal and agent but in *Pandurang* v. *Kalludas* (2) (Civil Revision No. 271 of 1921, decided on 9th March 1922), Art. 85 has been applied to an exactly similar case on the point and in a recent case of *Nanaji* v. *Rajaram Sao* (Civil Revision No. 204 of 1924, decided on 3rd October 1924), I summarily dismissed an application in which the lower Court had applied Art. 85 in the similar circumstances.

In the present case the defendant's salary was fixed by the year and the amount to his credit varied from day to day and might exceed the amount of the advances taken by him. It is not even necessary that the accounts should give rise to independent obligations or mutual demands, or that the balance should shift from one side to the other: *Cf.*, *Madhav* v. *Jairam* (3) and *Satappa* v. *Annappa* (4).

The present case is not like that of a creditor advancing money to a debtor who makes payments at instalments. In that case there could be no question of overpayment by the debtor. In the present case it is possible that the balance might be in favour of the defendant. I agree with the view taken by the Court below.

The application is dismissed with costs.

Z. K. *Application dismissed.*

(1) 10 M. 199; 3 Ind. Dec. (N. S.) 891.
(2) 65 Ind. Cas. 881.
(3) 63 Ind. Cas. 950; 23 Bom. L. R. 540.
(4) 76 Ind. Cas. 115; 47 B. 128; 24 Bom. L. R. 1284; (1923) A. I. R. (B.) 82.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 276 OF 1924.

January 8, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Mukerji.

JESSARAT AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 297, 298—Sessions trial—Mixed Jury on communal basis, whether can be allowed—Vague allegation against Juror—Discharge of Jury Charge to Jury, essentials of—Material omission Misdirection.

The law does not provide for a mixed Jury on a communal basis and an accused person is not entitled to ask for such a Jury. [p. 834, col. 1.]

The Court has inherent jurisdiction to discharge a Jury on the ground of misconduct or necessity which must be established in fact; but a vague allegation unsupported by any affidavit alleging that a Juror has told an outsider that he has already formed an opinion regarding the case, without giving any details, is not such on which the Court ought to act. [p. 834, col. 2.]

The failure of the Judge in a Sessions trial to present in his summing up to the Jury the First Information Report in its true perspective, which affects the complicity of the different accused persons in the offence, as also the credibility of the evidence given by some of the important witnesses in the case, constitutes a serious misdirection sufficient to vitiate the verdict of the Jury. [p. 836, cols. 1 & 2.]

The summing up contemplated by law is a fairly full and distinct statement of the evidence with such advice as to the legal bearing of that evidence and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest. The Judge must formulate and specify simple issues for the consideration of the Jury, and collate the evidence *pro* and *con* bearing upon the issues in order to assist the Jury to arrive at a correct decision thereon. Merely summarising the evidence, examination-in-chief, cross-examination and re-examination of the different witnesses who have deposed at the trial and putting before the Jury all that has been said by the witnesses or by the lawyers appearing on the two sides, and huddling together important facts as well as trivial points without any attempt at discrimination, instead of aiding the Jury only confuses them and does not comply with the object which the law has in view. Where there are several accused persons in a case the strength or weakness of the evidence of the witnesses as against each accused individually should be pointed out to the Jury. [p. 837, cols. 1 & 2.]

Appeal against an order of the Sessions Judge, Rangpur, dated the 8th March 1924.

Mr. *M. Wahed Hossein*, Babus *Promotho Lal Dutt* and *Sishir Kumar Banerjee*, for the Appellants.

Mr. *S. R. Das*, Advocate-General, for the Crown.

JUDGMENT.

Mukerji, J.—This appeal has been preferred by nine persons, Chota Jessarat, Baro Jessarat, Tazer, Gendla, Mazarulla Mistri, Kasim, Genda Fakir, Mohorulla and Amanulla Gachua, who were tried by the Sessions Judge of Rangpur with the aid of a Jury. The Jury brought in a unanimous verdict of guilty against all the accused under ss. 147 and 366, Indian Penal Code and against Chota Jesarat, Tazer, Gendla, Kasim, Genda Fakir and Mohorulla under s. 457, Indian Penal Code and against Baro Jessarat, Mazarulla Mistri and Amanulla Gachua under ss. 457/149, Indian Penal Code. The learned Judge agreeing with and accepting the said verdict convicted the accused in respect of the offences of which they were found guilty by the Jury, and sentenced them only under s. 366, Indian Penal Code; the accused Chota Jessarat, Tazer and Gendla being each sentenced to undergo rigorous imprisonment for seven years, and the accused Baro Jessarat, Mazarulla Mistri, Kasim, Genda Fakir, Mohorulla and Amanulla Gachua being each sentenced to undergo rigorous imprisonment for six years.

The appellant Kasim died in jail during the pendency of the appeal, and his case is not before us now.

Of the grounds urged in support of the appeal it is necessary to notice only a few, inasmuch as the others either relate to the sufficiency or insufficiency of evidence as supporting a particular finding on a question of fact, or to omissions on the part of the learned Judge to deal specifically with some conflicts or discrepancies in the evidence,—grounds which, even, if made out, could not entitle us to interfere with the verdict of the Jury.

One of the objections, worth noticing, relates to the constitution of the Jury who sat at the trial. What happened with regard to this matter was this. A Jury consisting of five persons was chosen by lot. Of these one was objected to on behalf of the defence; he was eliminated and another gentleman was chosen by lot from amongst the persons present. The Jurors so chosen then elected their foreman and were sworn. Thereafter two petitions were filed on behalf of the accused, one praying for a trial by a mixed Jury of Hindus and Muhammadans based upon the ground that as the case was one relating to the alleged abduction of a Hindu girl by the accused who are all Muhammadans and as the Hindus "bear a sort of instinctive hatred or prejudice against the accused in a case

of this nature the accused would not get a fair trial before a Jury composed entirely of Hindus," and the other, objecting to one of the Jurors Babu Nalini Kumar Chakravarti, said to be "the Head Master of the Ulipur School of the Maharajah Bahadur", and "an acquaintance of the Public Prosecutor who is a retained Pleader and *Am-mukhtear* of the estate of the said Maharajah Bahadur." The learned Judge rejected both the petitions and proceeded with the trial. I may say at once that so far as the second of the aforesaid two petitions is concerned the ground on which it is based is frivolous. As for the first one, it is sufficient to say that the law does not provide for a mixed Jury of this character, and the accused were not entitled to get what they asked for. The reason on which this petition was based, however, has some force; and if the matter had been properly represented to the learned Judge before the Jurors were summoned, it would perhaps have been considered by him and arrangements made to secure a mixed panel. Having regard, however, to the stage at which the application was made no grievance can legitimately be made of its rejection. All this took place on the 6th February 1924, and the trial then commenced. On the next day Baroda Sundari was examined-in-chief and partly cross-examined and on the day after, that is to say, on the 8th February, 1924, an application was filed on behalf of the defence, the order passed on which forms the subject-matter of the next ground of objection. It was alleged in that petition that one of the Jurors Babu Basanta Kumar Singh Roy had stated to a Pleader Babu Jatindra Nath Sen that he had already formed his opinion regarding the case and it was prayed that evidence might be taken on the point and the Jury discharged and the trial recommenced with a fresh Jury. The learned Judge heard the Pleader who filed the application and recorded the following order on the order-sheet:—

"This is an application for changing one of the Jurors and calling another Juror in his place. I heard the Pleader who filed this application. The complainant has not been cross-examined as yet and the whole of the evidence is not before this Court now. Under such circumstances I do not think that the Juror has formed any opinion. The Juror named in the petition is a highly educated man and is the Professor of the Carmichael College, Rangpur. I have no doubt that he will give his opinion after hearing both parties and the charge of the Court. The petition of the accused is rejected."

It is contended on behalf of the appellants that the rejection of the aforesaid petition was improper, and reliance is placed on their behalf on the cases of *Ramadge* v. *Ryan* (1) and *Allum* v. *Boultbee* (2). Reference has also been made to the cases of *In the matter of Bonomally Gupta* (3) and *Benimadhab Kundu* v. *Emperor* (4). It is urged that the verdict is fit to be set aside as the Juror aforesaid formed his opinion and expressed it in the midst of the case and before hearing all the evidence. The learned Advocate-General appearing on behalf of the Crown contends that the statement contained in the aforesaid petition is too vague to deserve an enquiry that it is at variance with what is to be found in the affidavit filed in support of it in this Court and that the mere expression of opinion by a Juror in the middle of a case is no ground for ordering a re-tiral. He seeks to distinguish the cases relied upon by the learned Vakil for the appellants and refers to the case of *Campbell* v. *Hackney Furnishing Co., Ltd.* (5)

In my opinion the learned Judge was right in rejecting the petition. It was not supported by any affidavit. It only alleged that the Juror told the Pleader that he had already formed his opinion regarding the case without mentioning any details. The details such as they are, are to be found in the affidavit which has been filed in this Court and that only a few days before the hearing of the appeal. The contents of the affidavit are said to be true to the information and belief of the deponent who happens to be a relation of one of the accused, and no disclosure has been made as to the source of the information. What is stated is that one morning before the Juror took his seat the said Juror and the said Pleader were standing in the verandah attached to the Court room, and while they were

(1) (1832) 9 Bing. 33; 2 Moo. & Sc. 421; 2 L. J. C. P 7; 131 E. R. 610; 35 R. R. 540.

(2) (1854) 9 Ex. 738; 2 Com. L. R. 1072; 23 L. J. Ex. 208; 18 Jur. 406; 2 W.R. 459; 156 E. R. 316; 96 R.R. 947.

(3) 38 Ind. Cas. 423; 44 C. 723; 21 C. W. N. 167 18; Cr. L. J. 311.

(4) 46 Ind. Cas. 513; 46 C. 207; 27 C. L. J. 553; 22 C. W. N. 740; 19 Cr. L. J. 737.

(5) (1906) 22 T. L. R. 318.

talking the Juror told the Pleader, "I have already formed my opinion regardings the case." No details are given, nor any circumstances mentioned as to why the Juror felt it necessary to communicate the matter to the Pleader, and the statement is singularly devoid of all features that might guarantee its truth. If this was the way in which it was put before the learned Judge and I have no reason to think that it was put before him in any other form, the learned Judge was perfectly right in not believing that the Juror had actually formed any opinion and in refusing to take any notice of such a casual remark as the Juror may have happened to make, assuming that he did make it. As for the cases cited at the bar, it is sufficient to say that they are all distinguishable. An inherent power in a Court to discharge a Jury on the ground of misconduct or necessity has been recognized in the cases of *Emperor* v. *Nazir Ali Beg* (6) and *Mamfru Chowdhury* v. *Emperor* (7), but no facts have been established in this case as would have justified such a course. This objection, therefore, fails.

The next ground of objection relates to the non-compliance with the provisions of s. 360, Cr. P. C. In support of this ground an affidavit was filed on behalf of the appellants, paras. 2, 3 and 4 of which run as follows:—

Para. 2.—"That I was present in the Sessions Court when the following witnesses deposed at the trial, *viz.*, P. W. No. 25, Babu Baroda Govinda Chaki, Pleader, and Court witnesses Nos. 1 and 2, Babu Hem Chandra Sen Gupta, Inspector and Rukunuddin Ahmed, Sub-Inspector."

Para. 3.—"That after recording the evidence of the above witnesses the record of their depositions were handed over to them and the said witnesses seemed to have read their deposition themselves."

Para 4.—"That the learned Sessions Judge did not read over their depositions to the said witnesses in the presence of the accused or their Pleaders."

On behalf of the Crown has been filed an affidavit sworn to by one Akshay Kumar Pal, who was the Sessions Clerk at Rangpur during the trial of the present case. While not denying the statements contained in the affidavit filed on behalf of the appellants the deponent states in paras. 3 and 4 of his affidavit as follows:

Para. 3.—"That in the presence of the accused I read over and explained in Bengali the depositions of the prosecution witness Babu Baroda Govinda Chaki and Court witnesses Babu Hem Chandra Sen and Moulvi Rukunuddin Thakur."

Para. 4.—"That the depositions as recorded by the Judge were admitted correct by the witnesses and none of the accused raised any objection as to the correctness of the record."

On a perusal of the two affidavits it is rather difficult to make out what exactly happened. It will be observed that in the first affidavit it is stated only that the witnesses in question seemed to have read their depositions themselves and that the learned Judge did not read over the depositions to them in the presence of the accused or their Pleaders, and that while in the second affidavit all that is not denied, it is asserted that the deponent read over and explained the depositions of the said witnesses in the presence of the accused, but it is not stated that their depositions were read over and explained to the witnesses themselves. Under the circumstances we are entitled, I think, to assume that both the affidavits are true; and if that is so, then what happened was this. The records of the depositions were made over to the witnesses who seemed to read them and the Sessions Clerk also read over and explained the depositions in the presence of the accused, though not in the presence of the witnesses. If this was what was done it was only a colourable compliance with the provisions of the law. I am, however, by no means sure that this double procedure was adopted. The learned Advocate-General assures us that the omission to deny the allegations contained in the first petition was due to the fact that a copy of it was not before the deponent Akshoy Kumar Pal when he swore to his affidavit, and the omission to state that the depositions were read over and explained to the witnesses was purely accidental. He says that if we are not satisfied on this point we should give the Crown a further opportunity to put in a further affidavit on fuller materials. In view of the opinion which I have formed on some of the other points urged on behalf of the appellants, I

(6) 62 Ind. Cas. 334; 25 C. W. N. 240; 33 C. L. J. 122; 22 Cr. L. J. 510.

(7) 81 Ind. Cas. 264; 51 C. 418; 38 C. L. J. 397; (1924) A. I. R. (C.) 323; 25 Cr. L. J. 776.

do not think it necessary to adopt that course.

An objection of a far more serious nature has been taken, and that relates to the omission on the part of the learned Judge to present in his summing up to the Jury the First Information in the case in its true perspective. This omission affects at once the complicity of the different accused persons as also the credibility of the evidence given by such of the witnesses examined in the case as profess to have seen a part of the occurrence and recognized the culprits. The occurrence is alleged to have taken place at about one and a half *prahar* of the night of the 20th March 1923 and the First Information was lodged at the *Thana*, 5 miles distant by Keshab Chandra Bairagi—the husband of Baroda Sundari at 10 A. M. the next day. In this information Keshab Chandra Bairagi named five accused persons and alleged that there were some 20 or 25 others unknown. This is what appears in the column provided for recording the names of the accused persons. He arrived at the *Thana* accompanied by *Chaukidar* Maharaj Tatwa and *Duffadar* Elahi Bux Sheikh. He stated in the information that when he was assaulted and wounded in the course of the occurrence he cried very loud and on hearing his cries the neighbours came but he did not see that then. He stated that he heard afterwards that Kalia Bairagi Barkandaz, and a master who lives in a Thakurbari and an Amla named Nitya Malakar came at the time of the occurrence and witnessed the occurrence, and that he did not ascertain whether any one else came or not. He also stated that after the occurrence, and after the accused had left, Pran Bandhu Deb Doctor, Natobar Doctor, Bepin Sonar and many other persons came and to them he narrated the occurrence in detail. From the information, therefore, it would appear that he classified the persons whom he named as having come to his place into two groups: the first group consisting of Kaliadas Bairagi, the master, and Nitya Malakar who came and saw a part of the occurrence, and the second group consisting of Pranbandhu Deb, Natabar Doctor, Bepin Sonar and others who came after the occurrence was over.

As already stated Keshab in his First Information named only five persons as accused, *viz.* Chota Jessarat, Kasim, Tozer, Genda Fakir and Mohorulla. Almost all the witnesses who have been examined as eye-witnesses deposed to having gone to Keshabs house during or shortly after the occurrence and not only heard from Keshab about the persons whom he had recognized but also gave out to the people assembled there the names of the accused persons whom they themselves had been able to recognize, and in point of fact some of the accused persons whom they profess to have recognized are persons other than the five mentioned by Keshab in his First Information. Then there is the fact that several witnesses have been examined as eye-witnesses who alleged to have seen some part or other of the occurrence and came to Keshab's house and gave out that they had done so, and yet their names are not to be found in the First Information. Nextly there is the fact that inspite of the clear distinction made by Keshab in his First Information as between the two classes of witnesses, Bepin Sonar who is classed there in the same category as Pranbandhu Deb, claims to have seen a part of the occurrence and recognized some of the accused persons while Pran Bandhu Deb speaks only to have come to the place after the occurrence was over and does not profess to have seen any part of it. These are matters of considerable importance and their bearing on the question of the credibility of the witnesses and the complicity of the accused cannot be over estimated. Omission to place such important matters having a material bearing on the case constitutes serious misdirection sufficient to vitiate the verdict of the Jury.

The next objection of importance relates to the evidence which was adduced in the case for the purpose of impugning the conduct of the investigating Police Officers and thereby discrediting the record of the Police investigation as also the record of the statements alleged to have been made by the witnesses in the course of the said investigation. It is not necessary to set out what the charges against the Police are that the prosecution prefer against them; they are set out at length and in sufficient detail in the learned Judge's elaborate summing up. There are two points, however, in connection with this matter which deserved specific mention and the omission to refer to which must necessarily have prejudiced the appellants. In the first place the evidence that has been adduced with regard to this matter, although relevant for the particular purpose of showing how the Police dealt

with the case and thereby impugning the correctness of the Police records, inevitably carries with it a certain amount of prejudice against the accused persons in whose interest the Police are charged with behaving in the way they are said to have done. In fact in one of the petitions filed on behalf of the Crown and which is to be found in the record there is reference to s. 10 of the Indian Evidence Act as justifying the reception of that evidence. It is hardly necessary to point out that the Police Officers were not parties to the conspiracy which the accused persons might have been members of and the object of which was to commit the offences for which they were tried and so s. 10 of the Indian Evidence Act can possibly have no application in the matter. It is gratifying to note that the learned Judge did not ask the Jury to use the evidence in that way. It is, however, to be noticed that no directions were given by the learned Judge as to how that evidence was to be treated, and nothing was said by him to remove from the minds of the Jury the prejudice which the admission of that evidence must necessarily have caused, and no warning administered to them to use the evidence for the limited purpose for which it can legitimately be taken into consideration. There is also a very important matter in this connection which should have been prominently brought to the notice of the Jury. Even if all that were urged against the Police were found to be true that would not touch the First Information lodged by Keshab, and the contents of the said document were still to be regarded as the statement of Keshab truly and correctly recorded by the Police, whatever might be the subsequent conduct of the investigating Police Officers. It is to be noticed also that under the guise of evidence adduced on this head, a mass of matter wholy inadmissible and of purely hearsay character has also been let in, the effect of which could not but have been highly prejudicial to the accused persons.

The charge of the learned Judge though a very lengthy one is far from satisfactory and is defective in more respects than one. The summing up contemplated by law is a fairly full and distinct statements of the evidence with such advice as to the legal bearing of that evidence, and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest. The Judge in a proper summing up must formulate and specify simple issues for consideration, and collate the evidence *pro* and *con* bearing upon the issues in order to assist the Jury to arrive at a correct decision thereon. Merely summarising the evidence, examination-in-chief cross-examination and re-examination of the different witnesses who have deposed at the trial, and putting before the Jury all that has been said by the witnesses or by the lawyers appearing on the two sides and huddling together important facts as well as trivial points without any attempt at discrimination, instead of aiding the Jury, only confuses them.

It is unnecessary to go further into detail in this matter in order to examine some of the inaccuracies that have been pointed out to us, for, in my opinion, the Jury upon such a charge as was delivered to them in the present case had no assistance rendered to them in order to find out what were the questions of fact which they had to determine and what was the evidence that bore upon those questions. The effect left upon their minds must have been that if they found the Police papers to be unworthy of reliance they were to find the case against the accused, all of them proved. It was scarcely desirable to tell the Jury as the learned Judge did that he had set aside the order of discharge passed in favour of three of the accused persons. Nor was the learned Judge right in telling the Jury that the way in which the girl pointed out the various houses and described the contents of the same, or in other words the verification, was a substantial corroboration of her story, without at the same time warning them that inspite of all that the Jury were not relieved from the task of weighing the evidence of the girl as to identification with every care and scrutiny. There has been no real attempt made by the learned Judge to deal with the evidence pointing to the complicities of the different accused persons, except by merely differentiating the cases against them by reference to the number of witnesses who spoke about the different accused persons in other words, the strength or weakness of the evidence of the witnesses as against each accused individually does not appear to have been pointed out to the Jury. It cannot be disputed that the evidence as against some of the accused persons is not quite so strong as against the others. The defences of the different accused persons and the

statements made by them were, no doubt, placed before the Jury; but the evidence, such as it is on the record supporting the said defences or portions of them were not brought to their notice. Facts and circumstances have been elicited in the cross-examination of the prosecution witnesses which do assist some of the accused persons to a certain extent. In short the learned Judge's charge to the Jury is not that intelligent summing up which the law requires and aims at.

The verdict of the Jury in the present case, therefore, cannot be upheld. Consequently the appeal must be allowed and the said verdict set aside.

I have carefully considered the question as to whether the order for re-trial which will have to be made should be made in respect of all or only some of the accused persons. The evidence against some of the accused persons is, no doubt, distinctly weak and not absolutely free from infirmities; but in the case of none of them can it be said that it is of such a character as would justify us in withholding the case from a Jury. I am, therefore, of opinion that all the appellants with the exception, of course, of Kasim who is dead, should be re-tried in accordance with law.

The appellants will be released on bail to the satisfaction of the District Magistrate pending the re-trial ordered

Let the order with the records be sent down at once.

Newbould, J.—I agree.

Z. K. *Order accordingly.*

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 369 OF 1924.

January 28, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

EMPEROR—PROSECUTOR

versus

KRISHTAPPA KHANDAPPA AND OTHERS —ACCUSED—RESPONDENTS.

Penal Code (Act XLV of 1860), ss. 29, 464, 473—Reserved forest—Letters imprinted on trees, whether "document"—Counterfeit stamp for the purpose of imprinting letters on trees in reserved forest, possession of —Offence.

Letters imprinted on a tree which are intended to be evidence of the fact that the tree has been passed by a Forest Officer and so can be removed from the place where it lies in the forest, constitute a "document" within the meaning of s. 29 of the Penal Code. [p. 839, col. 2.]

The possession of a counterfeit stamp, which is intended to be used for imprinting letters upon trees in a reserved forest so as to cause it to appear that those trees have been passed by a Forest Official for removal from the forest, is an offence under s. 473 of the Penal Code. [*ibid.*]

Criminal appeal by the Government of Bombay from an order of acquittal passed by the Assistant Sessions Judge, Dharwar.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

Messrs. *V. V. Bhadkamkar* and *H. B. Gumaste*, for the Accused.

JUDGMENT.—Six persons were charged before the Sessions Judge of Dharwar with having conspired and abetted each other in the felling and removal of twenty sandalwood trees from a Government reserved forest, and further with intending to commit forgery in respect of the trees by impressing thereon certain marks. Accused No. 4 was charged with possession of a counterfeit stamp for the purpose of impressing those marks. All the accused were acquitted. The Government have appealed with regard to the order of acquittal in favour of accused Nos. 1 to 4. We think that the record shows conclusively that accused Nos 1 to 3 were concerned in the removal of sandalwood trees from Coupes Nos. 2 to 4 of Block No. 15 in the reserved forest of Shirgod, and removing them to the adjoining Malki No. 41. We do not understand on what material the Assistant Sessions Judge came to the conclusion that the evidence against those accused failed to prove their guilt. Admittedly accused Nos. 1 to 3 having cut down the trees without permission, we fail to see who else would go to remove the logs except these accused. On the night of September 12, from the noise that was heard, Ismail, the Beat Guard, and his party, who were lying in ambush to catch the thieves, felt sure that logs were being removed from the reserved forest, and when the removal was complete they came out from their ambush and discovered accused Nos. 1 to 3. The Judge says: "I cannot believe that part of the prosecution story which relates to the rounding up of accused Nos. 1 to 3. The story is grotesque in its details, very improbable and

the witnesses contradict each other in material particulars." There can be no doubt that these three persons were caught in the forest coupe, from which the logs were removed, and there can be no justification for suggesting that the logs had been carried off by some other persons. These three accused, however, were only poor persons who had been employed by others who had purchased the right to cut trees from Government. Accused Nos. 5 and 6 who had purchased the trees in the Malki No. 41, on September 9, reported to the Forest Officer that they had sold their right to accused No. 4. Accused Nos. 1 to 3 told the Forest Officer that they had instructions from accused Nos. 5 and 6 to cut down trees and remove them and they expected accused Nos. 5 and 6 to arrive on the scene shortly. Accused Nos. 1 and 2 volunteered to go and fetch them with the stamp. About 2 P. M. on September 13, accused No. 1 came back with accused No. 4. The Forest party was again lying in ambush. Accused No. 1 pointed the logs to accused No. 4 saying that they were ready for stamping. Accused No. 4 replied that the stamp belonged to accused No. 5 who was soon coming and he would then stamp the logs. Accused No. 4 then, as he was walking about, saw Ismail and Ramchandra (also called *havaldar*), and cried out their names. The hiding party then emerged and caught accused No. 4. He was questioned by the *havaldar*, told that he must have the stamp, and threatened with a search of his person Accused No. 4 then of his own accord produced the stamp from a cloth round his waist. The Judge has believed that accused No. 4 produced the stamp but considered that he was not guilty of any offence under the Indian Penal Code. We are fully satisfied that accused Nos. 5 and 6 had originally employed accused Nos. 1 to 3 to cut down trees from the Government portion of the forest, and that the intention was to carry the wood into Malki No. 41, where accused Nos. 5 and 6 had got the right to cut. Application would then have been made to remove these trees, as if they had been cut in Malki No. 41.

The only question is whether possession of the counterfeit seal, plate or other instrument for making an impression, renders accused No. 4, liable as having committed an offence under s. 473, Indian Penal Code, in that he had made or counterfeited a seal, plate or other instrument for making an impression intending that the same should be used for the purpose of committing any forgery, which would be punishable under any section of Ch. XVIII other than s. 467, or with such intent had in his possession any seal, plate or other instrument, knowing the same to be counterfeit. It has been contended that as forgery implies the making of a false document, a person counterfeiting marks on a tree would not be making a false document within the meaning of s. 464, and this contention found favour with the Assistant Sessions Judge who relied upon the decision in *Empress* v. *Riasat Ali* (1). It seems to us that the learned Chief Justice for the purposes of that particular decision did not consider the provisions of s. 29, Indian Penal Code. The question here is whether a document must necessarily be something which is signed, sealed or executed. Section 29 says "the word 'document' denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of these means, intended to be used,...as evidence of that matter." Explanation 2 says: "Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed."

Now these letters when imprinted on the trees were intended to be evidence that the trees had been passed by the Ranger, and so could be removed from the place where they were lying in the forest. The letters therefore, imprinted on the trees would be a document within the meaning of s. 29 of the Indian Penal Code.

Then it is suggested that accused No. 4 could not have had the intention of making the imprint intending to use the same for the purpose of forgery. But on the evidence it seems perfectly clear to us that when accused No. 4 came where the trees were lying with this particular counterfeit mark in his possession, he must be taken to have had the intention of using it for the purpose of imprinting the trees with false marks.

It seems to us, therefore, that the order of acquittal in respect of accused Nos. 1

(1) 7 C. 352 at p. 354; 4 Shome L. R. 155; 8 C. L. R. 572; 3 Ind. Dec. (N. S.) 776.

to 4 was wrong. Accused Nos. 1 to 3 must be convicted under s. 379 and accused No. 4 under s. 473, Indian Penal Code. We do not think that any exemplary punisment is called for against accused Nos. 1 to 3. They were only persons who were employed as labourers to cut and remove the wood. We, therefore, discharge them under s. 562, Cr. P. C. The case against accused No. 4 is more serious. We think that a sentence of six months' rigorous imprisonment should be passed on accused No. 4.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 526 OF 1924.

January 19, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice B. B. Ghose.

ADILADDI AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 360—Deposition of witnesses read over by clerk, validity of—Failure to comply with provisions of section, effect of.

The depositions of the witnesses in a criminal trial, as soon as they were completed, were read over to the witnesses by the clerk and their signatures were taken, while the Court was recording the statements of other witnesses in the case:

Held, that the procedure was not warranted by law and did not amount to a compliance with the provisions of s. 360 of the Cr. P. C.

The omission to comply with the provisions of s. 360 of the Cr. P. C., vitiates a trial.

Mr. *B. M. Sen*, Babus *Manindra Kumar Bose* and *Anil Ch. Roy Chowdhury*, for the Appellants.

Mr. *Khandkar* (Deputy Legal Remembrancer), for the Crown.

JUDGMENT.—In this case the appellants take objection to the conviction and sentence on the ground that the depositions of some witnesses were not read over to them in the presence of the accused or their Pleader as provided for in s. 360, Cr. P. C. A further objection has been taken that the depositions of some of the witnesses before the Committing Magistrate as soon as they were completed were read over to the witnesses by the Bench Clerk and their signature taken while the Court was recording the examination of other witnesses in the case. This procedure is not warranted by the law, and it is not a compliance with the provisions of s. 360, Cr. P. C. A point might be raised whether under such circumstances the commitment should be quashed or not. It is not necessary for us to decide the question in this particular case, as we find that the conviction and sentence cannot stand on the ground that in the Court of Sessions the provisions of s. 360, Cr. P. C., had not been complied with.

We must under the circumstances send the case back for re-trial. Having regard to the sentence that the Additional Sessions Judge considered sufficient in the case of the accused and also having regard to the fact that the charge under s. 304-149 failed before the Sessions Court, we consider that the case should be tried by a Magistrate of the First Class and it is not necessary that it should be tried by the Court of Session.

We, therefore, set aside the conviction and sentence on the appellants and send the case back for trial according to law by the District Magistrate or some other Magistrate having First Class powers as the District Magistrate may appoint in this behalf.

Z. K. *Conviction set aside; Re-trial ordered.*

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 14 of 1925.

March 24, 1925.

Present:—Mr. Justice Pratt and Mr. Justice Crump.

SUPADI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 300 (4), 302, 304 A, 309—Mother jumping into well and causing death of her child tied to her back—Attempt to commit suicide—Murder—Death caused by negligent act.

Accused who was harassed and ill-treated by her husband, in a fit of disappointment and annoyance jumped into a well with the object of drowning herself. At the time when she jumped into the well she had her child tied at her back, but she was not conscious of the fact and the result was that although the accused escaped the child died:

Held, (1) that the accused was guilty of attempting to commit suicide.

(2) that it could not be said that her act came within the purview of cl. (4) of s. 300 of the Penal Code and that, therefore, she was not guilty of the offence of murder with regard to the death of her child;

(3) that she was guilty of a negligent omission, that is the omission to put the child down before jumping into the well and that the death of the child having been caused by such negligence, the accused was guilty of an offence under s. 301A of the Penal Code.

Criminal appeal from conviction and sentence passed by the Additional Sessions Judge, Khandesh.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

Pratt, J.—This appeal has been admitted though time-barred and I would deal with it in our revisional jurisdiction.

The accused has been convicted of an attempt to commit suicide and of the murder of her infant daughter.

The accused Supadi is a girl of seventeen years of age unhappily married to a man called Lukadu. Her mind was distracted by the illness of her infant daughter and she was anxious to go back to her father's house where she would get rest after the drudgery of her unhappy home, and time to attend to her ailing infant. Her father and sister came to see her home but the husband refused because he wanted her to stay at home and do the household work. Supadi was much disappointed and the next morning her father tried to take her back when the husband was absent. But the husband intercepted the cart and forced Supadi to return. This fresh disappointment was too much for Supadi who was already sorely tried by her husband's ill-treatment and the illness of her infant. She did go back, but instead of going to her husband's house she jumped into a well in order to drown herself. At the time she jumped in, her infant was tied on her back. She was found in the well the next day but the infant was drowned. When she was taken out she burst into tears and clasped the dead body of her child.

She has been rightly convicted of attempt to commit suicide but I cannot bring myself to believe that she is guilty of murder of the infant.

The Sessions Judge does not believe that she had any intention of causing the death of the child. He applies s. 300 (4) on the ground that she must have known that jumping into the well with the child was so imminently dangerous that the act would in all probability cause the child's death. That would be true if the accused at the time she jumped into the well were conscious of the presence of the child on her back. But her mind was in so abnormal a condition that she was at the moment attempting to commit suicide. I believe, therefore, that she was not thinking at that time of the child and that she was not conscious of the child's presence. As she was not conscious of the child there was not such knowledge as to make s. 300 (4) applicable. But that lack of consciousness implies negligence for, as said by Holloway, J. in *Reg. v. Nidamarti Nagabhushanam* (1) "culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness."

The offence which accused has committed is, in my opinion, not murder, but causing death by a negligent omission, *i.e.*, the omission to put the child down before jumping into the well.

I would alter the conviction under s. 302 to one under s. 304A and reduce the sentence to six months' simple imprisonment to run concurrently with the sentence under s. 309.

Crump, J.—It is a matter of some difficulty to determine what was the precise intention or knowledge of the accused at the moment when she threw herself into the well, and though it might be argued that she must have known that her child was with her, and that even if she did not intend its death, she knew that her act was so imminently dangerous that death was the most probable result, still the conclusion which commends itself to my learned brother is equally one which can be drawn from the proved facts. Where the balance is so equal I prefer to lean in favour of the accused. Therefore, I agree with the order proposed.

Z. K. *Conviction and sentence altered.*

(1) 7 M. H. C. R. 119 at p. 120.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 880 OF 1924.
November 25, 1924.
Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Mukerji.
RAKHAL CHANDRA BISWAS—
PETITIONER
versus
JAMINI KANTA BANERJEE—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 423—Penal Code (Act XLV of 1860), ss. 147, 323—Charge and conviction under s. 147—Appeal—Conviction, whether can be altered to one under s. 323.

In the absence of a charge under s. 323 of the Penal Code framed against an accused person during the trial, a conviction under s. 147 of the Penal Code cannot be altered in appeal to one under s. 323 of the Code.

Genu Majhi v. *King-Emperor*, 26 Ind. Cas. 152; 18 C. W. N. 1276; 15 Cr. L. J. 704 and *Yakub Ali* v. *Lethu Thakur*, 30 C. 288, followed.

Babu *Radhikaranjan Guha*, for the Petitioner.

JUDGMENT.—Three persons, of whom the petitioner is one were sent up for trial for an offence under s. 147, Indian Penal Code. The petitioner and one of the other persons were tried and convicted under that section and sentenced to pay a fine of Rs. 25 each. On an appeal preferred by the petitioner and the co-accused who had been convicted the learned District Magistrate acquitted the co-accused of the petitioner and altered the conviction of the petitioner from that under s. 147, Indian Penal Code to one under s. 323, Indian Penal Code maintaining the sentence passed upon him.

The petitioner has obtained a Rule to show cause why his conviction and sentence should not be set aside on the ground amongst others that such an alteration of the conviction is not permissible as the petitioner had not been tried on a charge under s. 323, Indian Penal Code. The contention seems to be supported by the decision of this Court in the case of *Genu Majhi* v. *King-Emperor* (1) where following the decision in the case of *Yakub Ali* v. *Lethu Thakur* (2), it was held by this Court that in the absence of a charge under s. 323, Indian Penal Code, framed during trial, the conviction under s. 147, Indian Penal Code, cannot be altered to one under s. 323, Indian Penal Code.

The Rule is accordingly made absolute. The conviction and sentence passed on the petitioner are set aside and the fine, if paid will be refunded.

Rule made absolute;
Z. K. *Conviction and sentence set aside.*

(1) 26 Ind. Cas. 152; 18 C. W. N. 1276; 15 Cr. L.J. 704.
(2) 30 C. 288.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 711 OF 1924.
January 6, 1925.
Present:—Mr. Justice Mukerji.
BAHORU AND OTHERS—APPLICANTS
versus
EMPEROR—RESPONDENT.

Criminal trial—Defence witness, evidence of, whether can be treated as evidence in support of prosecution.

The evidence of a defence witness cited by a co-accused cannot be treated as prosecution evidence against the other accused in the case.

Criminal revision from an order of the Sessions Judge, Meerut, dated the 14th November 1924.

Mr. *G. W. Dillon*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Three persons Bahoru, Naharya, and Kehri have applied in revision against their conviction and sentence under s. 363 of the Indian Penal Code which conviction was had in the Court of a Magistrate of the First Class and was upheld by the learned Sessions Judge on appeal.

The story for the prosecution briefly is this:—A minor girl of 12 was living with her father-in-law and was removed from her home at the instance of one *Musammat* Khizani. The appellants and one Sis Ram were waiting for the appearance of the girl and *Musammat* Khizani and joined their company when they came out. The evidence, if believed, would, no doubt, be sufficient for conviction. But the learned Sessions Judge has found that there were two witnesses on the point, and they were Dhara Singh and Tikam Singh. The learned Judge was not disposed to believe these witnesses because he found that they were relations of Sis Ram and were inclined to shield him. But what to the mind of the Judge clinched the matter was the fact that a witness for the defence produced by Sis Ram swore that he saw all the three petitioners with Sis Ram and the

kidnapped girl in a cart. It is contended and I think rightly that the evidence of the defence witness could not be treated as prosecution evidence against the petitioners. If we discard this evidence there is no reliable evidence to connect the petitioners with the kidnapping.

I accept the petition, set aside the conviction and sentence and order that the petitioners be released forthwith.

Z. K. *Conviction set aside.*

CALCUTTA HIGH COURT.

REFERENCE No. 8 OF 1924.

November 27, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PETITIONER

versus

Muktear JOGENDRA CHANDRA DAS —OPPOSITE PARTY.

Legal Practitioners Act (XVIII of 1879), s 14—Petition filed by legal practitioner, alteration of, without leave of Court—Unprofessional conduct—Punishment.

A legal practitioner instituted certain proceedings under s. 144 of the Cr. P. C. with respect to a certain plot of land which belonged to him. In his petition the number of the plot was, owing to inadvertance, wrongly described. Instead of presenting to the Court a further petition for amendment of the first petition, he proceeded to effect an alteration in the petition which had been filed in Court and corrected the description of the number of the plot. On the alteration being discovered by the Court he was prosecuted for an offence under s. 466 of the Penal Code but was discharged. Thereafter proceedings were taken against him under s. 14 of the Legal Practitioners Act:

Held, that his conduct fell within the purview of s. 14 of the Legal Practitioners Act, but that inasmuch as there was no question of any dishonesty and he was guilty merely of a foolish act, the period of suspension already undergone by him was sufficient punishment for his conduct.

Reference made by the Sessions Judge, Bakargunj.

Babu *Surendra Nath Guha*, for the Government.

Babus *Gunoda Charan Sen* and *Radhika Ranjan Guha*, for the Petitioner.

JUDGMENT.

Greaves, J.—This is a Reference under s. 14 of the Legal Practitioners Act made to us by the Sessions Judge of Bakargunj. The facts are as follows: A certain *Muktear*, Jogendra Chandra Das by name, instituted certain proceedings under s. 144 of the Cr. P. C., and instituted such proceedings by a petition. The proceedings related to a certain plot of land which belonged to him which he described in the petition as *Dag* No. 1441. He sought by the petition an injunction restraining the opposite party from doing certain acts with regard to the land. After the petition had been filed in Court the *muktear* discovered that he had made a mistake in his description of the *dag* in his petition and that it should have been described not merely as *Dag* No. 1441 but as *Dag* No. 1441/1659. Instead of presenting to the Court a further petition for amendment of the first petition he very foolishly proceeded to effect an alteration in the petition which had been filed in Court.....and he added to the *dag* of his petition—"1659" which made the description of the *dag* correct. A certified copy of the petition had been issued to the opposite party before the alteration was made. An injunction was granted and in the injunction the *dag* was correctly described as *Dag* No. 1441/1659. The fact that the certified copy of the petition served on the opposite party contained a reference to the *dag* which did not correspond with the description of the *dag* in the injunction caused the discovery of what had happened. The Deputy Magistrate in whose Court the alteration had been made lodged a complaint under s. 476 and sanction was granted and a prosecution was directed under the provisions of s 466 of the Indian Penal Code. The Additional District Magistrate found that there was no fraudulent motive in making the alteration and his finding was in these terms: "The substitution was not made to defraud the second party or to cause wrongful loss to any person or wrongful gain to any person except in so far as Government was defrauded of eight-annas Court-fee." In the result he came to the conclusion that the charge under s. 466 would not lie and he discharged the accused. But being impressed by what he considered the flagrant impropriety and professional dishonour and contempt of Court involved in the *muktear's* act he sent the record of the case to the District Judge with the recommendation that the High Court should be moved to cancel the *muktear's* license and to have him debarred from further practice. As a result, this Reference is made to us by

the learned Sessions Judge of Bakargunj. In the Letter of Reference he expressed his opinion that the recommendation of the Additional District Magistrate that the *muktear* may be permanently debarred from future practice is unnecessarily severe and in this comment I agree with him. Undoubtedly the *muktear* did act in a foolish and reprehensible manner but it seems to us that save and except this act of foolishness he did nothing else and we think having regard to the fact that the *muktear* has suffered the harassment of criminal proceedings under s. 466 that the justice of the case will be met by our saying that the suspension of practice which he has undergone since the 9th of August last will be sufficient punishment for the act he has committed. He will be entitled to recommence his practice from this date.

Chakravarti, J.—I agree.

Z. K. *Order accordingly.*

PRIVY COUNCIL.

APPEAL FROM THE LAHORE HIGH COURT.

November 17, 1924.

Present:—Lord Dunedin, Lord Atkinson, Lord Sumner and Sir John Edge.

UMRA—PETITIONER

versus.

EMPEROR—RESPONDENT.

Practice—Departure from rules of procedure - Privy Council, whether will interfere- Interpretation of Act —Special leave, whether will be granted.

The Privy Council will interfere if there has been any departure from the ordinary rules of procedure such as to amount to a denial of ordinary justice but where the matter depends upon the particular view taken of sections of an Indian Act, it cannot be said that grave and substantial injustice has been done and special leave to appeal to the Privy Council will not be granted. [p. 845, col. 1.]

Vaithinatha Pillai v. *Emperor*, 21 Ind. Cas. 369; 36 M. 501; 40 I. A. 193; 17 C. W. N. 110; 14 M. L. T. 263; 25 M. L. J. 518; 11 A. L. J. 881; 18 C. L. J. 365; (1913) M. W. N. 806; 14 Cr. L. J. 577; 15 Bom. L. R. 910 (P. C.), referred to.

Appeal from a judgment of the Lahore High Court, affirming that of the Sessions Judge, Shahpur, dated the 31st August 1923.

Mr. *W. Wallach*, for the Petitioner.

Messrs. *A. M. Dume, K. C.*, and *K. Brown*, for the Crown.

JUDGMENT.

Lord Dunedin.—This is a petition for special leave to appeal against a sentence of death pronounced on the petitioner by the Sessions Judge of Shahpur and confirmed by the High Court at Lahore.

The petitioner, with others, organized a robbery in the house of a money-lender. They broke into the house at night and took ornaments, money and other things from the wife who was in the house (the money-lender himself being absent). Other persons arriving on the scene, two of the gang stationed on the roof fired shots and killed two persons. The conviction pronounced against the petitioner and four others was for the murder of these persons.

One Misri, one of the party, made a statement to the Police, in which he detailed the incidents of the robbery and incriminated the various accused, including the petitioner. The admission of this statement was objected to by the Vakil for the petitioner, but it was admitted by the Sessions Judge, and this admission was confirmed by the High Court. The ground for the present application is that the admission of the statement was clearly wrong and that the improper admission of this evidence amounted to a grave injustice and a violation of the principles of natural justice, and especial reference was made to the case of *Vaithinatha Pillai* v. *Emperor* (1).

Their Lordships find that in the judgment of the High Court one of the learned Judges, while dealing with the point as to the admission of the evidence, expressed himself thus :—

"I do not suggest that in the present case, the statement of Misri is essential to the conviction, as I am satisfied that the rest of the evidence on the record establishes the guilt beyond any reasonable doubt."

And the other learned Judge agreed with these remarks. In view of this it seems to their Lordships out of the question that leave to appeal should be granted, as to do so would be to turn this Board into a Court of Criminal Appeal, a position which it has been again and again explained, the Board will not assume. But, in view of the judgments given and the argument raised thereon, their Lordships feel constrained to add something more. The question of the admissibility of the

(1) 21 Ind. Cas. 369; 36 M. 501; 40 I. A. 193; 17 C. W. N. 110; 14 M. L. T. 263; 25 M. L. J. 518; 11 A. L. J. 881; 18 C. L. J. 365; (1913) M. W. N. 806; 14 Cr. L. J. 577; 15 Bom. L. R. 910 (P. C.).

evidence turned entirely on the interpretation of certain sections of the Cr. P. C., and the Evidence Act. According to the view taken of these sections the evidence was or was not admissible. Now, although if there has been any departure from the ordinary rules of procedure such as to amount to a denial of ordinary justice, of which an illustration is given in *Pallai's case* (1), their Lordships will interfere; yet where the matter depends upon the particular view taken of sections of an Indian Act, their Lordships could not say that to assert that upon those sections the Judges had come to a wrong conclusion is tantamount to saying that there has been substantial and grave injustice done. Even, therefore, if there had not been the expression of opinion above quoted that the other evidence was sufficient, their Lordships would not have held that the so-called miscarriage of justice in respect of a wrong interpretation of the sections—as to the proper interpretation, their Lordships have not formed and expressed no opinion—is such as to bring the case within the rules laid down in *In re Dilet* (2) and insisted upon in subsequent cases.

Their Lordships are, therefore, unable to advise the Sovereign to grant special leave to appeal.

K. S. D. *Application rejected.*

Solicitors for the Petitioner—Messrs. *T. L. Wilson & Co.*

Solicitors for the Crown—Solicitor India Office.

(2) (1887) 12 App. Cas. 459; 56 L. T. 615; 36 W. R. 81; 16 Cox. C. C. 241.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 398 OF 1924.

November 4, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Mukerji.

GADADHAR SARKAR—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 297. Penal Code (Act XLV of 1860), s. 368—Charge to Jury—Knowledge and suspicion of accused, distinction between—Misdirection.

Section 368 of the Penal Code requires "Knowledge" on the part of the accused and not merely suspicion or belief. [p. 846, col. 2.]

The proper way to charge a Jury in a case under s. 368 of the Penal Code is to place before the Jury the direct evidence of the knowledge of the accused as to the abduction, to point out the strength and weakness of that evidence, to tell the Jury that this is the only evidence relating to knowledge, and then to place before them the circumstances, if any, which might raise an inference of knowledge on the part of the accused of the abduction and lastly to ask the Jury to draw their own conclusion on the question. [*ibid.*]

A charge which places before the Jury indiscriminately direct evidence as to the knowledge of the accused, the evidence as to suspicion having been aroused in the mind of the accused and evidence which shows that a suspicion should have arisen in the mind of the accused, without making any distinction, is defective on a crucial point and is likely to vitiate the verdict. [*ibid.*]

Babus *Narendra Kumar Bose* and *Radhikaranjan Guha*, for Babu *Benoy Kumar Ghose*, for the Appellant.

Babu *Mrityunjoy Chatterjee*, for the Crown.

Babu *Biraj Mohan Roy*, for the Complainant.

JUDGMENT.—The appellant has been convicted under s. 368, Indian Penal Code and sentenced to undergo rigorous imprisonment for one year, on a second trial held by the Additional Sessions Judge and a Jury, the Jury having on this occasion brought in a unanimous verdict of guilty on the said charge.

The point that has been urged in support of this appeal is that the directions of the learned Judge on the question of 'knowledge'—knowledge on the part of the appellant that the girl was abducted—are defective.

The learned Judge's charge is an elaborate one, very fully dealing with the evidence and circumstances of the case, and he set out the details of the ingredients necessary to constitute an offence punishable under s. 368, Indian Penal Code with punctilious care. There is, however, an unfortunate defect, and that, in our opinion, a serious one, as regards his presentation of the facts and circumstances relating to 'knowledge.'

He first of all told the Jury that one of the essential ingredients of an offence punishable under s. 368, Indian Penal Code was knowledge on the part of the accused person that the girl was abducted, and that it was not necessary to prove who abducted the girl but that it was sufficient that the woman was abducted and that the accused had knowledge of the abduction. He next placed before the Jury the evidence as to abduction, and then asked them to

"consider the evidence and conclude whether the girl was abducted or not." He then observed as follows:—"It is an admitted fact that she (meaning the girl) was kept in the house of the accused and Kuti was with her. Both of them were kept there. The explanation is that Kuti was a prostitute, the girl looked to be a female of a cultivator, so to ascertain her whereabouts and to send her to her husband's house she had been kept in the house. It is for you to consider whether this suspicion indicates that the accused knew her to be an abducted girl." Then he proceeded to place before the Jury the evidence of the girl, which, if believed, would afford a piece of direct evidence as to knowledge on the part of the appellant. Lastly he again referred to the circumstances that the girl did not look to be a prostitute but the wife of a Grihastya and observed thus: "The latter (meaning Kuti) was a prostitute, which seems to have been known to the accused; the young girl was with her; naturally a suspicion should have arisen about abduction. The evidence of these two defence witnesses (meaning D. Ws. Nos. 1 and 2) also seem to give support to this inference. You are the best and sole judges of fact, it is for you to conclude whether the accused knew the girl's abduction when he retained her in his house."

This is how the learned Judge has dealt with the matter. It will appear then, that the learned Judge placed before the Jury three things for their consideration in order to determine the question as to whether the appellant had knowledge that the girl was an abducted girl: Firstly, *suspicion which arose in the mind* of the appellant that the girl might have been abducted and in consequence of which he desired to ascertain her whereabouts; secondly, *direct evidence* of the girl to the effect that she told the appellant that she had a husband and that she had been abducted, which she says, she did after having been ravished by the accused; and thirdly, a *suspicion which should have naturally arisen in the mind* of the appellant that the girl had been abducted. Each one of these has been placed before the Jury as evidence or circumstances, independently of the others, from which appellant's knowledge might be inferred. This, in our opinion, was wrong and had the effect of obliterating from the mind of the Jury any distinction that they might have entertained between knowledge and suspicion on the part of the appellant with regard to this matter. The importance of this distinction cannot be overstated for the section says "knowing" and not "suspecting" or "having reason to believe."

The proper way to charge the Jury in this matter would have been to place before the Jury the evidence,—the direct evidence of knowledge as given of the abduction of the girl, to point out the strength and weakness of that evidence to tell them that this was the only evidence relating to knowledge, and then to place before them the circumstances, if any, which might raise an inference of knowledge on the part of the accused that the girl was an abducted girl; and lastly to have asked the Jury to draw their own conclusion on that question.

A defect of this nature on a curcial point is likely to vitiate the verdict; at any rate on a careful consideration of the facts and circumstances of the case we are unable to say that it did not so vitiate it. Having regard to the erroneous delay in implicating the appellant on the charge and the very poor explanation that has been offered in order to account for it, the fact that the *mukhtear* who drew the original petition of complaint was not examined as a witness for the prosecution, and lastly the extremely unsatisfactory nature of the evidence of the girl herself. We decline to prolong the harassment of the appellant which he has already suffered in the course of two trials by directing a third one.

The appeal is allowed, the conviction and sentence passed on the appellant are set aside and he is directed to be discharged from his bail-bond.

Z. K. *Appeal allowed; Conviction set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 582 of 1924.
January 7, 1925.
Present:—Mr. Justice Mukerji.
RAM AUTAR—APPLICANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 411—Possession of stolen goods—Goods found in room belonging to joint family.

Where stolen goods were found in a room which had no shutters and which was accessible to all the members of a joint family of whom the accused was one:

Held, that it could not be held that the accused was in possession of the goods within the meaning of s. 411 of the Penal Code.

Queen-Empress v. *Sangam Lal*, 15 A. 129; A. W. N. (1893) 48; 7 Ind. Dec. (N. S.) 800 and *Queen-Empress* v. *Nirmal Das*, 22 A. 445; A. W. N. (1900) 169; 9 Ind. Dec. (N. S.) 1334, followed.

Criminal revision from an order of the Additional Sessions Judge, Benares at Jaunpur, dated the 16th September 1924.

Mr *A. Sanyal*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant has been convicted of the offence under s. 411 of the Indian Penal Code and the allegation against him is that he was in possession of a stolen *lota* and a stolen *thali*.

This application in revision, in my opinion, should succeed on two grounds: First, the whole case is a very suspicious one and secondly, even if all the facts found by the learned Sessions Judge in appeal be accepted it has not been established that the appellant was in possession of the stolen articles.

On the first point. The judgment of the learned Sessions Judge leaves an impression on the mind that the accusation was more or less reckless and that the appellant was charged with having stolen more things than have been established to have been stolen property.

Coming to the second point. It appears that the goods were found in a room which had no shutters and which was accessible to all the members of a joint family. Here we have at least the appellant, and his father Ganga Din living in the house. The principle laid down in the cases of *Queen-Empress* v. *Sangam Lal* (1) and *Queen-Empress* v. *Nirmal Dass* (2) applies.

I accept the application in revision and acquitting the applicant of the offence of which he has been convicted, set aside the sentence and order his release. The fine, if paid, will be refunded.

Z. K.

Application accepted.

(1) 15 A. 129; A. W. N. (1893) 48; 7 Ind. Dec. (N. S.) 800.

(2) 22 A. 445; A. W. N. (1900) 169; 9 Ind. Dec. (N. S.) 1334.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 736 OF 192

November 7, 1924.

Present:—Mr. Justice Suhrawardy, and Mr. Justice Mukerji.

CHERAGALI BEPARI AND ANOTHER —PETITIONERS

versus

SATISH CHANDRA GHOSE— OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 403—Penal Code (Act XLV of 1860), ss. 120-B, 193, 467, 471—Trial for offence under s. 193—Acquittal—Charge under ss. 467, 471 on identical facts, whether can be proceeded with.

Accused was charged with an offence under s. 193 of the Penal Code and was acquitted after a careful trial. He was subsequently charged under ss. 467 and 471 read with s. 120-B of the Penal Code upon facts which were wholly inseparable from the facts upon which the previous case against him had proceeded:

Held, that the present charge could not be proceeded with in view of the previous trial.

Babus *Devendra Narayan Bhattacharji* and *Benoyendra Prasad Bagchi*, for the Petitioners.

Babus *Narendra Kumar Basu* and *Radhikaranjan Guha* for Babu *Prokash Chandra Pakrashi*, for the Opposite Party.

JUDGMENT.—As to the two grounds upon which this Rule was issued, we are of opinion that they are not well-founded. The grounds are to the effect that the present proceedings are barred by the provisions of s. 403, Cr. P. C., and that the facts alleged in the petition of complaint and examination of the complainant under s. 200, Cr. P. C., do not constitute in law the offence of forgery within the meaning of that word as used in the Indian Penal Code. But on a reference to the judgment of the learned Deputy Magistrate who dealt with the case against the accused that is referred to in the petition we find that the present proceedings should not have been allowed to be instituted. The learned Magistrate went very carefully into the cases set up on behalf of the parties, dealt exhaustively with the evidence that was adduced in the case, considered the probabilities thereof and came to the conclusion that the culpability of the accused had not been established beyond reasonable doubt. Although the accused were tried in that case only on a charge under s. 193, Indian Penal Code, the facts upon which the complainant founded the present case with regard to offences under ss. 467, 471 read with s. 120-B, Indian Penal Code are

[redacted]nseparable from the facts upon the previous case was proceeded We, therefore, think that the petitioner was entitled to a Rule upon the third ground stated in his petition. We have asked the learned Vakil appearing on behalf of the opposite party to show cause with regard to that ground. Having heard both parties we have come to the conclusion that the present proceedings should be quashed on the said ground.

We accordingly quash the said proceedings and make the Rule absolute.

Z. K. *Rule made abslute.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 322 OF 1925.

May 9, 1925.

Present:—Mr. Justice Zafar Ali.

BANWARI—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 401—Habitually associating for the purpose of committing theft—Gang, existence of, not proved, effect of.

Ten persons were put on their trial for an offence under s. 401 of the Penal Code as being members of a gang associated for the purpose of habitually committing theft. Nine out of the ten were acquitted and the appellant alone was convicted. In addition to the evidence of the approver against the appellant there was the evidence that several thefts and several articles stolen from different houses were discovered on the information supplied by him and that he had made promises to restore certain stolen property:

Held, that the story of the approver having been disbelieved with regard to the remaining nine accused the inference was that his testimony that they were members of an alleged gang was not true and that the mere fact that certain stolen property had been discovered as the result of information given by the accused and that he had promised to restore other stolen property was not enough to prove that he was the member of a gang of habitual thieves whose existence had not been established.

Appeal from an order of the Assistant Sessions Judge, Rohtak, dated the 10th January 1925.

Mr. *Shamair Chand*, for the Appellant.

Mr. *D. C. Ralli*, for the Respondent.

JUDGMENT.—Banwari appellant has been found by the Assistant Sessions Judge of Rohtak to be a member of a gang of persons associated for the purpose of habitually committing thefts and sentenced under s. 401 of the Indian Penal Code to rigorous imprisonment for seven years and a fine of Rs. 200.

The principal witness for the prosecution was Faqira approver according to whose testimony the gang consisted of twelve men including himself. Ten of the remaining eleven were tried together with the result that nine were acquitted and only one, *i. e.*, Banwari appellant, was convicted. That being the result of the trial the question that naturally presents itself is where was the gang of which Banwari was found to be a member. The approver's testimony was of very doubtful value because he made alterations in his story from time to time as found by the learned Assistant Sessions Judge. As nine out of the ten accused were acquitted the inference is that his testimony that they were members of the alleged gang was not true. The rest of the evidence against Banwari was that several thefts and several articles which had been stolen from different houses were discovered on the information supplied by him, that he was suspected in one of those theft cases and that he made promises to restore certain stolen cattle. Such evidence does not prove that he was a member of the gang the very existence of which is not proved. He might himself have committed all those thefts or might have come to know of them in some way, but it cannot be inferred from this evidence that he was a member of a gang of habitual thieves.

In the circumstances stated above the conviction under s. 401 of the Indian Penal Code cannot be upheld. I, therefore, accept the appeal and setting aside the conviction and sentence direct his release forthwith. The fine, if already realized, will be refunded.

Z. K. *Conviction set aside.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 206 OF 1924.

December 19, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, Mr. Justice Das and Mr. Justice Foster.

Babu HITENDRA SINGH AND OTHERS —PLAINTIFFS—APPELLANTS

versus

Maharajadhiraj SIR RAMESWAR SINGH BAHADUR AND OTHERS— DEFENDANTS—RESPONDENTS.

Hindu Law—Mithila *School*—*Mitakshara, authority of*—*Gift by husband to wife*—*Estate taken by wife*—*Alienation, power of*—*Consent of husband, effect of*—*Construction of deed* –Benami—*Burden of proof* · *Grant of property* ba farzandan naslan bad naslan, *effect of*- *Transfer of Property Act (IV of 1882), ss. 2, 8, applicability of* -*Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—Mortgage-decree—Sale*—*Objection by judgment-debtor, dismissal of—Legal representatives, whether can maintain suit to recover property—Evidence Act (I of 1872), ss. 41, 42, 43—Judgment not* inter partes, *admissibility of—Limitation Act (IX of 1908), Sch. I, Arts. 95, 142—Suit for possession*—*Plaintiff not bound by decree* -*Decree, whether must be set aside—Limitation*—*Muhammadan Law*—Heba-bil-ewaz, *whether gift or sale.*

Plaintiffs' father executed a document described as a *heba-bil-ewaz* in favour of his wife transferring the property in dispute to her in consideration of a certain sum of money which he received from her and with which he paid off a decree which had been obtained against him and in execution of which the property in dispute was about to be sold. The document contained the following recital:—"Although I, the executant, tried to procure money from creditors, etc., for payment of the decretal amount to the said decree-holder, I could not get it and I see no means to safeguard my *milkiat* properties from sale as mentioned in the inventory. As the sale will entail loss of the said two *milkiat* properties on sale, belonging to me, the executant, my share of 7 annas 8$\frac{3}{4}$ *gandas* situate in Taluka Laheri *asli* with *dakhli, Pergana* Jabdi, T. N. 1522 appertaining to Registration Office, District Darbhanga and Sub-District Madhubani and *Thana* Lockhe, with trees fruit-bearing and non-fruit-bearing and *ahar*, and *pokhar* and reservoir and tank and *cucha* and *pucca* wells, and *sair*, and salt *sair* and houses occupied by tenants, and all my *zemindari* rights which up to now have been in my possession without the co-partnership of any one to my wife *Musammat* Anuragin Bahuasin, having taken Rs. 41,532-6-8-16 cr. 16 ms. in cash, I have made of my free-will and accord, *heba-bil-ewaz*, and having with the said amount paid up the amount of the decree of the aforesaid decree-holder and got the property released from sale have put the aforesaid *Musammat* in possession of the subject of the *heba*. The aforesaid *Musammat* should by becoming possessed of the subject of the *heba* spend the produce of the property with sons generation after generation (*ba farzandan naslan bad naslan*). I, the declarant, or my heirs and representatives (*quaim moqaimain*) shall have no right or concern in demanding the subject of the *heba* or the consideration money from the aforesaid *Musammat* or her heirs and representatives. Should I, the executant, my heirs and representatives make any claim or put forward any demand in respect of the gift-properties or the consideration thereof the same will be deemed null and void. I have, therefore, given in writing these few words in the shape of a *heba-bil-ewaz* so that it may be of use when required." The donee obtained possession of the property under the deed of gift. Some years afterwards the donor and the donee together mortgaged the disputed property to the defendant to secure the re-payment of a certain sum of money which was then due by the donor to the defendant. The defendant obtained an *ex parte* decree against the donor and the donee upon his mortgage took out execution and purchased the property in execution of the decree. The judgment-debtors applied for setting aside the sale but the donee died during the pendency of the application and the plaintiffs were substituted in the record as her representatives. Eventually the application was refused and the sale was confirmed. On the death of their mother the plaintiffs entered upon possession of the disputed property and in 1906, they instituted a suit for confirmation of their possession on the ground that the mortgage-bond had been obtained from their mother without her knowledge and that the mortgage-decree was fraudulent. Their father was a *pro forma* defendant in the case. The cause of action was stated as having arisen a few months before the institution of the suit when the frauds therein stated had been discovered. That suit was withdrawn with liberty to bring a fresh suit. The plaintiffs' father died shortly after. On the 24th July 1918 the plaintiffs instituted the present suit for recovery of possession of the disputed property from the defendant and for mesne profits on the allegation that the property belonged to their mother and that their father had no right to execute a mortgage-bond in respect of it and that the rights of their mother and of themselves were not affected by the mortgage-suit, the decree, the sale and the delivery of possession. The cause of action was stated to have arisen on the 10th of December 1906, when possession had been obtained by the defendant as auction-purchaser. It was admitted that the plaintiffs and their father and mother were governed by the *Mithila* School of Hindu Law:

Held, per *Das, J.* (1) that it was not open to the plaintiffs, who had been substituted as the legal representatives of their mother in the application to set aside the auction-sale, to re-agitate the questions which could have been raised in that application in a regularly constituted suit between the parties; [p. 853, col. 2.]

(2) that inasmuch as the plaintiffs' mother in spite of the dismissal of her application to set aside the auction sale might still have maintained a suit for setting aside all the proceedings as a fraud upon her from start to finish, it was open to the plaintiffs to maintain such a suit, but that such a suit would be barred by time under Art. 95 of Sch. I to the Limitation Act; [*ibid.*]

(3) that it was not open to the plaintiffs' mother to object to the validity of the mortgage on the ground that the property was inalienable inasmuch as she could not claim adversely to her own deed, and that her failure to set up the inalienability of the property as an answer to the mortgage-suit did not operate as constructive *res judicata* so as to preclude the plaintiffs from setting up the inalienability of the property as a ground for the declaration that the mortgage and the decree and sale following upon it were not binding upon them, and that consequently the plaintiffs

were entitled to maintain the suit and to show that the property in dispute was inalienable in the hands of their mother; [p. 855, cols. 1 & 2.]

(4) that if the property in dispute was inalienable the plaintiffs were not bound by the decree and the sale and could treat those proceedings as a nullity without the intervention of any Court and that the suit was governed by Art. 142 of Sch. I to the Limitation Act and having been brought within twelve years of the date of the plaintiffs' dispossession was within limitation; [p. 856, col.1.]

(5) that the application made by the plaintiffs' mother to set aside the auction-sale was one under O. XXI, r. 90 of the C. P. C., and not under s. 47 of the Code and that the latter section was not, therefore, a bar to the maintenance of the present suit; [p. 867, col. 2.]

(6) that the transaction of *heba-bil-ewaz* was a genuine transaction and operated as a transfer of the property to the plaintiffs' mother; [p. 865, col. 2.]

(7) that the transaction was one of gift and not of sale; [p. 870, col. 2.]

(8) that under the *Mithila* School of Hindu Law the gift being one by the husband to the wife subsequent to marriage must be regarded as the *stridhan* of the wife and was a *saudayica* gift of the husband to the wife; [p. 871, col. 1.]

(9) that the plaintiffs were, therefore, entitled to succeed to the property after the death of their mother as her heirs and not as the heirs of her husband; [p. 871, col. 2.]

(10) that the property in dispute being immoveable property taken as a gift by the wife from her husband was heritable but was not alienable by the wife except for legal necessity and that there being no such necessity in the present case the donee had no power to alienate it; [p. 875, col. 1.]

(11) that the donee having acted in passive obedience to her husband's direction in joining in the execution of the mortgage-deed, the deed was not obtained with her consent and was not binding upon the plaintiffs; [p. 878, col. 1.]

(12) that under the deed of gift the plaintiffs' mother was not given any power of alienation which she did not possess under the *Mithila* School of Hindu Law;

(13) that the property in dispute in the hands of the plaintiffs' mother was inalienable even with the consent of her husband, and that consequently the mortgage-bond, the decree and the sale were not binding upon the plaintiffs and that plaintiffs' suit must be decreed;

Per *Foster, J.* (1) that the *heba-bil-ewaz* was not a *benami* transaction and operated to transfer the property to the plaintiffs' mother; [p. 887, col. 1.]

(2) that the transfer was in substance a gift and conferred an absolute estate upon the donee; [p. 888, col. 1.]

(3) that the plaintiffs were the heirs and legal representatives of their mother and inasmuch as they claimed under her they were bound by the mortgage-decree and the sale which took place thereunder and they could not sue for possession unless they had cleared the way for such a suit by securing the annulment of the mortgage-decree and the sale; [p. 889, col. 2; p. 890, col. 1.]

(4) that a suit to set aside the decree being now barred by time the present suit was not maintainable. [p. 890, col. 1.]

Per *Das, J.*—An Appellate Court should allow a question of law to be argued before it which fairly arises on the allegations made in the plaint though it is not stated in that form in the plaint. [p. 854, col. 1.]

It is not necessary to set out an inference of law in the pleadings. [p. 855, col. 1.]

A grantor cannot dispute with his grantee his right to alienate the land to him. [*ibid.*]

Where a person is *prima facie* bound by a decree he cannot by suing ostensibly for possession ignore the decree and evade the operation of law; and where such a decree is an impediment in the plaintiffs' way in obtaining relief inconsistent with it, he must bring the suit within the period prescribed by law for setting aside a decree. Where, however, a person is not bound by a decree he can treat the decree as a nullity and can sue to recover the property affected by the decree without taking proceedings to set aside the decree. [p. 855, col. 2.]

An apparent transaction must be assumed to be real until the contrary is shown, and the onus is on the person who alleges that a transaction is not what it purports to be. [p. 857, col. 2.]

Judgments *qua* judgments or adjudications upon questions in issue and proofs of particular points therein decided are only admissible either as *res judicata* under s. 40 or as being *in rem* under s. 41 or as relating to matters of a public nature under s. 42 of the Evidence Act. Judgments, orders and decrees other than those admissible under ss. 40, 41 and 42 of the Evidence Act may be relevant under s. 43 of the Act. The cases contemplated by s. 43 are such as the section itself illustrates, namely; where the fact of any particular judgment having been given is a matter to be proved in the case. [p. 861, col. 2.]

A former judgment which is not a judgment *in rem* nor one relating to matters of a public nature is not admissible in a subsequent suit either as *res judicata* or as a proof of the particular point which it decided unless between the same parties or those claiming under them. [p. 862, col. 1.]

The decision of a Court should not rest upon suspicion but upon legal grounds established by legal testimony. [p. 864, col. 1.]

Benami transactions are very familiar in Indian practice and even a slight quantity of evidence to show that a transaction was a sham transaction may suffice for the purpose. A person, however, who impugns the apparent character of a transaction must not rely solely on probabilities; he must show something definite to establish that it is a sham transaction on the principle that the burden of proof lies upon a person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things. [p. 864, col. 2.]

The most important test to be applied in such cases is the source whence the consideration came. [*ibid.*]

Where, however, from the lapse of time direct evidence of a conclusive or reliable character is not forthcoming as to the payment of the consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. [p. 865, col. 1.]

Where a decree directs the sale of specific property, the Court executing the decree has no power to go behind the decree and to refuse to sell the property because the interest of the judgment-debtor in the property has come to an end. [p. 866, col. 2.]

A *heba-bil-ewaz* is a transaction made by mutual or reciprocal gifts between two persons each of whom is alternately the donor of one gift and the donee of the other. [p. 869, col. 1.]

In determining the real nature of a transaction it is

influence over his wife preferred to mortgage the disputed property in the said mortgage-bond, and she was induced to become a party thereto upon a misrepresentation that the debts of the husband were binding on the wife and the said Maharaja with the knowledge that the property in suit belonged to the Bahuasin and with the further knowledge that it had been wrongly represented to her that the debts of the husband were binding on the wife, accepted the mortgage in his favour." It appears, however, that plaintiff No. 2 actually signed the mortgage-bond on behalf of his mother and that plaintiffs Nos. 1 and 3 were the attesting witnesses. In order to meet this difficulty the plaintiffs say that "they were not at all aware of the contents of the bond and as they were fully under the control of their father they had only to act according to his dictation and on the pressure of the men of the Maharaja." The plaintiffs further say that the Bahuasin was a *purdanashin* lady and had no independent advice in the matter of the execution of the mortgage-bond and that she did not execute it "knowing and understanding its contents or the importance thereof, or realizing the consequences of her act." In regard to the *ex parte* decree obtained against Durga Dutt and the Bahuasin, the plaintiffs allege that summons was not served on the Bahuasin according to law and that "as a matter of fact she was purposely kept from all knowledge of the said suits or of the decrees obtained therein and that in the circumstances of the case she was neither in law nor in equity bound by the proceedings taken in the above suits, the decrees passed therein or by subsequent proceedings in execution of which also she had absolutely no knowledge." In regard to the execution proceedings, they say that they were taken without the knowledge of the Bahuasin and that the Maharaja purchased the property "for an inadequate price of 3 lacs of rupees though its actual price then was not less than 6 lacs of rupees." They allege that as the heirs of the Bahuasin they succeeded to the disputed property and came into possession thereof; but that they were dispossessed on the 16th December 1906, and they say that their cause of action arose on the 16th December 1906, "the date of their wrongful dispossession."

It will be noticed that two important questions of fact are pleaded; first, that there was a complete defence to the mortgage action and that the decree obtained against the Bahuasin was a fraudulent decree which does not affect the rights of the plaintiffs as the heirs of the Bahuasin; and secondly, that the execution proceedings were fraudulent and that the property was purchased by the defendant for the very inadequate price of 3 lacs of rupees and that all the proceedings from start to finish ought to be set aside. But it is obvious that these questions were not available to the plaintiffs. The Bahuasin applied for setting aside the *ex parte* decree and failed. That question could not be raised by the Bahuasin except on the ground that the decree against her was obtained by fraud. So far as the execution sale is concerned she again applied for setting it aside under s. 311 and s. 244 of the C. P. C. Pending the disposal of that application the Bahuasin died and the plaintiffs were substituted in the record of that application as the heirs of the Bahuasin. That application again failed and it is not open to the plaintiffs to re-agitate the same question in a regularly constituted suit between the parties. It is quite true that although the Bahuasin might have failed first in her application for setting aside the *ex parte* decree, secondly, in her application for setting aside the sale, she might still have maintained a suit for setting aside all the proceedings as a fraud upon her from start to finish. But to such a suit, Art. 95 of the Limitation Act affords a complete reply. It is not open to doubt that the Bahuasin did sometime or other become aware of the fraud practiced on her. Article 95 of the Limitation Act provides "that a suit to set aside a decree obtained by fraud or for other relief on the ground of fraud" must be instituted within three years from the time "when the fraud became known to the party wronged." If seems to me, therefore, that it is not open to us to consider the main questions of fact raised by the plaintiffs in this case; and if there were no other questions which could legitimately be raised by the plaintiffs on the plaint as presented by them there is no option but to dismiss the suit.

But a very important question was raised by the plaintiffs in the Court below, the adjudication of which does not depend on any question of fact. It was insisted on behalf of the plaintiffs that both under the Hindu Law as also under

the *heba-bil-ewaz* of the 17th April, 1876, the Bahuasin took a heritable but inalienable interest, and that consequently the plaintiffs are not embarrassed by the decree or the execution proceedings against the Bahuasin and that it is not necessary for them to ask the Court to set aside the proceedings in connection with the mortgage-suit as a condition precedent to this action. The question is a pure question of law, and, arises on the *Mithila* School of Hindu Law by which the parties are governed and on the construction of the *heba-bil-ewaz*. It was directly raised by the plaintiffs in the Court below and the learned District Judge has given his decision on the point. The plaintiffs assert that they are entitled to raise this point on their allegations in the plaint that there was a conveyance of the property by Durga Dutt Singh in favour of the Bahuasin and that upon the death of the Bahuasin they became entitled to succeed to the property as her heirs. It is quite true that they do not allege in the plaint that in the hands of the Bahuasin the property was inalienable, but they contend that, if they can satisfy the Court on Hindu Law and on the construction of the *heba-bil-ewaz* of the 17th April 1876, that in her hands the property was inalienable, the Courts cannot refuse to consider the point merely because they have not put their case in that form in the plaint. In my opinion, it would be wrong on our part not to allow a question of law to be argued before us which fairly arises on the allegations made in the plaint, though it is not stated in that form in the plaint.

It is not necessary for me in the view which I take to refer to those allegations in the written statement which expressly deny that there was any undue influence exerted over the Bahuasin either by Babu Durga Dutt or by the Maharaja of Darbhanga or to those which deny that there was any fraud either in connection with the *ex parte* decree obtained in the mortgage-suit or in the course of the execution proceedings which followed the decree. The main question of fact raised by the defendant in this case is that the *heba-bil-ewaz* dated the 17th April 1876 was a *farzi* document not intended to be acted upon. The defendant asserts that the *heba-bil-ewaz* was "merely a nominal and colourable transaction without consideration" and that Babu Durga Dutt Singh "was very much indebted and he took the opportunity of and taking advantage of the payment by him out of the joint family funds of the decretal dues of Rai Banwari Lal Sahu, he (the said Babu Durga Dutt Singh) brought into existence the *heba-bil-ewaz* in favour of his wife, the said *Musammat* Anuragin Bahuasin, as a subterfuge and means for protection of the property from his creditors, that the said *heba-bil-ewaz* does not evidence a real or *bona fide* transaction, that no consideration passed thereunder and neither the said Bahuasin paid the money recited therein nor had she means of her own to make such payment" and he alleges that the property was throughout in the possession of Durga Dutt Singh. The reference in the written statement to Rai Banwari Lal Sahu should be explained. The *heba-bil-ewaz* shows that there was a sum of Rs. 41,532-6-8 due by Babu Durga Dutt Singh to Banwari Lal Sahu on a decree obtained by Banwari Lal Sahu against him, that the disputed property and another property were advertised for sale to recover the sum of Rs. 41,532-5-8 and that Babu Durga Dutt Singh failed to procure the money in order to pay off Banwari Lal Sahu and that the Bahuasin gave him the money to enable him to save the property. The suggestion of the defendant is that taking advantage of the proceedings in connection with the suit of Banwari Lal Sahu against him, Babu Durga Dutt Singh put this property in the name of his wife so as to defeat his creditors. This is the main question of fact raised by the defendant; and on this issue the decision of the learned District Judge is in favour of the plaintiffs. The other question raised by the defendant is that the suit is not maintainable and that it is barred by limitation. It is obvious that if these questions be decided in favour of the defendant, the plaintiffs' suit must fail, and it will be necessary for us to discuss these questions before proceeding to deal with the more serious questions raised before us.

I will first deal with the question of the maintainability of the suit and whether the plaintiffs' suit is barred by limitation. Now I quite agree that it is not open to the plaintiffs to maintain the suit on any of the grounds which were available to the Bahuasin. I have dealt with the point, and I do not desire to repeat myself. But the plaintiffs contend that the property was inalienable in the hands of the Bahuasin and that, as her heirs, they are entitled to recover possession of the property from any one

into whose hands the property may have passed by an act of the Bahuasin. Three considered; first, whe- ent allegations in the plaintiffs to raise such ther it is open to them to ask the Court to consider such a case; and thirdly, whether the consideration of such a case is not barred by lapse of time.

I am of opinion that all the material facts are stated which entitle the plaintiffs to contend that the property was inalienable in the hands of the Bahuasin. They allege that Durga Dutt executed a deed of gift in favour of his wife and put her in possession of the property. They also allege that upon the death of the Bahuasin, they succeeded to the property as her heirs. On these facts, "the material facts" in the words of the Code—they contend that they are entitled to ask the Court to hold that the property was inalienable in the hands of the Bahuasin. Now whether the property was or was not inalienable is not a question of fact, it is an inference of law; and it is not necessary to set out an inference of law in the pleading. There is no question of surprise in this case, for the point was stated to us before we remanded the case for trial of all the issues raised in the case. The question was argued at great length before the District Judge; and, in my opinion, it would be wrong on our part to refuse to hear the plaintiffs on this point on a needlessly technical view of the plaint.

The second question must also be answered in favour of the plaintiffs. If the property was in fact inalienable, then the plaintiffs must have the right to claim the property if it had been alienated, unless the Bahuasin could herself set up the inalienability of the property as a defence to the mortgage action. But it is well-established that "the grantor cannot dispute with his grantee his right to alienate the land to him." That being so, the Bahuasin could not claim adversely to her own deed, and her failure to set up the inalienability of the property in the mortgage action cannot operate as constructive *res judicata* in this case. It was contended that the mortgage-decree binds the heirs and that the property having passed away in execution sale, the present suit is not maintainable. I am unable to assent to this proposition. It is true that the plaintiffs are heirs; but the property being inalienable, they are wholly unaffected by the mortgage decree. To hold otherwise is to say that property which is inalienable may become alienable by the act of alienation. In my opinion, the plaintiffs are entitled to maintain this suit and to show that the property was inalienable in the hands of their mother.

On the question of limitation, it is material to remember that, on the plaintiffs' case, they entered upon possession of the property on the death of their mother and that they were dispossessed on the 16th December 1906. It is the common case that on the death of the Bahuasin, the plaintiffs were substituted in the record of the proceeding under s. 311 of the Code which was then pending in the place of the Bahuasin. It is admitted by the defendant that he obtained delivery of possession on the 16th December 1906. That being so, the suit is governed by Art. 142 of the Limitation Act and is within time.

But it was contended that the plaintiffs cannot sue for possession until they had cleared the way for such a suit by securing the annulment of the mortgage-decree and the sale thereunder; and that, in that view, the suit is barred by the provision of Art. 95 of the Limitation Act. Now I quite agree that where a person is *prima facie* bound by a decree, he cannot, by suing ostensibly for possession, ignore the decree and evade the operation of law; and where such a decree is an impediment to the plaintiffs' way in obtaining relief inconsistent with it, he must bring his suit within the period prescribed by law for setting aside a decree. But the argument assumes that the plaintiffs are bound by the decree obtained against the Bahuasin. If I may say so with respect, the confusion in the argument is due to the fact that the plaintiffs claim as the heirs of the Bahuasin. Ordinarily a decree obtained against a person binds the heirs; and, if the decree was obtained by fraud, the heirs must sue within the period prescribed by Art. 95 of the Limitation Act. But the argument overlooks two important points; first, that the plaintiffs are not bound by the alienation, and, therefore, by the mortgage-decree; and secondly, it was not open to the Bahuasin at any time to claim adversely to her own deed. The Bahuasin could not claim to have the decree set aside on the ground that she was not competent to mortgage the property. That being so, the plaintiffs could not bring a suit to have the decree

set aside on that ground. But although they were not entitled to bring a suit to have the decree set aside, they were entitled to bring a suit for possession if being in possession they were dispossessed from it; but to such a suit Art. 142 clearly applies. The whole question is, are the plaintiffs entitled to recover possession without having the mortgage-decree and the sale thereunder set aside? In my opinion, since they were not bound by the decree and the sale thereunder, they could treat those proceedings as a nullity without the intervention of any Court, and they showed their election to do so by commencing an action to recover possession of the property. In my opinion, the suit is governed by Art. 142 of the Limitation Act and is consequently within time.

I now come to the question of *benami*. Now in dealing with this question, it is to be remembered that the case is not one that Babu Durga Dutt Singh purchased the property in the name of his wife. The property stood in his name and undoubtedly belonged to him, and he conveyed it to his wife by a document which is described as a *heba-bil-ewaz*. Cases are to be found in the books which lay down that where a person purchases a property in the name of his relative, the important point to be considered is, who paid the purchase-money. But here the purchase-money was undoubtedly paid by Babu Durga Dutt Singh and he transferred it to his wife on the 17th April, 1876. The case of the defendant is that the transfer was wholly fictitious; but before deciding this question in favour of the defendant, we must ask ourselves the question—what was the motive for this fictitious transfer? The case of the defendant on this point is contained in the 14th paragraph of his written statement which runs as follows:—

That the alleged deed of gift to *Musammat* Anuragin Bahuasin was merely a nominal and colourable transaction without consideration, that Babu Durga Dutt Singh was very much indebted and he took the opportunity of and taking advantage of the payment by him out of the joint family funds of the decretal dues of Rai Banwari Lal Sahu he (the said Babu Durga Dutt Singh) brought into existence the *heba-bil-ewaz* in favour of his wife the said *Musammat* Anuragin Bahuasin as a subterfuge and means for protection of the property from his creditors, that the said *heba-bil-ewaz* does not evidence a real or *bona fide* transaction that no consideration passed thereunder and neither the said Bahuasin paid the money recited therein nor had she means of her own to make such payment, and this defendant submits that upon execution of the said deed or at any time thereafter the possession of the share in question of Taluka Laheri aforesaid did not pass to the alleged donee but, on the other hand, the said share of the property remained as before in the possession of the said Babu Durga Dutt Singh until possession thereof was delivered to this defendant under the process of the Court after this defendant's purchase thereof and after disallowance by the Courts of the plaintiffs' and their father's objection to the sale as set forth above. This defendant further submits that the said deed is otherwise invalid and inoperative and that there was no transfer of any beneficial interest thereunder.

The suggestion of the defendant accordingly is that the object of Durga Dutt in entering into the transaction of the 17th April 1876 was to defeat his creditors. In view of the case made, it is important for us to consider whether at the date of the execution of the *heba-bil-ewaz* Babu Durga Dutt Singh was in such embarrassed condition as would induce him to enter into a fictitious transaction for the protection of his property.

In dealing with this question it must be remembered that Babu Durga Dutt was a wealthy man and was in possession of *babuana* properties which even now yield an income of a lac and a half of rupees. In 1873 Durga Dutt and his brother Girdhari sold certain valuable properties belonging to them for six lacs of rupees by which they paid off all their debts then existing. At the date of the *heba-bil-ewaz* Durga Dutt owed Rs. 41,532-6-8 to Rai Banwari Lal Sahu Bahadur on a decree which had been obtained by the latter against the former. The *heba-bil-ewaz* shows that he raised this sum from his wife and satisfied the decree of Rai Banwari Lal Sahu. The positive evidence in the case is that at the date of the transaction in question there were no other debts due by Babu Durga Dutt Singh. The case put to Amarendra Singh, one of the plaintiffs, by the defendant was that Durga Dutt was indebted to various persons including Ram Narain Thakur, *Musammat* Fulbati Kumari, Tulsi

Sahu, Mr. Henry Gyll, Jhumak Purbey, Subans Sahu and Jailal Sahu. But no attempt has been made by the defendant to establish the case put to Amarendra Singh. In my opinion the evidence establishes that by the transaction of the 17th April 1876, Durga Dutt satisfied his debt and that at the date of the transaction there were no other debts due by him. That being so, the positive case made by, the defendant on this point fails. The defendant sought to supplement the weakness of his evidence on this point by attempting to prove an admission on the part of Babu Durga Dutt Singh. The evidence adduced on behalf of the defendant on this point is to the effect that when it was proposed that Babu Durga Dutt should in some way secure the debt which was due by him to the Maharajah of Darbhanga in 1890, and Durga Dutt offered to execute a mortgage in respect of Taluka Laheri, a question arose whether the *heba-bil-ewaz* which had been executed by him in favour of his wife was a genuine transaction or a fictitious transaction and that Babu Durga Dutt admitted to the Maharaja of Darbhanga in the presence of various persons that he had entered into that transaction to save his properties as he was heavily indebted at that time. The evidence is furnished by Bhikhai Lal Missir, and Lalji Singh, both called on behalf of the defendant. In his evidence in examination-in-chief Bhikhai narrated the incident which took place in Maharaja's *Durbar* in 1890. His account is as follows:—Durga Dutt came to the Maharaja and offered to execute a document to secure the debt which was due by him to the Maharajah. Upon that the Maharaja asked him 'what kind of document he would execute.' Durga Dutt said that he would execute a mortgage document. Maharaja thereupon asked him what properties he would mortgage. Durga Dutt answered that he would mortgage Laheri. Thereupon Balbhadar Missir who was a *mushahib* in the *Durbar* pointed out that that property stood in the name of the Bahuasin. Durga Dutt thereupon said 'the property is really mine but I have kept it in her name and that if asked we both would execute the document'. In cross-examination the witness stated that Durga Dutt admitted that there were debts due by him and so he entered into a fictitious transaction in regard to the property. (See Parts I and II after remand, page 123). This is in substance the evidence of Lalji Singh. The learned District Judge has not accepted this evidence, and I entirely agree with his judgment on this point. It is improbable that, if Durga Dutt had entered into a fictitious transaction in order to save this property from his creditors, he should have made a solemn admission before the full *Durbar*; and it is unlikely that these witnesses should remember the details of a conversation which took place 33 years ago. The story is inherently improbable since there is no evidence to establish that at the date of the *heba-bil-ewaz* Durga Dutt had any debts to pay other than that which was satisfied by the execution of the *heba-bil-ewaz*.

The suggestion of Mr. Hasan Imam is that although Durga Dutt was not indebted to any one at the date of the *heba-bil-ewaz*, he knew that, being a man of extravagant habits, he would sooner or later be involved in debts and that the *heba-bil-ewaz* was executed, not with a view to defeat any existing creditors, but with a view to save the property from future creditors. It is quite true that the affairs of Babu Durga Dutt became involved later on in his life, but it is impossible to indulge in a speculation of the kind suggested by Mr. Hasan Imam especially as the positive case made by the defendant has failed.

It is well-established that an apparent transaction must be assumed to be real until the contrary is shown. The onus is accordingly on the defendant to show that the transaction of 1876 was a fictitious transaction. I have already shown that the definite case made by the defendant as to the motive which induced Durga Dutt to put the property in the name of his wife has failed. The only other questions are; first, whether the Bahuasin in fact paid Rs. 41,532-6-8 to Durga Dutt as alleged in the *heba-bil-ewaz*; secondly, whether Durga Dutt continued to be in possession of the property although he had executed a document in favour of his wife; and thirdly, whether the surrounding circumstances throw any light on the question. It is not possible to get any direct evidence at this distance of time as to a transaction which took place in 1876. It is true that there is some evidence on each side bearing directly on the character of the transaction; but this evidence has not been believed by the learned District Judge. It is, therefore, useless for me to go through that oral evidence as I see no reason for differing from

the conclusion of the learned Judge on this point. In regard to the first question, namely, whether consideration was paid by the Bahuasin, the view of the learned District Judge is on the whole in favour of the defendant. But in arriving at this conclusion the learned District Judge assumed that the onus was entirely on the plaintiffs. The learned District Judge was impressed by the fact that, undoubtedly, Banwari Lal Sahu had obtained a decree for Rs. 41,532 against Babu Durga Dutt and had attached Taluka Laheri in the execution proceedings in connection with that decree and that, undoubtedly, the decree was satisfied and the property released from attachment. The inquiry being thus limited, the learned District Judge rightly thought that the only question for determination was whether payment was made out of the husband's or the lady's money. He considered the evidence of the three witnesses examined on behalf of the plaintiffs on the question of the payment of the consideration by the lady. He conceded that the witnesses, on this point, were all competent witnesses, but he thought that their evidence was not wholly acceptable. Conceding that the money may have come from the lady he held that "there was no sufficient evidence to show if it was her own money or her husband's" and the conclusion at which he arrived may be stated in his own words: "that being the case, I am of opinion that it has not been proved that the money was her own money. Therefore, I find that plaintiffs have failed to prove that the lady had paid the money out of her private funds."

The conclusion of the learned District Judge is somewhat halting. It is not quite clear whether he rejected the case of the plaintiffs that the money was actually paid by the Bahuasin (whether it belonged to herself or to her husband) or whether he rejected the case of the plaintiffs that the money which was, in fact, paid by the Bahuasin belonged to her and not to her husband. If I had to come to a conclusion on this point, on the actual evidence of the three witnesses to which the learned District Judge refers, I would unhesitatingly agree with the conclusion at which the District Judge has arrived. They are speaking of an incident which took place in 1876 and, in my opinion, it is impossible for this Court to rely on that evidence.

But as I have said before, the onus is on the defendant and not on the plaintiffs and, in my opinion, the defendant has not shown that the money was not, in fact, paid by the Bahuasin in regard to the transaction of 1876. It is quite true that the account-books which would show the payment of the money by the Bahuasin to Durga Dutt have not been produced by the plaintiffs; and I am not prepared to assent to the argument that the onus being on the defendant it was not necessary for the plaintiffs to produce the best evidence on the point. But there is one circumstance in connection with this point which should not be ignored by us; and it is this, that it is somewhat difficult for the plaintiffs to produce the account-books of 1876. The account-books actually produced in the case are in such decayed condition that I cannot altogether reject the plaintiffs' story that the account-books other than those produced cannot be traced.

There being no reliable direct evidence on this point, we are bound to consider the surrounding circumstances. These surrounding circumstances are, first, that Taluka Laheri was attached in execution of a decree obtained by Banwari Lal Sahu against Durga Dutt, and secondly, that the property was released from attachment after payment by Durga Dutt of the decretal amount due to Banwari Lal Sahu. The *heba-bil-ewaz* recites that Babu Durga Dutt tried to procure the money from the market but failed and that, as a last resort, he took the money from his wife. I can find no sufficient reason for holding that the recitals in the *heba-bil-ewaz* are deliberately false. A lady of the rank and position of the Bahuasin might well have Rs. 41,000 in her hand, though it may be that, in point of law, the money belonged, not to herself, but to her husband; and it is not improbable that she should make over the money to her husband to save her husband's property from sale. The conclusion at which I arrive on this point is that it has not been shown by the defendant that the money was not actually paid by the Bahuasin to her husband, and that there is no reason why we should not rely upon the recitals in the document.

On the question of actual possession, the evidence adduced on behalf of the plaintiffs is, in my opinion, conclusive. The Bahuasin was recorded in the Land Registration Department as the owner of the property and the public demands were admittedly

paid in her name. Mr. Hasan Imam contends that if the original transaction was fictitious all public transactions must of necessity be in the name of the fictitious owner. I entirely agree with this argument; but it is for the defendant to show that the original transaction was fictitious. It is not disputed by Mr. Hasan Imam that since September 1882, all the accounts stand in the name of the Bahuasin; but he contends that there is no evidence to show that the income of the property was appropriated by the Bahuasin between 1876 and 1882. In 1881 the Bahuasin instituted an account suit against her agent Turant Lal; and in that suit Turant Lal raised the defence that the Bahuasin was a *farzidar* on behalf of her husband. The defence succeeded, and it is Mr. Hasan Imam's case that since 1882 false account-books were prepared by Durga Dutt in order to make it appear that the Bahuasin was the owner of the property.

We have, however, in the record of the case *jamabandis* of 1878, 1879, 1880 and 1881 which show that collection was made on behalf of the Bahuasin. I am not referring to the *jamabandis* of the subsequent years, for it is not disputed by Mr. Hasan Imam that those *jamabandis* do show that the property belonged to the Bahuasin. Now the *jamabandis* of 1878, 1879, 1880 and 1881 strongly corroborate the evidence adduced on behalf of the plaintiffs that the Bahuasin was in possession of the property. The only criticism directed against these *jamabandis* is that they were not produced in Turant Lal's case and that, therefore, we should reject them as having been fabricated for the purpose of this case. I am unable to accept this argument, I have examined these books for myself and they are in such a decayed state that it is impossible to take the view that they have been got up for the purpose of this case. These *jamabandis* have been accepted by the learned District Judge as genuine and I can see no reason for coming to the opposite conclusion. The basis of Mr. Hasan Imam's argument that these *jamabandis* were not produced in Turant Lal's case is that they do not bear any exhibit mark of the Court. It is not possible to get a witness now to speak of what happened in Turant Lal's case. The judgment in Turant Lal's case, Ex. F (1) (Part II after remand, page 16) shows that *jamabandis* were produced in that case which, however, were not accepted by the Court as genuine. The conclusion of the learned District Judge in that case on the evidence adduced before him is, of course, entirely irrelevant; but the fact remains that *jamabandis* were produced on behalf of the Bahuasin in that case.

I now come to the *deori* account-books kept by Raghunandan Jha, brother of the Bahuasin. These books show that the income of the property was appropriated by the Bahuasin. *Deori* account-books are private account-books, not of the entire income of the property but of such part of the income as was actually spent by the Bahuasin through her private servants. Mr. Hasan Imam does not accept these books as genuine; but he has an alternative argument, namely, that these books if genuine; show that approximately 90 per cent. of the money that actually came into the hands of the Bahuasin was paid to her husband. Counsel on behalf of the plaintiffs has analysed the accounts for six years, 1290, 1292, 1307 to 1310. These are the only accounts which have been printed in the paper-book. The account-book of 1290 shows that Rs. 10,950 was advanced as loans to Durga Dutt and that Rs. 3,700 was re-paid by him. The account-book of 1299 shows that Rs. 23,257 was advanced as loans to Durga Dutt and that Rs. 10,456 was re-paid by him. The account-books of 1307 to 1310 show that Rs. 1,876 was advanced as loans to Durga Dutt and that Rs. 12,537 was in those years re-paid by Durga Dutt. Mr. Hasan Imam concedes that the income of the property was anything between Rs. 30,000 and Rs. 40,000 a year. The result of a careful examination of those account-books, which have been printed in the paper-book, that is to say, the account-books for six years, is that out of Rs. 1,50,000 that must have come into the hands of the Bahuasin, Durga Dutt was indebted to her in the sum of Rs. 9,381. This does not support the argument of Mr. Hasan Imam that 90 per cent. of the income actually went into the pocket of Durga Dutt. The rest of the accounts have not been translated and we are not in a position to say what the actual state of affairs as between Durga Dutt and the Bahuasin may be on an examination of these accounts. I hold that these account-books are genuine and they show the enjoyment of the property by the Bahuasin.

Mr. Hasan Imam has strongly relied upon the evidence of Mr. Onraet and Mr. King

in support of his case that the Bahuasin was a *benamdar* for her husband. Mr. Onraet was in the service of Durga Dutt from 1896 to 1901. His evidence is that he was in charge both of the *babuana* properties and of Taluka Laheri and that in regard to the management of Taluka Laheri he used to get instructions from Durga Dutt and in his absence from Amarendra Singh, plaintiff No. 2. He denies that he ever received any instructions from the Bahuasin or from Raghunandan Jha. He says that he used to keep the collections of *babuana* properties, *sikamat* properties and Taluka Laheri in one safe mixed together and that he used to remit the collections of Taluka Laheri in the name of the Bahuasin and those of the *babuana* properties in the name of Durga Dutt Singh, but that he actually sent all the remittances to Durga Dutt. His evidence is that Durga Dutt was the proprietor of Taluka Laheri. Asked for the reasons for his opinion he said as follows:—

"When I was appointed by Babu Durga Dutt Singh he told me that he was the proprietor but as his wife's name was registered in Register D as the proprietress, everything in connection with Taluka Laheri would be done in her name and for that reason he would have to give me power-of-attorney in her name also; I also used to receive my instructions and order concerning Taluka Laheri direct from him; when he wanted money for *pujas* and festivals he used to order me to send money indiscriminately from Taluka Laheri and the *babuana* properties; Babu Jawahir Saheb was supposed to be the *karpardaz* of his mother, but even in his presence Babu Durga Dutt Singh used to give me order and instructions concerning Taluka Laheri without consulting him. On one occasion two villages Khojpur and Barail belonging to *babuana* properties were up for sale at Muzafferpur. Babu Durga Dutt Singh asked me to go and get in any way an adjournment for the same; I replied that this would not be possible without paying some money and as I had just before that sent him money from Taluka Laheri I asked him to let me have that money to go and pay into Court and get the sale adjourned. These are the things besides what I was told by him when he appointed me, showed that he was the proprietor of Taluka Laheri."

It will be noticed that the value of Mr. Onraet's evidence lies in the admission alleged to have been made to him by Babu Durga Dutt Singh and on the alleged appropriation of the income of the property by Durga Dutt. He admits that all the account-books stood in the name of the Bahuasin and that the collections of Taluka Laheri were remitted in the name of the Bahuasin. He admits that he got a power-of-attorney from the Bahuasin and that the orders in connection with Taluka Laheri were sent to him in the name of the Bahuasin. The question is whether we ought to accept the oral testimony of Mr. Onraet unsupported as it is by the documentary evidence in the case. At the time when he was giving his evidence Mr. Onraet was a manager of Raj Darbhanga and, therefore, a servant of the defendant. Now I can understand public transactions being carried on in the name of a fictitious owner; but what was the necessity of resorting to a fiction as between the owner of the property and his manager? If Durga Dutt admitted to Mr. Onraet that he was the proprietor of the property, I can see no reason why the orders in connection with the property should be sent to him in the name of the Bahuasin. The alleged admission by Durga Dutt must have been made in 1896, when Mr. Onraet entered the service of Durga Dutt. The Maharaja of Darbhanga had already in 1892, brought a suit as against Durga Dutt and the Bahuasin for recovery of interest due upon the mortgage in 1890. There was a second suit in 1895, for recovery of interest upon the same mortgage. Is it likely that with those two decrees standing as against Durga Dutt he would make a solemn admission to Mr. Onraet, if it was his object to defeat his creditors by putting the property in the name of his wife.

But the most serious criticism against the evidence of Mr. Onraet is that he is contradicted by his previous deposition in another suit—Suit No. 455 of 1906. That deposition is Ex. 37 and is printed at page 244 in Part III after remand. The whole of that deposition shows that the Bahuasin was the owner and proprietress of Taluka Laheri. He stated definitely in the course of his evidence in that case that "Babu Amarendra Singh's mother" (that is to say, the Bahuasin) "had Taluka Laheri and some *kamats*." It is not surprising that having regard to all the circumstances the learned District Judge has refused to

accept the evidence as reliable. For myself I am unable to accept Mr. Onraet as a truthful witness.

Mr. King's evidence stands on a different footing. He is a man of undoubted position and respectability, and anything spoken to by him must carry great weight with us. But, in my opinion, his evidence does not touch the point. His evidence is as follows: "I was for some time manager of Taluka Laheri from about the end of 1904, or beginning of 1905 upto the beginning of 1906. I am speaking from re-collection after 16 years. Babu Durga Dutt Singh appointed me manager of Taluka Laheri. During my tenure of management I received instructions from Babu Durga Dutt through his son plaintiff No. 2 and from no one else so far as I recollect. During my management I received the collections and I sent it to Babu Durga Dutt Singh. I had no Assistant Manager under me at any time." He admitted that during the same period he was also a Sub-Manager of Raj Darbhanga and that he had a power-of-attorney from the Bahuasin. In cross-examination he said as follows: "My recollection is that I used to send all the collections including those from Taluka Laheri to Babu Durga Dutt Singh in one lump and did not make any distinction as to the collection of Laheri Taluka. I used to send the money by peons with *chalans*. I do not say or cannot say that Laheri Taluka money used to be kept separately. It is true that in regard to estate matters I used to keep Amarendra Babu informed of what was going on." Now it is impossible to take the view that because Babu Durga Dutt used to give instructions to Mr. King in regard to the management of the property that, therefore, he and not his wife was the owner of the property and this is not the position which has been taken up by Mr. Hasan Imam. As a matter of fact the instructions to Mr. King came direct from Amarendra Babu. As the witness himself says, he was giving the evidence from re-collection after 16 years, and, in my opinion, his evidence is valueless on this point.

It is necessary now to notice some of the arguments which have been advanced by Mr. Hasan Imam on behalf of the defendant. Mr. Hasan Imam strongly relies upon the decision in Suit No. 6 of 1881 which was a suit by the Bahuasin against Turant Lal for account in regard to his management of Taluka Laheri. Turant Lal admittedly accepted the appointment from the Bahuasin; and when the suit for account was brought against him he raised the plea that the Bahusain was a *benamdar* for her husband. How this plea was allowed to be raised in view of the admitted fact that he was appointed by the Bahuasin as her agent is a matter of considerable surprise to me; but allowed to be raised it was, and the learned Judge who tried that case solemnly examined the evidence to find out whether the plea of Turant Lal was sustainable and he came to the conclusion that the Bahuasin was in fact the *benamdar* for her husband.

In my opinion the judgment in Suit No. 6 of 1881, is inadmissible in evidence as against the plaintiffs. Sections 40-43 of the Evidence Act deal with the subject of relevancy of judgments, orders or decrees of Court. Judgments, *qua* judgments or adjudications upon questions in issue and proofs of the particular points they decide are only admissible either as *res judicata* under s. 40 or as being '*in rem*' under s. 41, or as relating to matters of a public nature under s. 42 of the Evidence Act. The judgments, orders and decrees other than those admissible by ss. 40, 41 and 42 may be relevant under s. 43, *if their existence is a fact in issue or is relevant under other provision of the Act.* It is obvious that the judgment in question is not relevant either under s. 40 or under s. 41 or under s. 42 of the Evidence Act. The question which we have to decide is whether it is relevant under s. 43. As has been pointed out by the learned authors of Woodroffe and Ameer Ali on Evidence Act, the cases contemplated by s. 43 are such as the section itself illustrates, namely, where the fact of any particular judgment having been given is a matter to be proved in the case. Under that section a judgment may be admissible as relevant under some other provisions of the Act.

The question was debated in the leading case of *Gujja Lal* v. *Fatteh Lall* (1, decided by the Full Bench of the Calcutta High Court. That was a suit between *A* and *B* in which the question was whether *C* or *D* was the heir of *H*. If *C* was the

(1) 6 C. 171; 6 C. L. R. 439; 3 Shome L. R. 132; 3 Ind. Dec. (N. S.) 112.

heir of *H* then *A* was entitled to succeed; otherwise not. The same question had been raised in a former suit brought by *X* against *A* and was decided against *A* and the question arose whether the former judgment in the suit brought by *X* and *A* was admissible in evidence in the suit between *A* and *B*. It was held by the Full Bench of the Calcutta High Court (Mitter, J., dissenting) that a former judgment which was not a judgment *in rem* nor one relating to matters of a public nature was not admissible in a subsequent suit either as *res judicata* or as a proof of the particular point which it decided unless between the same parties or those claiming under them. In the view of the learned authors of Woodroffe and Ameer Ali on Evidence Act, the decision of the Full Bench of the Calcutta High Court in *Gujja Lal* v. *Fatteh Lall* (1) has not been touched by the decisions of the Judicial Committee, and it is somewhat remarkable that that case has been followed by the Bombay High Court, by the Madras High Court and by the Allahabad High Court.

I propose to refer to three cases upon which the plaintiffs relied, and which seem to me to be directly in point. In *Basi Nath Pal* v. *Jagat Kisore Acharjee* (2), it was held by Mukerji and Roe, JJ. that although a judgment not *inter partes*. may be used in evidence in certain circumstances, as a fact in issue, or as a relevant fact or possibly as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between the parties. In *Debendra Nath Haldar* v. *Bireshwar Haldar* (3), the plaintiff sued for recovery of his share in the land in suit. The Subordinate Judge in appeal admitted a judgment in a previous suit brought by another person against the defendants and mainly relying on a certain passage therein as proving an admission by the defendant decided in favour of the plaintiff. It was held by Richardson and Mullick, JJ., that the judgment was inadmissible in evidence for the purpose of proving the alleged admission and that the error committed by the Subordinate Judge in using the judgment for a purpose for which it could not be legitimately used vitiated the decree.

(2) 35 Ind. Cas. 298; 20 C. W. N. 643; 23 C. L. J. 583.

(3) 30 Ind. Cas. 821; 20 C. W. N. 648; 20 C. L. J. 270.

In *Abdul Latif* v. *Abdul Huq* (4) which was a case of *benami*, it was held by Mukerji and Rankin, JJ., that the fact that a judgment was admitted in evidence in order to prove that there was a litigation which terminated in a certain way, did not make all the recitals in that judgment part of the evidence of the subsequent action. It is not necessary for me to deal with the numerous cases on the point it is sufficient for me to say that I entirely agree with the view expressed by the learned authors of Woodroffe on Evidence that a judgment or decree is not admissible in evidence under s. 43, of the Evidence Act unless as a fact in issue or as a relevant fact under other sections of the Act. Thus if *A* has obtained a decree for the possession of land against *B* and *C*, *B*'s son murders *A* in consequence, the existence of the judgment is relevant as showing motive for the crime. So again in a suit for malicious prosecution the judgment in the criminal proceeding is evidence to establish the fact of acquittal, the fact, namely, that the criminal proceedings terminated in favour of the plaintiff. Again a reference to the finding of a judgment may explain the character of the party's possession and the nature of the enjoyment had in the property in suit and so the finding of a judgment may be referred to in all other cases where the record is matter of inducement or merely introductory to other evidence. Other instances may be cited where a judgment is admissible in evidence in a subsequent litigation ; but it must be shown that the existence of the judgment is a fact in issue, or that it is relevant under the other sections of the Evidence Act. This has not been shown in this case; and I must hold that the judgment in Turant Lal's case is not relevant in this case.

The next circumstance upon which Mr. Hasan Imam relies is the institution of a suit by Tara Dutt and Sashi Sekhar sons of Amarendra Singh plaintiff No. 2 in which they alleged that the transaction of 1876 was a *benami* transaction, that the property belonged to the joint family and that, being *babauna* property, it was inalienable. The evidence of Amarendra in this suit is that he knew nothing about that suit. The evidence is worthless, and I have no doubt whatever that the plaint-

(4) 81 Ind. Cas. 667; 28 C. W. N. 62; (1924) A. I. R. (C.) 523.

iffs were well aware of that suit. But then the question arises, what weight we should attach to the incident? I have already stated that the Maharaja of Darbhanga sued upon the mortgage executed by the Bahuasin and her husband and obtained an *ex parte* decree on the 3rd June, 1897. The property was sold on the 21st May 1902. There was then an application for setting aside the sale under ss. 311 and 244, C. P. C. That application failed and the sale was confirmed. On the 23rd February 1906 a suit, being Suit No. 19 of 1906, was instituted by the present plaintiffs for confirmation of their possession. In that suit they alleged that the transaction of 1876 was a perfectly genuine one and they set out various circumstances in support of their case that the sale of the 21st May 1902 did not affect their interest. They also applied for an injunction restraining the defendant from taking possession of the property until the determination of their suit. That application failed, and the plaintiffs thereupon presented an appeal to the Calcutta High Court against the order of the learned Subordinate Judge, dated the 30th June, 1906, refusing to grant a temporary injunction: On the 15th August 1906 the High Court dismissed the appeal. Thereupon Tara Dutt and Sashi Sekhar filed a suit on the 4th of September 1902 in which they claimed that the property belonged to the joint family and that, being *babuana* property, it was inalienable. They also applied for an injunction restraining the defendant from taking possession of the property until the determination of the suit. This application was dismissed on the 10th December 1906, and the defendant recovered possession of the property on the 14th December 1906.

In my opinion, no weight ought to attach to the circumstance connected with Suit No. 410 of 1906. It is obvious that the family was making frantic efforts to save the property. First the plaintiffs filed a suit on the allegation that the property belonged to their mother and that the sale did not affect their interest. They failed in inducing the Court to give them a temporary injunction restraining the Maharaja of Darbhanga from taking possession of the property. Thereupon they caused Tara Dutt and Sashi Sekhar to institute a suit on different allegations altogether with a view to induce the Court to issue an injunction. I am, therefore, not prepared to attach any weight to the admission made by the plaintiffs in Suit No. 410 of 1906. It may be mentioned that Suit No. 19 of 1906, and Suit No. 410 of 1906, were both withdrawn soon after the Maharaja of Darbhanga got possession of the property. Mr. Hasam Iman also relies upon the judgment in Suit No. 29 of 1900 between the Bahuasin and the present defendant. The Maharaja in execution of a decree against Durga Dutt had attached certain properties as being in the possession of Durga Dutt. The Bahuasin preferred a claim to those properties alleging that at the date of the attachment those properties were in her possession and not in the possession of her husband. The Court rejected her claim, whereupon a suit was instituted by her for declaration of her title to the properties which were the subject-matter of her claim. Now it is important to remember that the property which is in dispute in this suit was not involved in the litigation of 1900; but a question arose as to the means at the disposal of the Bahuasin to enable her to acquire those properties. The Bahuasin alleged that, at the time of her marriage, her father-in-law made a gift to her of 5 gold *mohurs* and certain *kamat* lands in 12 *mouzahs* and a *mouza* named Sonepatha. She also alleged that she was in possession of *Mouza* Laheri, and the Court had to consider whether *Mouza* Laheri, in fact, belonged to her. It is obvious that the question as to her title to *Mouza* Laheri arose very incidently and was not a matter in issue in that case. The learned Judge in dealing with the case said as follows :—"The second source of plaintiff's income is said to be the *Mouza* Laheri. This property is said to have been purchased by her in 1284, from her husband. But it appears that for the debts of her husband alone amounting to one lakh eighty-eight thousand rupees and odd this property was mortgaged on the 15th December 1890 by a deed executed by the plaintiff and her husband in favour of defendant No. 1's precedessor-in-title. This is quite clear that because the plaintiff became the apparent owner by the execution in her favour of a deed of sale by her husband, the mortgage-deed was taken from her husband as well as from her. Of course in the body of the deed, the plural number is used both in respect of the debt and the

ownership of the property; but that is merely a matter of form. The list given in that deed clearly shows that the debts for which the mortgage-deed was executed, were of the husband's alone. If the mortgaged property had really been sold to her by her husband, why should she mortgage her property for her husband's debt or why should she allow her husband to allege himself as co-owner of the property? I make these observations simply with a view to show that the alleged second source of income is also a myth and a non-entity." Any attempt to come to a conclusion on this point on the judgment in Suit No. 29 of 1900, (Ex. F-5, printed at page 78 of Part III after remand) would operate as a gross injustice in this case; but it is not open to me to criticise the judgment of the learned Subordinate Judge in that case. It is sufficient for me to state that for the reasons which I have already given this judgment is not admissible in evidence against the plaintiffs.

I think I have dealt with all the arguments bearing on this point; it is not necessary to deal with the numerous cases on the question of *benami*. These cases are quoted in the judgment of Mukerji, J., in *Promode Kumar Roy* v. *Kali Mohan Shah Pramanick* (5). I would respectfully appropriate the following passage appearing in that judgment as part of my judgment:—"It is important to bear in mind in this class of cases that, as pointed out by Lord Phillimore in *Maniklal Mansukhbhai* v. *Bijoy Singh* (6), the decision of the Court should rest not upon suspicion, but upon legal grounds established by legal testimony. This re-calls the earlier pronouncements to the same effect by Lord Westbury in *Sreemanchunder Dey* v. *Gopalchunder Chakrabutty* (7) and by Sir Lawrence Jenkins in *Mina Kumari Bibi* v. *Bijoy Singh* (8). But we are not unmindful that in the words of Lord Hobhouse in *Uman Parshad* v. *Gandharp Singh* (9) and of Lord Shaw in *Muhammad Mahbub Ali Khan* v. *Bharat Indu* (10) as *benami* transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. The person who impugns its apparent character must not rely, however, solely on probabilities as Lord Buckmaster observed in *Irshad Ali* v. *Kariman* (11). He must show something definite to establish that it is a sham transaction, on the principle that the burden of proof lies upon the person, who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things:—*Nawab Azimut Ali Khan* v. *Hardwaree Mull* (12), *Faez Buksh Chowdhury* v. *Fakeeroodeen Mahomed* (13), *Sulaiman Kader Bahadur* v. *Mehndi Begam* (14), *Nirmal Chunder Banerjee* v. *Mahomed Siddik* (15), and *Moti Lal* v. *Kundan Lal* (16). The most important test to be applied in these cases is, as observed by Mr. Ameer Ali in *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (17), the source whence the consideration came. Sir George Farwell formulated the same test in different language, when he observed in *Bilas Kunwar* v. *Desraj Ranjit Singh* (18), that where it is asserted that an assignment in the name of one person is really for the benefit of another person, the principle applies that the trust of the legal estate results to the man who pays the purchase-money. To the same effect is the decision of the Judicial Committee in *Parbati Dasi*

(5) 70 Ind. Cas. 555; 36 C. L J. 396; 27 C. W. N. 305; (1923) A. I. R. (C.) 228.

(6) 62 Ind. Cas. 356; 25 C. W. N. 409; (1921) M. W. N. 80 (P. C.).

(7) 11 M. I. A. 28; 7 W. R. 10 (P. C.); 2 Sar. P. C. J. 215; 1 Suth. P. C. J. 651; 20 E. R. 11.

(8) 40 Ind. Cas. 242; 44 I. A. 72; 1 P. L. W. 425; 5 L. W. 711; 32 M. L. J. 425; 21 C. W. N. 585; 21 M. L. T. 344; 15 A. L. J. 382; 25 C. L. J. 508; 19 Bom. L. R. 424; (1917) M. W. N. 473; 44 C. 662 (P. C.).

(9) 14 I. A. 127; 15 C. 20; 5 Sar. P. C. J. 71. Refique & Jackson's P. C. No. 98; 11 Ind. Jur. 474; 7 Ind Dec. (N. S.) 599 (P. C.).

(10) 53 Ind. Cas. 54; 23 C. W. N. 321; (1919) M. W. N. 507 (P. C.).

(11) 46 Ind. Cas. 217; 22 C. W. N. 530; (1918) M. W. N. 394; 21 O. C. 86; 5 O. L. J. 197; 28 C. L. J. 173; 20 Bom. L. R. 790; 24 M. L. T. 86 (P. C.).

(12) 13 M. I. A. 395; 14 W. R. (P. C.) 14; 5 B. L. R. (P. C.) 578; 2 Suth. P. C. J. 343; 2 Sar. P. C. J. 571; 20 E. R. 599.

(13) 14 M. I. A. 234; 9 B. L. R. 456; 2 Suth P. C. J. 490; 2 Sar. P. C. J. 733; 20 E. R. 775.

(14) 25 I. A. 15; 25 C. 473; 2 C. W. N. 186; 7 Sar. P. C. J. 254; 13 Ind. Dec. (N. S.) 313 (P. C.).

(15) 25 I. A. 225; 26 C. 11; 7 Sar. P. C. J. 383; 13 Ind. Dec. (N. S.) 611 (P. C.).

(16) 39 Ind. Cas. 964; 25 C. L. J. 581; 32 M. L. J. 468; 15 A. L. J. 329; 1 P. L. W. 490; 19 Bom. L. R. 471; 21 C. W. N. 929; 22 M. L. T. 10; (1917) M. W. N. 464; 6 L. W. 92 (P. C.).

(17) 33 Ind. Cas. 452; 43 C. 660; 20 C. W. N. 522; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10 (P. C.).

(18) 30 Ind. Cas. 299; 42 I. A. 202; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 37 A. 557; 22 C. L. J. 516; (1915) M. W. N. 757 (P. C.).

v. *Baikuntha Nath Das* (19) which re-calls the earlier pronouncements by Lord Campbell in *Dhurm Das Pandey* v. *Shama Soondari Dibiah* (20) and by Knight Bruce, L. J., in *Gopeekrist Gosain* v. *Gungapersaud Gosain* (21). Where, however, from the lapse of time direct evidence of a conclusive or reliable character is not forthcoming, as to the payment of consideration the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. Sir Arthur Wilson emphasised this when he observed in *Dalip Singh* v. *Chaudhrain Nawal Kunwar* (22) that if the evidence on neither side is wholly convincing as to the fundamental criterion, namely, the source of the purchase-money, if the evidence given and withheld is open to adverse criticism, the Court must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct, including their dealings with or enjoyment of the disputed property: see *Upendra Nath Nag* v. *Bhupendra Nath Nag* (23). We must further look to the substance of the transaction as evidence in the deeds of the parties, not permitting the real question to be obscured by what Knight Bruce, L. J., calls, in *Hunoomanpersaud Pandey* v. *Babooee Munraj Kunweree* (24), the form of expression the literal sense, nor by what Lord Macnaghten describes, in *Lal Achal Ram* v. *Raja Kazim Hussain Khan* (25) as exhibitions of the art of the conveyancer in the shape of recitals of obviously untrue statements introduced to impart some additional solemnity to an instrument." Applying these tests to the present case, I have no doubt whatever that the defendant has failed to establish that the transaction of 1876 was a fictitious transaction. The actual oral evidence produced is not convincing and there is no option but to found our conclusion mainly on the surrounding circumstances. I have no doubt whatever that the Bahuasin has been in possession of the property ever since the *heba-bil-ewaz* of 1876. I can see no motive which would lead Durga Dutt to put the property in the name of his wife; and even if I were to hold that no consideration was, in fact, paid by the Bahuasin my conclusion on this point would be the same. In *Ismail Mussajee Mookerdam* v. *Hafiz Boo* (26), the defendant relied upon a document, which, on the face of it, purported to be a deed of sale in her favour. The plaintiff contended that the transaction was a *benami* one and that it did not operate to confer any title on the defendant. It was found as a fact that no consideration was in fact paid by the defendant; but notwithstanding this, the Judicial Committee came to the conclusion that the transaction was one of gift. The decision destroys one part of the argument of Mr. Hasan Imam where he contended that if we found on the evidence that no consideration was paid, we must hold that the transaction was a fictitious one, there being no reason for putting a false recital in the document if the document was intended to have operation. I have anxiously considered all the evidence in this case and I entirely agree with the conclusion at which the learned District Judge has arrived on this point. I hold that the transaction of the 17th April 1876 was a genuine transaction and operated as a transfer of the property to the Bahuasin.

Before coming to the points which have been decided by the learned District Judge in favour of the respondent it will be convenient to dispose of a short question which was answered by the learned District Judge in favour of the appellants. Mr. Hasan Imam contends that s. 244 of the Code of 1882 operates as a bar to this suit. In order to deal with the question it is necessary to remember that the sale took place on the 21st May 1902 and that the Bahuasin and her husband applied for setting aside the sale on the 10th June 1902. The Bahuasin died in February 1904. Thereupon the present plaintiffs were substituted in the record of the application in the place of the Bahuasin on the application.

(19) 22 Ind. Cas. 51; 19 C. L. J. 129; 15 M. L. T. 66; (1914) M. W. N. 42; 12 A. L. J. 79; 18 C. W. N. 428; 16 Bom. L. R. 101; 26 M. L. J. 248 (P. C.).

(20) 3 M. I. A. 229; 6 W. R. P. C. 43; 1 Suth. P. C. J. 147; 1 Sar. P. C. J. 271; 18 E. R. 484.

(21) 6 M. I. A. 53; 4 W. R. P. C. 46; 1 Sar. P. C. J. 493; 2 Suth. P. C. J. 13; 19 E. R. 20.

(22) 35 I. A. 104; 30 A. 258; 10 Bom. L. R. 600; 12 C. W. N. 609; 14 Bur. L. R. 151; 4 M. L. T. 141 (P. C.).

(23) 32 Ind. Cas. 267; 21 C. W. N. 280.

(24) 6 M. I. A. 393; 18 W. R. 81n; Sevestre 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(25) 32 I. A. 113; 9 C. W. N. 477; 8 C. C. 155; 27 A. 271; 15 M. L. J. 197; 8 Sar. P. C. J. 772 (P. C.).

(26) 33 C. 773; 10 C. W. N. 570; 3 A. L. J. 353; 3 C. L. J. 484; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 137; 33 I. A. 86 (P. C.).

of Durga Dutt. The substitution was effected on the 31st May 1904 and the application was dismissed on the 2nd June 1904. The contention of Mr. Hasan Imam is that the plaintiffs on being substituted should have raised the question whether the sale of the property affected their interest; and Mr. Hasan Imam relied upon various cases which are all (with one exception) cases of money decrees.

Now, in my opinion, it is impossible to regard the application of the 10th June 1902 as an application under s. 244 of the Code. No doubt the applicants described the application as one under s. 311 and s. 244 of the Code; but it is not very material how an application is headed if we know what questions are substantially raised by the application. It must be remembered that an order under s. 244 of the Code of 1882 operated as a decree whereas an order under s. 311 did not operate as a decree. It used to be the constant endeavour of the litigants to bring their application for setting aside a sale within the terms of s. 244 in order to get a second appeal to the High Court. It is for this reason that applications for setting aside a sale used to be invariably made both under ss. 311 and 244 just as they are now made under O. XXI, r. 90 and s. 47 of the present Code. It may be conceded that an application for setting aside a sale could be brought within the terms of s. 244 if there were sufficient allegations to support such a case. For instance an application for setting aside a sale on the ground of fraud could be made under the provisions of s. 244 of the Code. It is, therefore, necessary to examine the allegations made by Durga Dutt and the Bahuasin in their application dated the 10th June 1902 in order to determine whether their application was one under s. 311 or one under s. 311 and s. 244 of the Code. That application is Ex. M-3 and has been printed at page 104 of the paper-book, Part III after remand. Now it will be noticed that the allegations are all allegations necessary to enable a party to succeed in an application under s. 311 of the Code. There is not a single allegation made in the petition which would enable the Court to try the case under s. 244 of the Code. I am of opinion, therefore, that the application of the 10th June 1902 though described as one under s. 311 and s. 244 of the Code of 1882 could only be investigated under the provisions of s. 311 of the Code. That being so, s. 244 cannot operate as a bar to the present suit.

But there is a more serious objection to the argument. It will be remembered that the decree was a mortgage-decree and there is abundant authority for the view that where a decree directs the sale of specific property, the Court executing the decree has no power to go behind the decree and say "I will not sell the property because the interest of the judgment-debtor has come to an end." The exact point has been decided in cases far too numerous to mention. In *Liladhar* v. *Chaturbhuj* (27), there was a decree for sale of certain mortgaged properties against *Musammat* Jhuna. *Musammat* Jhuna died on the 29th October 1895 and on the 13th June 1896, an application was made for execution of the decree which was dated the 28th June 1893. The plaintiffs who were entitled on their case to succeed to the property on the death of *Musammat* Jhuno were made parties to the execution proceedings as the legal representatives of *Musammat* Jhuno. They raised several objections in regard to the application for execution, the first of which was to the effect that the decree was a decree for the sale of the life-interest of *Musammat* Jhuno and that the estate having determined on her death the decree was no longer capable of execution. They also contended that *Musammat* Jhuno was not competent to effect a mortgage of the property to enure beyond her lifetime and that there was no justifying necessity for such a mortgage. The Court executing the decree overruled the objections and directed the sale of the mortgaged properties. Thereupon a suit was instituted by the plaintiffs and they sought a declaration that the decree of the 28th June 1893 which was obtained by the defendants against *Musammat* Jhuno became void and inoperative at her death and that the property mentioned in the plaint which was in the possession of the plaintiffs and which the defendants caused to be advertised for sale was not liable to be sold in the events which had happened. It was contended on behalf of the defendants that s. 244 operated as a bar to the suit. The learned Judges deciding the

(27) 21 A. 277; A. W. N. (1899) 64; 9 Ind. Dec (N. S.) 885.

case conceded that if the matter in controversy between the parties in the suit could be decided under s. 244 then there could be no doubt that the suit was not maintainable. But they came to the conclusion that the Court executing the decree could not consider the question of the validity of the decree. In delivering the judgment, the learned Judges said as follows: "A Court executing a decree is bound to give effect to it as it finds it, and it is not in the province of that Court to consider whether the decree was or was not rightly passed. The decree in this case was a decree for the sale of the property; the plaintiffs, who were parties to the execution proceedings in the character of legal representatives of *Musammat* Jhubo Kunwar, could only raise objections relating to the execution, discharge, or satisfaction of the decree, or to the stay of execution thereof, starting with the assumption that the decree was a valid one. That a judgment debtor cannot dispute the validity of a decree, is a proposition for which we have abundant authority. We may refer to the recent case of *Maluji* v. *Fakirchand*. (28). It is clear that a person claiming title through the original judgment-debtor cannot dispute the validity of the decree, and where a decree directs the sale of particluar property, a person who does not claim through the mortgagor cannot in execution contend that the mortgagor was not competent to make the mortgage, and that the decree was one which ought not to have been passed. Such questions would, in our opinion, be outside the province of the Court executing the decree; for instance in the present case, if we assume that the present plaintiffs could properly raise the objection upon which they mainly rely, the Court executing the decree would have to determine, after taking evidence, whether the mortgage was effected by Jhuna Kunwar, that is whether the mortgage bond was executed by her, whether there was consideration for the mortgage, and whether there was valid necessity for it. Such an inquiry is certainly not contemplated by s. 244 of the C. P. C." With reference to the cases which were cited before the learned Judges relating to decrees for money where there was no direction in the decree for sale of specific property, the learned Judges said as follows:—"The case of a decree for money in which after the death of the debtor, property is attached as the assets of the debtor, and in which the legal representatives of the deceased debtor object to the attachment on the ground that the property attached is no part of the assets of the deceased debtor, is different from the case of a decree which orders sale of specific property, a case of the former class is contemplated by the ruling of the Full Bench in *Seth Chand Mal* v. *Durga Dei* (29)" and then the learned Judges proceeded to say as follows: "But when a decree specifically orders the sale of particular property no question of assets can arise and the Court executing the decree is bound to execute it as it stands. Any question relating to the validity of that decree must, in our opinion, be decided in a separate suit." This is the view which has been accepted by both the Madras High Court and by the Calcutta High Court: see *Kumaretta Servaigaran* v. *Sabapathy Chettiar* (30) and *Khetrapal Singh Roy* v. *Shyama Prosad Barman* (31). Mr. Hasan Imam relies upon *Rajbansi Roy* v. *Mahabir Roy* (32), where the learned Judges appear to have held that when a judgment-debtor does not challenge the validity of a mortgage-decree but contends that in execution thereof certain property should not be attached and sold in consequence of circumstances arising subsequent to the decree such contention ought to be dealt with under s. 244 of the Code, and not by a separate suit. With all respect, I am unable to agree with that decision and prefer to follow the decision of the Allahabad High Court in the case to which I have already referred. I have no doubt whatever that the decision of the District Judge on this point is right, and I must hold that s. 244 of the Code does not operate as a bar to this suit.

I now come to the real point in controversy between the parties, namely, what was the effect of the transaction of 1876 on the power of the Bahuasin to mortgage the property? The plaintiffs contend that the gift in favour of the Bahuasin was a *Saudyaica* gift and that the Bahuasin by virtue of that gift took a heritable but inalienable interest in

(28) 22 B. 225; 11 Ind. Dec. (N. S.) 732.

(29) 12 A. 313; A. W. N. (1890) 137; 6 Ind. Dec. (N. S.) 946 (F. B.).

(30) 30 M. 26; 16 M. L. J. 545.

(31) 32 C. 265.

(32) 4 Ind. Cas. 121; 9 C. L. J. 358.

the property and that accordingly it was not in the power of the Bahuasin to enter into a mortgage transaction with reference to the property so as to bind the interest of the plaintiffs who claim through the Bahuasin and not through their father. Mr. Hasan Imam on behalf of the defendant contends, first, that the transaction of 1876 was a transaction of sale and not a transaction of gift and that accordingly the Bahusain took an absolute interest in the property, secondly, that if the transaction was one of gift the Bahuasin took an absolute interest in the property under the Hindu Law and that in any event the consent of her hushand as evidenced by the fact that he joined in the mortgage validated the mortgage if it were otherwise invalid, and that, thirdly, whatever may be the position under the Hindu Law, the Bahuasin took an absolute heritable and transferable interest under the terms of the *heba-bil-ewaz*. The questions raised in the arguments before us are not easy of solution, and it is necessary to proceed with care.

The first question which must be considered is whether the transaction of 1876 was one of sale or one of gift. The document is described as a *heba-bil-ewaz*; and Mr. Hasan Imam contends that the parties having elected to use a term which is well-known in Muhammadan Law must, in this instance, be deemed to be governad by the Muhammadan Law in regard to the effect of the transaction. As authorities in support of his proposition Mr. Hasan Imam relied upon *Abdul Aziz Khan* v. *Appayasami Naicker* (33) and *Ram Narain Singh* v. *Chota Nagpur Banking Association* (34). These cases establish that the rights of the parties to a contract are to be judged of by that law by which they may justly be presumed to have bound themselves. In the case of *Abdul Aziz Khan* v. *Appayasami Naicker* (33), the questirn arose whether a purchaser at an execution sale of an impartible *zemindari* could be allowed to put forward the case that he had purchased an absolute interest in it. In order to understand the decision it is well to point out that it was understood in India up to the decision of the Judicial Committee in *Sartaj Kuari* v. *Deoraj Kuari* (35), that an holder of an impartible *zemindari* had only a limited interest and that, except for special justifiable causes, he had no power of alienation beyond his lifetime. While this was the view of the law, the plaintiffs purchased the right, title and interest of the holder of an impartible *zemindari* at a sale held in execution of a decree against such holder. Subsequently this interpretation of the law was reversed, as I have said, by the Judicial Committee in *Sartaj Kuari* v. *Deoraj Kuari* (35) and in the *Pithapur case*, [*Rama Krishna Rao* v. *Court of Wards* (36)] which decided that the holder of an impartible estate had an absolute and alienable interest in it unless a custom against alienation was proved. The plaintiff who was the purchaser of the right, title and interest of the holder of the impartible estate brought a suit against the successor by survivorship for possession of the subject of sale on the ground that the plaintiff had purchased an absolute interest in it. It was held that the reversal of the previously accepted interpretation of the law did not displace its application to the contract contained in the certificate of sale of 1876, the parties to which were bound by the law as then understood and that only the life-interest of the then holder passed by the sale. In *Ram Narain Singh* v. *Chota Nagpur Banking Association* (34), the question arose as to the meaning of the expression "*istemrari mokarrari*" in a lease granted by the Raja of Ramgarh. The learned Judges pointed out that at the time when the leases were granted the idea was universally held that the holder of an impartible *zemindari* like the Ramgarh Raj could not encumber the corpus of the estate so as to bind the co-parceners except for justifiable special causes and that it was not till the decision in *Sartaj Kuari's case* (35) that the contrary view was authoritatively formulated. Mukerji, J., referred to the words of Willes, J., in *Ltyod* v. *Guibert* (37) and said that the rights of the parties to a contract are to be judged of by that law by which they may justly be presumed to have bound themselves. But it will be noticed that the law by which they were held to be bound was their personal law, a law which

(33) 27 M. 131; 31 I. A. 1; 8 C. W. N. 186; 6 Bom. L. R. 7; 8 Sar. P. C. J. 568 (P. C.).
(34) 36 Ind. Cas. 321; 43 C. 332.
(35) 15 I. A. 51; 10 A. 272; 5 Sar. P. C. J. 139; 12 Ind. Jur. 213; 6 Ind. Dec. (N. S.) 182.
(36) 26 I. A. 83; 22 M. 383; 1 Bom. L. R. 277; 3 C. W. N. 415; 7 Sar. P. C. J. 481; 9 M. L. J. Sup. 1; 8 Ind. Dec. (N. S.) 276 (P. C.).
(37) (1895) 1 Q. B. 115; 6 B. & S. 100; 122 E. R. 1134; 35 L. J. Q. B. 74; 13 L. T. 602.

was applicable to them, and that there was no difficulty in applying that law to them although the previously accepted interpretation of that personal law was subsequently reversed by an authoritative decision of the Judicial Committee. No authority has been cited to us to the effect that a Hindu may by adopting a term well-known to Muhammadan Law, make himself bound by the Muhammadan Law. Indeed it is impossible, in my opinion, to maintain that view. It is not necessary to discuss the various cases which have been cited to us by Mr. Hasan Imam to the effect that a *heba-bil-ewaz* is looked upon in Muhammadan Law as a sale, but I may usefully refer to the following observations of Mahmood, J., in *Rahim Baksh* v. *Mohammad Hasan* (38): "*Heba-bil ewaz* is a transaction made up of mutual or reciprocal gift between two persons each of whom is alternatively the donor of one gift and the donee of the other."

After all it is not very material to consider how the parties describe a transaction, if we know what the transaction is, for it is the substance of the transaction and not the form of it, to which we must have regard. I must accordingly consider the terms of the document itself to see whether the transaction was one of sale or one of gift. In considering the terms it is only necessary to remember, as Mr. Hasan Imam has admitted before us, that the income of the property at the time of the transaction in question was anything between Rs. 30,000 and Rs. 40,000 per year. The document itself will be found at page 7 Part III of the paper-book after remand, but I have adopted the translation of Mr. Hasan Imam which has been accepted by the plaintiffs. The document runs as follows:—"The decree of Rai Banwari Lal Sahu against me for Rs. 41,532-6-8-16 cr, 16 ms. is under execution in the Court of the District Judge at Muzaffarpur and the shares of me, the executant in Taluka Laheri, *Pergana* Jabdi, T. N. No. 1522 and in *Mouzah* Pandaul, *Pergana* Hati, T. N. No. 54167 have as per inventory filed by the said decree-holder, been advertised for sale on the 17th April 1876. Although I, the executant tried to procure money from creditors, etc., for payment of the decretal amount to the said decree-holder, I could not get it and I see no means to safeguard my *milkiat* properties from sale as mentioned in the inventory. As the sale will entail loss of the said two *milkiat* properties on sale, belonging to me, the executant my share of 7 annas $8\frac{3}{4}$ *gandas* situate in Taluka Laheri *asli* with *dakhli*, *Pergana* Jabdi, T. N. No. 1522 appertaining to Registration Office, District Darbhanga and Sub-District Madhubani and *Thana* Lockhe, with trees fruit bearing and non-fruit bearing and *ahar*, and *pokhar* and reservoir and tank and *cucha* and *pucca* wells, and *sair*, and salt *sair* and houses occupied by tenants, and all my *zemindari* rights which up to now have been in my possession without the co-partnership of any one to my wife *Musammat* Anuragin Bahuasin, having taken Rs. 41,532-6-8-16 cr. 16 ms. in cash, I have made of my free-will and accord *heba-bil-ewaz*, and having with the said amount paid up the amount of the decree of the aforesaid decree-holder and got the property released from sale have put the aforesaid *Musammat* in possession of the subject of the *heba*. The aforesaid *Musammat* should by becoming possessed of the subject of the *heba* spend the produce of the property with sons generation after generation (*ba farzandan naslan bad naslan.*) I, the declarant, or my heirs and representatives (*quam moqaimain*) shall have no right or concern in demanding the subject of the *heba* or the consideration money from the aforesaid *Musammat* or her heirs and representatives. Should I, the executant, my heirs and representatives make any claim or put forward any demand in respect of the gift properties or the consideration thereof the same will be deemed null and void. I have, therefore, given in writing these few words in the shape of a *heba-bil-ewaz* so that it may be of use when required."

No doubt the payment of a consideration of Rs. 41,532 is mentioned, but the question is whether the transaction was substantially one of gift or one of sale. If Mahmood, J., is right in his view that a *heba-bil-ewaz* is a transaction made up of mutual or reciprocal gifts between two persons, then it would appear that there was a gift by the Bahuasin of Rs. 41,532 to her husband and a gift of Taluka Laheri by her husband to her. The income of the property was anything between Rs. 30,000 and Rs. 40,000 a year, and, in my opinion, it is impossible to regard the transaction as a sale when all that

(38) 11 A. 1; A. W. N. (1888) 266; 13 Ind. Jur. 152; 6 Ind. Dec. (N. S.) 429.

was paid by the Bahuasin was Rs. 41,532. I have no difficulty whatever in understanding the transaction Durga Dutt was in need of Rs. 41,532 to save the property from the sale. He had tried to procure the money from the market and had failed. The Bahuasin had Rs. 41,532. In order to save the property she handed it over to her husband. The husband in return made a gift of the property to his wife. In my opinion the transaction was substantially one of gift although Durga Dutt received Rs. 41,532 as a gift from his wife.

Mr. Hasan Imam has drawn our attention to certain statements alleged to have been made by the Bahusain, suggesting an inference that the transaction in her favour was one of sale. In Suit No. 6 of 1881 which was the suit instituted by her against Turant Lal Choudhury she is alleged to have put forward the claim that she was the purchaser of the property in question. The plaint filed by her in that case is, however, not in the record. But Mr. Hasan Imam relies upon the recitals in the judgment itself; but, as I have said before the recitals in the judgment are not admissible in evidence against the plaintiffs in this suit. The next admission upon which Mr. Hasan Imam relies is that alleged to have been made by her in Suit No. 29 of 1900. That was a suit by her as against the Maharaja of Darbhanga under the provisions of s. 283 of the Code of 1882 to establish her right to certain properties which did not include the property now in suit. The Maharaja had obtained a decree against Babu Durga Dutt and in question of that decree had attached certain properties alleged to belong to him. The Bahuasin laid a claim to those properties and was defeated in the claim case. Thereupon a title suit was instituted by her. Neither the plaint filed in that suit nor her deposition is in the record. It appears that the question arose as to the source of the Bahuasin's income which enabled her to acquire the properties in dispute in that suit, and in dealing with this point the learned Subordinate Judge says as follows:—"The second source of plaintiffs' income is said to be the *Mouza* Laheri. This property is said to have been purchased by her in 1284 from her husband." As I have said before the recital in the judgment is not admissible in evidence against the plaintiffs and assuming that the admission as alleged was made by Bahuasin, I cannot attach any importance to it, since on the construction of the document itself we are in a position to say what the transaction was. I come to the conclusion that the transaction of 1876 in favour of the Bahuasin was one of gift.

The next question is, what is the effect of that gift. The plaintiffs contend that by virtue of the *Mithila* Law by which the parties are admittedly governed, the Bahuasin took a heritable but inalienable interest in the property and that the terms of the gift did not confer on her a larger interest. I will first consider the case under the Hindu Law. The question must be determined in accordance with the doctrine to be found in the Vivada Chintamani. Bachaspati Misra, the author of Vivada Chitamani, adopts the enumeration of women's peculiar property which is to be found in Manu and Katyayana, but says that the "six kinds of property" which is to be found in Manu "means that there cannot be a less number." In fact Bachaspati Misra gives other kinds of *stridhan* which are not to be found in Manu. It is not necessary for our present purpose to go through Bachaspati Misra's list, which appears to be exhaustive. The plaintiffs contend that the gift in this case is what is known as a gift subsequent and constituted the *Saudayica* of the Bahuasin. The original text upon which the claim is founded is that of Vishnu which is referred to by Bachaspati Misra and which runs as follows in the translation of Vivada Chintamani by Mr. Tagore:—"The property of a female is what her father, mother, son, or brother has given her, what she received before the nuptial fire; or at the bridal procession, or when her husband took a second wife, what her husband agrees should be regarded as her perquisites; what is received from his or her kinsmen as a gift subsequent to the marriage." The gloss of Bachaspati Misra on the text of Bishnu as translated by Mr. Tagore is as follows:—"What is received by a woman after marriage from the kinsmen of her lord or those of her parents is called a gift subsequent" (Mr. Tagore's Edition, page 259). Mr. Hasan Imam contends that a gift from husband is not within the text; for the husband cannot be referred to as "the kinsman of her lord," but there is no

doubt whatever that the translation of Mr. Tagore is not very accurate. The word used in the original is *bhartrikul* which means the *kul* or the family of her husband and includes the husband. The correct translation of the passage is as follows:—"That which is received by a woman from the family of her husband subsequent to marriage is called *anvadheya* or gift subsequent, so also that which is similarly received from the family of her father." A reference to Vivada Ratnakar, Ch. 12, verse 10, which is also of authority in *Mithila* will show that this translation is correct. The passage is translated as follows by Mr. Shastri: "Whatever is received by a woman after marriage from the husband's family or from her own family is called gift subsequent." I am of opinion, therefore, that the gift in the present case being a gift by the husband to the wife subsequent to marriage must be regardad as the *stridhan* of the wife. According to Bachaspati (see Mr. Tagore's Edition, page 259) "*Saudayica* is the name by which the different kinds of the peculiar property of women are known." That being so, the gift in the present case was a *Saudayica* gift of the husband to the wife.

This was not seriously disputed before us, but it was contended that such a gift is neither heritable nor inalienable. That such a gift is heritable admits of no doubt whatever. Bachaspati Misra refers to the text of Manu on this point which is as follows:—"On the death of the mother, let all the uterine brothers (and if unmarried) the uterine sisters divide the maternal estate in equal shares. It is fit even to the daughters of those daughters something should be given from the estate of their maternal grandmother on the ground of natural affection." The words "uterine brothers" obviously do not mean the brothers of the donee, as is shown by the text of Brihaspati to which Bachaspati Misra next refers in these words "Brihaspati confirms this" namely, the text of Manu, by declaring that "a woman's property goes to her children, and the daughter is a sharer with them provided she be unaffianced; but if she be married, she shall not receive the maternal wealth. Something should be given to her that her feeling may not be wounded." Bachaspati Misra makes the position perfectly clear by interpreting the words "to her children" in the text of Brihaspati as meaning "to her sons." The other text to which he refers on this point is that of Gautama which lays down that a woman's separate property goes to her daughters unmarried and unprovided for. In this case at the date of the transaction, namely, the 17th April 1876, the Bahuasin had a daughter Aparajita and five sons who are the plaintiffs in this action. Aparajita was married in 1869 and was cited as defendant third party in the action. It is nobody's case that Aparajita was unmarried and unprovided for at the time when the succession opened out. That being so, the plaintiffs as the sons of the Bahuasin were entitled to succeed to the property after her death as her heirs and not as the heirs of her husband.

I now come to the question whether, in her hands, the property was inalienable. I propose to consider the point first on the Hindu Law itself apart from the terms of the *heba-bil-ewaz* Bachaspati Misra refers to the following text of Narada:—"Property given to her by her husband through pure affection, she may enjoy at her pleasure after his death or give away, with the exception of lands or houses" and draws the following conclusion from that text:—"Consequently a woman can dispose of moveable property which has been given to her by her husband, *but she can never dispose of immoveable property.* The same rule holds good in the case of *Saudayaica* or the gifts of affectionate kindred." see Tagore's Edition, page 261. It would appear from this passage that it was the view of Bachaspati Misra, who is of paramount authority in *Mithial*, that a woman can under no circumstances dispose of immoveable property given to her by her husband. Bachaspati Misra then refers to the text of Katayayana which provides that a woman on the death of her husband may enjoy his estate according to her pleasure; but that in his lifetime she should carefully preserve it. He concedes that the text admits of two meanings: "The one is that, on the death of the husband, his property devolves on his wife and becomes her own in default of other heirs; the other is, that the property, she enjoys with the consent of her husband in the lifetime is to be regarded as her peculiar property." It will be noticed that the text of Katyayana is open to two interpretations and this has given rise to a difference of opinion amongst the

commentators. The word used in Katyayana is '*daya*'. Now the dictionary meaning of '*daya*' is both heritage and gift and this is the sense in which Bachaspati Misra understands the term '*daya*' as used in Katyayana. On the other hand, the author of Smriti Chandrika, which is of paramount authority in Madras, interprets the term '*daya*' as meaning a "donation". According to Bachaspati Misra the words "let a woman on the death of her husband enjoy her husband's property at her discretion" refer to a heritage, that is to say, to the property which devolves on the widow in default of other heirs, and the words "while he lives she should carefully preserve it" refer to a donation, that is to say, to what is received by the wife in the lifetime of her husband, and the conclusion at which Bachaspati Misra arrives is as follows:—"*As a woman cannot make a present of or at pleasure dispose of immoveable property, given to her by her husband in his lifetime*, so she cannot dispose of any immoveable property which she inherits on his death," and he says that the same opinion is maintained in Ratnakara and the Prakashakara which are of authority in *Mithila*. In my opinion, a reference to the scheme set out by Bachaspati Misra makes it abundantly clear that a wife receiving a gift from her husband is incapable of alienating it except under circumstances which would enable a widow taking the property of her husband by inheritance to alienate it. He is at some pains to show that a wife taking a gift from her husband is exactly in the same position as a widow succeeding to the property of her husband by inheritance. If that be so, it follows that in the absence of legal necessity or the consent of those persons who are entitled to succeed to the property on her death, there is no power of alienation in a woman taking a property by gift from her husband.

The next question is whether the consent of her husband has the effect of validating the transaction, and, if so, whether there was "consent" in this case, within the meaning of that term as used in the Hindu texts. It is contended on behalf of the plaintiffs that Bachaspati Misra is perfectly clear on this point and reference is made to the following passage in Vivada Chintamani as translated by Mr. Setlur:—"Just as in the case of immoveable property given by the husband the widow has no power of gift, etc., *even with the permission of the husband* so also in the case of immoveable property of the husband which is descended to the widow. The Prakashakara and the Ratnakara are to the same effect"—(Part II, page 257). If Mr. Setlur's translation be correct, then the point is concluded by the authority of Bachaspati Misra; but the original passage in Vivada Chintamani has been translated by Mr. Tagore. By Mr. Ghose and by Golap Chandra Sarkar. The translation of Mr. Tagore is as follows:—

"As a woman cannot make a present of or at pleasure dispose of immoveable property, given to her by her husband in his lifetime, so she cannot dispose of any immoveable property which she inherits on his death. The same opinion is maintained in the Ratnakara and the Prakashakara" (Mr. Tagore's translation, 263). Mr. Ghose adopts the translation of Mr. Tagore. Mr. Shastri translates the text as follows:—"Just as in immoveable property given by the husband there is incompetency of women in making gift and the like by reason of this text, so also in the husband's immoveable property devolving by inheritance on the wife." The text referred to in Shastri is the text of Katyayana referred to above.

It would appear then that Mr. Setlur stands alone in his translation that there is prohibition on the wife to dispose of immoveable property taken by her under a gift from her husband even with the consent of the husband. The critical words in the original are "*etat bachanat*." It is contended on behalf of the plaintiffs that there are two readings of this passage and that in one of these readings the word '*etat*' is omitted. The contention is that if the word '*etat*' be omitted, the word '*bachanat*' is capable of being rendered as "by the command or order" and the disputed passage is capable of being rendered as follows:—"As by virtue of the order or permission (of the husband) a woman cannot make a present of or at pleasure dispose of immoveable property, given to her by her husband in his lifetime, so she cannot dispose of any immoveable property which she inherits on his death" but that if the word '*etat*' be taken into consideration, the passage would mean that as by virtue of the text a woman cannot make a present of, etc. It is contended that the word '*bachanat*' may mean

either a text or order, command, permission, etc., but it appears that in the text as quoted in Shastri the word *'etat'* is omitted and still he renders the word *'bachanat'* as text.

In view of the authority of Tagore and Shastri, I am unable to come to the conclusion that there is direct prohibition in Vivada Chintamani on the power of a woman to deal with immoveable property even with the consent of her husband.

But I am of opinion that Mr. Setlur has rendered the spirit of Bachaspati Misra. The whole idea running through the mind of Bachaspati Misra is that the property taken by a woman by a gift from her husband, must be protected during her lifetime and that she is in the same position in regard to that property as a widow taking the property of her husband by inheritance after his death. Now a widow can alienate such property only for legal necessity or with the consent of these who are entitled to succeed to the property on her death. So also it would seem that in the view of Bachaspati Misra a woman taking the property by gift from her husband can only alienate the property in case of necessity or with the consent of those who are entitled to succeed to the property on her death.

It has been urged before us that if there is no express text on this point in Vivada Chintamani we must decide the point on the interpretation of the texts of Mitakshara with such assistance as may be afforded by other commentaries (though not recognized as authorities in *Mithila*) and by modern text books. It is conceded that there is no express text on this point in the Mitakshara; but it is contended that both in the Mayukha and Smriti Chandrika it is expressly provided that the prohibition on the right of a woman to alienate property taken by her as a gift from her husband is not absolute, but that she may alienate such property with the consent of her husband; and a decision of the Bombay High Court in *Bhan* v. *Raghunath* (39) has been cited before us.

I will consider the case first under the Mitakshara; for Mitakshara is of authority in *Mithila* except in regard to those matters where there is a difference of opinion between Vignanesvara and the *Mithila* commentators. Now it is conceded that there is no text in the Mitakshara dealing with the question whether a woman taking a property by gift from her husband can alienate such property with the consent of her husband.

But Mitra Misra, who is of very high authority in the Benares School is of opinion that "in the disposal of woman's property, females have not independence without the permission of their husband" (See Sircar's Edition of Viramitrodya, page 224). At first sight, the text of Mitra Misra would appear to be conclusive in this case, but on further investigation it will be noticed that the opinion of Mitra Misra is based on a text of Manu which has been interpreted in a different sense in the *Mithila* School. The text of Manu (Ch. IX, verse 109) upon which reliance is placed in all the schools has been translated as follows in the Sacred Books of the East:—"Women should never make a hoard from (the property of) their families which is common to many, nor from their own (husband's particular) property without permission"—(Vol. 25, page 372). It is obvious that there is wide scope for different interpretations, since the critical words "husband's particular" are missing in the text, and are left to be inferred from the context. Now Mitra Misra (and, as I shall presently show, the authors of Smriti Chandrika and Mayukha) declined to read these words in the text, with the result that he rendered the text as follows:—"Women shall not make any disbursement out of family property which is common to many, or *even out of their own property*, without the permission of their husbands. The conclusion at which Mitra Misra arrived followed directly from the text of Manu, as he read it, which he accepted as of undoubted authority. Now this text of Manu is not referred to in Vivada Chintamani; but Chandreswar, who is of equal authority in *Mithila*, refers to it only to show that he has read the text differently. The passage occurs in Ch. VII, para. 2, and is rendered as follows by Sircar, "Manu says, 'woman shall not make abstractions from family (property) common to many, nor even from her husband's own property, without permission.'" And then follows the commentory of Chandreswar in these words: "Here by the word 'family' is intended family property by reason of contextual association; hence, out of joint property, 'abstraction;'

(39) 30 B. 229; 7 Bom. L. R. 936.

i. e., secret appropriation of property, should not be made by women without the permission of the owners. Likewise from even husband's own property, *i e.*, from husband's property, held not in common with other members of the family, secret appropriation should not be made, without the permission of the owner of the property. This is the meaning." It is obvious that there is a difference, and a serious difference between Mitra Misra and Chandreswar on the critical text of Manu, and that the view of Mitra Misra based as it is on his interpretation of the text of Manu, can be of no authority in *Mithila*.

The view of Mitra Misra as to the text of Manu was shared by Nilkantha, the author of the Mayukha. In the Mayukha (Ch. IV, s. 10, page 93 of Mr. Mandlik's Edition), the text of Manu is rendered as follows :—"Hence, says Manu (Ch. IX, verse 199) : 'A woman should never make (any) expenditure out of the family (property) belonging to several or *even (out of) her own wealth* without the assent of her husband.'" This passage is prominently referred to in the judgment of Jenkins, C. J., in *Bhan* v. *Raghunath* (39) in support of the proposition that a woman's power of disposal over her *stridhan* is during coverture subject to her husband's consent.

The author of the Smriti Chandrika also adopts the interpretation placed upon the text of Manu by Mitra Misra and Nilkantha. That text is rendered as follows in Smriti Chandrika:—"Manu, therefore, says, "woman should never make expenditure from the wealth of the family common to many, inclusive of themselves, or *even from their separate property* without the permission of their respective lords." And the comment of the author on the text is as follows : "The meaning is that women who are naturally wanting in independence cannot, of their own choice, make disbursements, use, or the like of the property belonging in common to themselves and their husbands, *or of property belonging to them exclusively*:" (Ch. IX, ss. 14 and 15, Setlur's Collection of Hindu Law Books on Inheritance, Part I, page 259).

Now I quite agree that, in dealing with this point, we may take such assistance as may be afforded by other commentaries though not recognized as authorities in *Mithila*, but I think that I have shown with sufficient clearness that the view presented in the Viramitrodya, the Mayukha and the Smriti Chandrika on this point cannot be regarded as of authority in *Mithila*. The foundation of the rules enunciated in those schools is the text of Manu; and, when that text is interpreted in a different light in the *Mithila* School, it follows that the rule based on a particular interpretation of the text, not accepted in *Mithila*, cannot have any operation in *Mithila*.

And a careful examination of Vivada Chintamani will lead to the conclusion that there is no question of the control of the husband in property given by him to his wife. Bachaspati Misra refers to the text of Katyayana, only to put it aside. He then quotes the text of Narada, and draws the conclusion, binding in *Mithila*, that a wife can never dispose of immoveable property given to her by her husband (Mr. Tagore's Edition, page 261). Later in the Chapter he says that "the immoveable property which a woman gets after the death of her husband, cannot be disposed of at her pleasure" and that "the meaning of this is consonant with that of the husband's donation which can only be enjoyed but not spent" and lastly he points out that "as a woman cannot make a present of, or at pleasure dispose of immoveable property, given to her by her husband in his lifetime, so she cannot dispose of any immoveable property which she inherits on his death." It will be noticed that, in the scheme of Bachaspati Misra, the gift and the heritage stand on the same footing and that he deduces the rule that the widow cannot dispose of any immoveable property which she inherits on the death of her husband as a logical consequence of the rule that the wife cannot make a present, or at pleasure dispose of immoveable property.

Now if the gift and the heritage stand on the same footing then it follows that the subject-matter of the gift, if immoveable property cannot be dealt with by the wife except for purposes which may be denominated "necessary purposes." The consent of the husband, who has parted with his proprietary interest in the property, will not validate the transaction, though the consent of the next heirs may raise a presumption of the existence of necessity. In this case the transaction did not rest on any necessity nor is it pretended that it did. Babu Durga Dutt, it is true, owed a sum

of money to the Maharajah, but he had valuable properties of his own which could be offered as a security for the debt. It is urged that Durga Dutt and his sons were under the impression that *bäbuana* properties were inalienable; but the Maharajah was not of that opinion, and the impression of Babu Durga Dutt and his sons cannot decide the question of necessity to the prejudice of the Bahuasin. It is for the party founding title on an alienation by a limited owner to show necessity in respect of the alienation and the Maharajah obviously cannot establish necessity, since he never assented to the doctrine that *babuana* properties were inalienable. I have no doubt whatever that under the *Mithila* Law, immoveable property taken as a gift by a wife from her husband is heritable but inalienable except for purposes which may be denominated necessary purposes, and that in this case there was no legal necessity to support the transaction.

Assuming that I am wrong in my view that the consent of the husband will not validate the alienation, I have still to enquire into the question whether there was in this case "the consent" of her husband to the mortgage. Now the case cannot be put on a higher footing than this that, while the husband is living, his consent will raise the presumption that there was necessity to support the transaction. But presumption is a rule of evidence, not a rule of law; and we have all the facts to enable us to decide the point on evidence. Those facts are not in dispute; and I am unable to assent to the proposition that the act of the husband in consenting to a transaction for his benefit is to be regarded as a consent which will validate the transaction. The control exercisable by the husband in regard to the dealings of the wife with property given to her by him is in no sense proprietary. It may be incident to his status as the guardian of his wife; but if his control is to be put on that footing, he is bound to exercise it for the protection of his wife and the preservation of the property. It cannot be suggested that it is in the power of a guardian to give validity to a transaction by the ward by consenting to it, when the transaction is wholly for the benefit of the guardian; and in this case, the Maharajah must be regarded as a party to the breach of trust, since he knew that the debt was of Durga Dutt Singh, in no way binding on the Bahuasin.

It was next contended on behalf of the respondent that the Hindu Law allows the husband, under certain circumstances to deal with the property of his wife for his benefit, and that the transaction ought to be supported on this ground. The texts of Devala, Yajanavalkya and Katyayana have been adopted by all the schools as the law on the subject, but we are concerned with the interpretation put on these texts in the *Mithila* School. Devala gives a complete enumeration of the peculiar property of woman. According to him, it consists of "food and vesture, ornaments, perquisites and wealth received by a woman from a *kinsman*" (Vivada Chintamani, Tagore's Edition, page 263). According to him, the husband has no right to it except in extreme distress. He provides however, "If he (the husband) give it away on a false consideration, or consume it, he must make good the value to the woman with interest; but he may use the property of his wife to relieve a distressed son." Bachaspati Misra's gloss on this text is important, and I give it in full as Mr. Imam strongly relies on it in support of his case. The gloss is as follows: "The property of a woman should not be improperly given away or consumed without her consent, but it may be used for the relief of a distressed son. It is declared by the same writer that the husband has power to use it with or without the consent of his wife. If the husband having obtained her consent use the property amicably, he shall be required to pay the principal when he becomes rich. If the wife give her peculiar property through affection, when her husband is ill, or in danger, or has been confined by a creditor, he may give her the value of it when he pleases. The meaning of the above is that if the wife, observing her husband's illness and the like, give her wealth, it may be re-paid by him at his pleasure."

Mr. Hasan Imam contends that the text gives the husband the power "to use the property amicably having obtained her consent"; but it is obvious that the rule is confined to such properties as are enumerated by Devala which, according to him, constitute "the several kinds of the peculiar property of women." They are (1) food and vesture, (2) ornaments, (3)

perquisites, that is, wealth given to a damsel on demanding her in marriage, and (4) wealth received from a kinsman. We are not concerned in this suit with the first three classes of *stridhan*, for property given by a husband to a wife does not fall within these classes. Does it fall within the words "wealth received from kinsman?" The word in the original for kinsman is "*bandhus*" which word is also used in Yajnavalkya and which is rendered in the Mitakshara as *matri-bandhus* and *pitri-bandhus*, that is to say, persons related to mother and father (see Colebrook 2-XI-6, Ghorpure's Edition of the Mitakshara, page 273 and Banarji's *stridhan*, page 299). It is obvious that the husband is not comprehended within the term, and that the text of Devala cannot be cited as authority for the proposition that the husband may deal with the property given by him to his wife with her consent.

In the next place it seems to me that neither in form nor in substance was the transaction one in which the husband, "having obtained her consent, used the property amicably." Now what was the transaction? In point of form the mortgage was by Durga Dutt and the Bahuasin on the footing that the property belonged to them, and that the debt, to secure which the mortgage was executed, was binding on both. If, however, the substance is to be regarded, then obviously the Maharajah secured the execution of the mortgage by both of them for his own safety, because there was a *hebanama* in favour of the Bahuasin, and it might be urged, if he took the mortgage from the Bahuasin, that the *heba* did not operate to convey any title to the Bahuasin. The transaction was not a transaction of the husband with the consent of the wife, but a transaction of the husband and wife on the footing that the title was in both of them, so that the Maharajah would have a claim good on the mortgage, if the title was in either.

Lastly, I am of opinion that it has not been established that the Bahuasin consented to her husband mortgaging the property for his personal benefit. Now I am quite aware that the plaintiffs cannot, in this action, raise the question whether there was not undue influence exerted on the Bahuasin in regard to the execution of the mortgage by her. On the hypothesis that the property was alienable by her, no question of undue influence can now arise, since the Bahuasin had the right and the opportunity to establish a case of undue influence in the mortgage action against her. But if I am right in holding that the property was not alienable by her, then the question of "consent" becomes material in discussing whether there is an answer to the plaintiffs' suit. The plaintiffs say that the property was inalienable and that accordingly they became entitled to recover the property on the death of the Bahuasin. To that, the defendant replies that under the Hindu Law, Durga Dutt had complete power to mortgage the property with the consent of the Bahuasin. Thereupon the plaintiffs retort, "prove that the Bahuasin consented to her husband mortgaging the property for his personal benefit." Now this question was not in issue in the mortgage action, either directly or constructively, for it was a simple suit to enforce a mortgage executed by Durga Dutt and the Bahuasin, on the footing that the property belonged to both of them. The only defence that could be put forward by the Bahuasin in that litigation would be that there was undue influence exerted on her in the matter of the execution of the bond. That issue cannot be raised by the plaintiffs in this Court. But at the same time it must be remembered that the question as to the inalienability of the property could not be put in issue in that litigation; for, as I have said before, the Bahuasin could not claim adversely to her own deed. The plaintiffs raise the question of inalienability in this action, and, in answer to the defendant's case that, though the Bahuasin could not mortgage the property, her husband could mortgage it with the consent of the Bahuasin, they are entitled to ask the defendant to prove that the Bahuasin, did consent to her husband mortgaging the property for his personal benefit.

It is, therefore, necessary to examine the circumstances connected with the execution of the mortgage-bond. In dealing with the point, it is to be remembered that the Bahuasin was an illiterate *purdanashin* woman living with her husband at the date of the transaction. The evidence of Amarendra Singh, one of the plaintiffs in this action, is as follows:—The Maharajah had several decrees against Durga Dutt which were under execution. Mr. Duff, sub-manager of the Darbhanga Raj brought

an account of the money due to the Raj and informed Durga Dutt that the Maharajah wanted a mortgage document to secure the debt. After some conversation, Mr. Duff left but came back again after a few days and said that the Maharajah wanted the Laheri property to be mortgaged. Durga Dutt said, "the property is not mine. I have given a *heba* of it to my wife." Mr. Duff went away, but came back again and said: "Maharajah has ordered me to get the mortgage-deed executed by both of you as the property is in the name of your wife." Durga Dutt thereupon directed the maternal uncle of the witness to ask the Bahuasin, and said:—"Whatever decrees there are on me, she also ought to pay." The person so directed went to the Bahuasin, and related every thing to her. The Bahuasin said, "I know nothing. What is proper may be done." Durga Dutt, on hearing this, informed Mr. Duff that the deed would be executed by both of them. The witness denied that the Bahuasin had any independent legal advice.

This is substantially the evidence of Amarendra Singh; and whatever difficulty there may be in accepting the whole of that evidence, this at least is clear that the lady did not have any independent advice and that she executed the document because she was asked to do so by her husband, or this part of the evidence of Amarendra Singh remains unchallenged and uncontradicted.

The defendant's version of what took place in connection with the transaction is as follows:—Durga Dutt Singh accompanied by his son Amarendra Singh came and saw the Maharajah and said, "I owe you money, but I am unable to pay it now. So I want to execute a mortgage-bond for the whole amount." The Maharajah asked him what property he wanted to mortgage. He said that he would mortgage Laheri. Balbhadra Misser, a senior *mosahib* of the Maharajah, thereupon said that Durga Dutt had already executed a *farzi* deed in respect of that property in favour of his wife. To this Durga Dutt said: "This is true. But the property is mine, but I have actually executed the *farzi* deed. This should not stand in the way as I and my wife would jointly execute the mortgage." The Maharajah thought over the matter and said that he was agreeable if there was a joint execution of the document by Durga Dutt and his wife.

It is not necessary for me to say which of the two versions is true. It is sufficient for me to point out that, whether the suggestion that a mortgage-bond should be executed to cover the debt proceeded from the Maharajah or from Durga Dutt, the parties are agreed that the whole of the negotiation was conducted by Durga Dutt without any reference to his wife, and that her consent was assumed rather than taken, and that, if her consent was at all taken, it was taken as a matter of form, and that no opportunity was given to her to consult her interest in the matter. It is, in my opinion, not open to doubt, that her consent was obtained by pressure through her husband, and without independent advice.

In these circumstances the question arises, whether a Court of Equity will give effect to the argument advanced on behalf of the Maharajah that the Bahuasin consented to her husband mortgaging her property for his personal benefit. In *Turnbull & Co.* v. *Duval* (40), Lord Lindley said as follows:—"Whether the security could be upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice has not really to be determined. Their Lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it. It is in their Lordships' opinion quite clear that Mrs. Duval was pressed by her husband to sign and did sign, the document, which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull & Co., are unaffected by such pressure and ignorance." In *Bank of Montreal* v. *Stuart* (41), the evidence was summed up in these words by Lord Macnaghten: "The evidence is clear that in all these transactions Mrs. Stuart, who was a confirmed invalid, acted in passive obedience to her husband's directions. She had no will of her own. Nor had she any means of forming an independent judgment even if she had desired to do so." Upon this evidence the House of Lords had no hesitation in refusing to support the

(40) (1902) A. C. 429; 71 L. J. P. C. 84; 87 L. T. 154; 18 T. L. R. 521.

(41) (1911) A. C. 120; 80 L. J. P. C. 75; 103 L. T. 641; 27 T. L. R. 117.

transaction by which Mrs. Stuart gave her own properties as securities for advance made by the Bank to her husband. Other cases may be cited; but it is not necessary to pursue the subject. In my opinion, "consent" has not been proved as a fact. If, however, it is to be inferred from the circumstances thas she was a party to the mortgage-bond, I have no difficulty in coming to the conclusion that a Court of Equity will disregard that consent, having regard to the fact that the Bahuasin, an illiterate *pirdánashin* lady, acted in passive obedience to her husband's direction, not having a will of her own, nor having any means of forming an independent judgment, even if she had desired to do so.

I now come to the text of Yajnavalkya, which, in my opinion, creates no difficulty whatever. The text is as follows:—"A husband is not liable to make good the property of his wife, taken by him in a famine, or for the performance of a duty, or during illness or while under restraint." The conditions which would enable Durga Dutt to deal with the property of his wife, were not present and the Maharajah was aware that those conditions were not present.

The only other text on this point is that of Katyayana who declares that "money taken by a man from his wife, for performing some imperative duty when he has no means of doing so, shall not be re-paid." The text has no application, and it is not necessary to pursue the point.

In my opinion, the subject-matter of the gift was under the Hindu Law heritable but inalienable except under circumstances which were not present and if the terms of the gift did not confer on the Bahuasin the right to alienate the property, the plaintiffs as the heirs of the Bahuasin, are entitled to succeed in the action. This brings me to the question whether the Bahuasin took an alienable interest under the terms of the gift.

Now in construing the *heba-bil-ewaz* executed by Durga Dutt in favour of his wife, we are bound to proceed on the assumption that a Hindu knows that, as a general rule, women do not take absolute estates of inheritance which they are enabled to alienate. This was laid down by the Judicial Committee in *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (42) and repeated by their Lordships in *Radha Prasad Mullick* v. *Ranee Mani Dassee* (43). This does not mean that where there are words of sufficient amplitude conveying in the terms of the gift itself the fullest rights of ownership, including the power to alienate, the Court will refuse to construe the deed of gift so as to deny to the donee the reght to alienate. But I think that in construing a deed of gift executed by a Hindu husband in favour of his wife, the Court would be right in leaning towards a construction which is in consonance with the ordinary notions and wishes of the Hindus with respect to devolution of property and in harmony with the law by which the parties are governed. The ordinary notions and wishes of Hindus are well-known and have been recoganized by the Judicial Committee in the cases to which I have referred. In regard to the law by which the parties are governed, I have already expressed my opinion that the *Mithila* Law recognizes that immoveable property taken as a gift by a wife from her husband is inalienable except for purposes which may be denominated "necessary purposes."

The question, then is, to quote the language of Lord Buckmaster in *Ramachandra Rao* v. *Ramachandra Rao*. (44) has the donor made use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including the power to alienate? It is not necessary that there should be an express declaration to that effect, but it must follow, as a matter of construction, that something more has been granted than what the law would give, —that in fact the fullest rights of ownership, including the power to alienate, have been conveyed.

I have set out the document at page 42 of the judgment and it is not necessary to set it out again. It is conceded that there is no express declaration to the effect that the Bahuasin would have the power to alienate; but it is contended that there are various expressions in the grant itself which suggest the inference that the fullest rights of ownership were conveyed to the Bahuasin.

(42) 22 W. R 409; 14 B. L. R. 226; 2 I. A. 7; 3 Sar. P. C. J. 405 (P. C.).

(43) 35 C. 896; 10 Bom. L. R. 604; 12 C. W. N. 729; 18 M. L. J. 287; 5 A. L. J. 460; 8 C. L. J. 48 (P. C.).

(44) 67 Ind. Cas. 408; 45 M. 320 at p. 328; 30 M. L. T. 154; 26 C. W. N. 713; 35 C. L. J. 545; 16 L. W. 1; (1922) M. W. N. 359; (1922) A. I. R. (P. C.) 80; 20 A. L. J. 684; 43 M. L J. 78; 24 Bom. L. R. 963; 49 I. A. 129 (P. C.).

It was argued that the donor, having described himself as a *malik* and having conferred all his *zemindari* rights upon his wife, has said as plainly as he could that she should have the power to exercise the fullest rights of ownership. The argument is an attractive one, but it is necessary to consider the passage upon which the argument is founded. That passage is as follows:—"Having taken Rs. 41,532, I have made *heba-bil-ewaz* to my wife of my share of 7 annas $8\frac{3}{4}$ *gandas* situate in Taluka Laheri .....with trees, fruit bearing and non-fruit bearing and *ahar* and *pokur* and reservoirs and tank and *cutcha* and *pucca* wells and *sair* and salt *sair* and houses occupied by tenants and all may *zemindari* rights which up to now have been in my possession without the co-partnership of any one in possession." Mr. Hasan Imam's argument is that the words, "*zemindari* rights" mean rights over the *zemindari* and that as the rights of the donor over the *zemindari* were absolute, nothing short of an absolute estate were by these words granted to the Bahuasin. With great respect, I am unable to assent to the argument. Here general words — "*zemindari* rights" — follow an enumeration of specific things—"trees, fruit bearing and non-fruit bearing, and *ahar* and *pokur*, and reservoirs and tanks and *cutcha* and *pucca* wells and *sair* and salt *sair* and houses occupied by tenants"—which undoubtedly have some common characteristic which constitutes them a genus, and the general words can be properly regarded as in the nature of a sweeping clause designed to guard against accidental omissions. That being so, the rule of *ejusdem generis* will apply and the general words will be restricted to things of the same nature as those which have been already mentioned. The expression "*zemindari* rights", in my opinion, means rights to specific properties of the same nature as those specified and not rights of a *zemindar* in the properties specified. If there was any doubt as to this interpretation, the words which precede and the words which follow remove that doubt. The document says: "I am making a *heba-bil-ewaz*." Now in respect of what properties? The grantor enumerates the specific properties and ends with the sweeping clause, "all my *zemindari* rights" and he puts the matter beyond doubt by adding the words, "which up to now have been in my possession without the co-partnership of any one." Now I can undestand a *heba-bil-ewaz* of specific properties; but I do not understand a *heba-bil-ewaz* of an abstract right, the right of a proprietor to alienate the properties. Nor is it possible to speak of an abstract right as being in the possession of the donor without the co-partnership of any one. In my opinion, the full description of what was intended to be conveyed shows conclusively that the expression "*zemindari* rights" means rights or title to properties constituting the *zemindari*, those properties being of the same nature as those already specified.

It was next contended that a gift by a husband to his wife generation after generation,—*ba farzandan, naslan bad naslan*—carries with it the right to alienate. Now I entirely agree that these words in the absence of anything showing a contrary intention pass a general estate of inheritance according to Hindu Law. This is the primary significance of these words, which denote heritability and connote an estate of unlimited duration. I also agree that the right of alienation, speaking broadly is a necessary part of the ownership of an estate of inheritance. Hence there is a secondary significance of those words, which denote an absolute estate and connote alienability. A grant of an estate to a person "*ba farzandan naslan bad naslan*" is a grant of an estate of inheritance. An estate of inheritance is a heritable estate. Therefore an estate granted to a person "*ba farzandan naslan bad naslan*" is an absolute and alienable estate. If I am right in this view, then the words "*ba farzandan naslan bad naslan*" are apt for conferring an estate of inheritance and, *therefore*, an absolute and alienable estate, not an estate of inheritance *and* an absolute and alienable estate.

Now it is quite true that, both in this country and in England, the right of free disposition is generally inherent in an estate of inheritance but the holder of such an estate might be prevented by personal incapacity from exercising the right of alienation; and a restraint on alienation might be imposed by family custom or local law. For instance, an infant, though holding an estate of inheritance, is not permitted to exercise the right of alienation. So, in England, wives married before 1883, could not dispose of any property to which their title accrued before that year. So also, where the personal enjoyment of the property is essential to the performance of

certain public duties, no alienation of such property can be made. So also as I have already said, a restraint on alienation might be imposed by family custom or local law. If I am right in this view, then an estate of inheritance would not carry with it the right of alienation, when such an estate is conveyed to a person suffering under a personal incapacity or subject to a family or local custom prohibiting alienation. If this be so, then clearly a right of alienation is not *necessarily* inherent in an estate of inheritance, and a grant of property to a person "*ba farzandan naslan bad naslan*" would not necessarily give that person the right to alienate the property, though these words would confer on him an estate of inheritance. For instance, a grant of property to a *ghatwal* "*ba farzandan naslan bad naslan*" to enable him to perform certain public duties would not confer on him the right to alienate the property. I arrive at the conclusion that these words "*ba farzandan naslan bad naslan*"—are generally sufficient to confer an estate of inheritance; that a right of alienation is generally inherent in an estate of inheritance; but that, as the incidents of every estate in land may be affected by the personal incapacity of the holder for the time being, or, by the existence of the personal law by which the holder may be governed, it may be shown in any particular instance that the grant of an estate of inheritance did not carry with it the right of alienation.

Now the personal law by which the Bahuasin was governed prohibited her from alienating the immoveable property which she took as a gift from her husband. Bachaspati Misra has laid down in distinct terms that though a woman can dispose of moveable property which has been given to her by her husband, she can never dispose of immoveable property. In my opinion, the ordinary incident of an estate of inheritance was so affected by the personal law by which the Bahuasin was governed that in this case the grant of such an estate as evidence by the words "*ba farzandan naslan bad naslan*" did not carry with it the right of alienation.

I will now consider some of the cases on the subject; but I may begin by giving the opinion of Mr. Mayne on the point. "Gifts by a husband to his wife of immoveable property" says Mr. Mayne in his Hindu Law "even though accompanied by express words of inheritance, are not alienable unless distinctly declared to be so. It is a quality of such gifts that though they descend to wife's heirs, she cannot alien them" (8th Edition, para. 397, page 542).

I am informed that this passage is omitted in the latest edition of the book; but the latest edition is not by Mr. Mayne. The only criticism that can legitimately be directed against this passage is that there is a suggestion in it that there is no power of alienation unless that power is expressly conferred. This would not be correct; nor do I think that Mr. Mayne has so stated the proposition. But the passage is valuable as indicating that an estate of inheritance granted by a husband to his wife does not carry with it the right of alienation.

In *Bhujanga Rau* v. *Ramayamma* (45), the Madras High Court held that "Where property is given to a Hindu lady by her husband, and the gift is expressed only in such terms as create a heritable estate, it must be taken that it was the intention of the donor that she should acquire such an interest as the personal law of the parties recognizes to be created by the transaction." The gift in that case was by a Hindu to his wife "*putra poutra paryantan*", which expression has the same significance as that conveyed by the expression "*ba farzandan naslan bad naslan.*" The decision was followed in *Nunnu Meah* v. *Krishnasami* (46), but was disapproved of in *Muthuvenkatanarayanan Chetti* v. *Athipanduranga Naidu* (47). In the latter case, however, the question did not fall to be considered as a power of alienation was expressly conferred on the wife. It was also disapproved of in *Ramachandra Rao* v. *Ramachanhra Rao* (48), where Sheshagiri Ayyar, J., considered that it was inconsistent with the conclusions of the Judicial Committee in *Surajmoni* v. *Rabi Nath Ojha* (49). In delivering his judgment that learned Judge referred to the terms of s. 8 of the Transfer of Property Act and held that, unless, a different intention is expressed or neces-

(45) 7 M. 387; 8 Ind. Jur. 238; 2 Ind. Dec. (N. S.) 853.
(46) 14 M. 274; 5 Ind. Dec. (N. S.) 192.
(47) 51 Ind. Cas. 217; (1919) M. W. N. 103.
(48) 52 Ind. Cas. 94; 42 M. 283; 36 M. L. J. 306.
(49) 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17 (P. C.).

sarily implied, a transfer of property by a husband to his wife passes forthwith to the wife all the interest which the husband is capable of passing in the property or in the legal incidents thereof; and the learned Judge said: "This is what was laid down in *Surajmani* v. *Rabi Nath Ojha* (49)."

Now if this is what was laid down in *Surajmani's case* (49), then it is obvious that *Bhujanga Rau* v. *Ramayamma* (45) can no longer be followed. The decision of the High Court in *Ramchandra Rao* v. *Ramchandra Rao* (48) was, however, reversed by the Judicial Committee on another point [see *Ramachandra Rao* v. *Ramachandra Rao* (44)]; but their Lordships thought it their duty to state in clear terms what was actually decided by them in *Surajmani's case* (49), as there was some misapprehension as to the effect of that decision: "In the case referred to," said their Lordships "when originally heard before the High Court, *Surajmani* v. *Rabi Nath* (50), it had been stated that under the Hindu Law in the case of a gift of immoveable property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of this Board did no more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate, which the High Court had thought required to be added by express declaration. In that case, it is true that there is some comparison drawn between the gift to a widow and a gift to a person not under disability, but that was not the foundation of the decision which depended entirely upon the wide meaning attributed to the words in which the gift to the widow was clothed. More recent decisions of this Board in *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury* (51), and *Bhaidas Shivdas* v. *Bai Golab* (52) do nothing but repeat this same proposition in other words." I think that it is perfectly clear that their Lordships did not decide in *Surajmani's case* (49) that, to quote the words of Sheshagiri Ayyar, J., "unless there is an expressed or implied qualification to the contrary, the donor must be deemed to have conveyed all that he was possessed of in the property granted."

The decisions of the Indian Courts on this point afford an interesting study. *Moulvi Mohamed Shumsool Hooda* v. *Shewukram* (42) was decided by the Judicial Committee in 1874. The rule of construction formulated in that decision gradually came to be treated as a rule of law, and a tendency appeared in the decisions to treat gifts by Hindu husbands to their wives as conveying only a limited estate, unless a power of alienation was conferred by express declaration. This tendency found its fullest expression in *Surajmani's case* (50) which was decided by the Allahabad High Court in 1903. An appeal was taken to the Judicial Committee which decided in 1907 that the expression "*malik wa khud ikhtiyar*" imported full proprietary rights, and that, in order to cut down the full proprietary rights that the word imported, something must be found in the context to qualify it. Now this was all that was decided by the Judicial Committee in *Surajmani's case* (49); but it was thought that the decision came to this that a gift by a Hindu husband to his wife should be construed as conveying an absolute estate, unless there was something in the context to qualify it. But, as the Judicial Committee has now plainly intimated to the Indian Courts, it decided nothing of the kind. Their Lordships found an expression in the grant *malik wa khud ikhtiyar*—which they construed as importing full proprietary rights. The decision, therefore, rested on the view that the grantor had used words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership. It is obvious that there is no conflict between the decision in *Surajmani's case* (49) and the decision in *Bhujanga Rau* v. *Ramayamma* (45). In my opinion, the latter case was correctly decided, and there is no reason why we should not follow it.

I should like to say a word about s. 8 of the Transfer of Property Act on which Sheshagiri Ayyar, J. strongly relied in *Ramachandra Rao* v. *Ramachandra Rao* (48). That section provides that unless a different

(50) 25 A. 351; A. W. N. (1903) 66.

(51) 66 Ind. Cas. 193; 49 I. A. 25; 26 C. W. N. 425; 15 L. W. 434; 42 M. L. J. 492; 30 M. L. T. 242; 20 A. L. J. 362; 35 C. L. J. 427; 24 Bom. L. R. 576; (1922) M. W. N. 368; (1922) A. I. R. (P. C.) 63; 1 Pat. 305; 3 P. L. T. 133 (P. C.).

(52) 65 Ind. Cas. 974; 49 I. A. 1; 26 C. W. N. 129; 15 L. W. 412; 20 A. L. J. 289; 42 M. L. J. 385; 35 C. L. J. 314; 24 Bom. L. R. 551; 46 B. 153; (1922) A. I. R. (P. C.) 193 (P. C.).

intention is expressly or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. But s. 8, which is in the Second Chapter of the Act, must be read subject to the provision in s. 2 which provides that nothing in the Second Chapter of the Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist Law. Now it is a rule of Hindu Law as it is understood in *Mithila* that a gift by a Hindu to his wife does not carry with it the right to alienate. In my opinion, therefore, we cannot have recourse to s. 8 in construing the gift in this case.

In the *Tagore case* [*Ganendra Mohan Tagore* v. *Upendra Mohan Tagore* (53)], Sir Barnes Peacock said as follows:—"It is certainly true, as stated by the learned Judge, that a gift to a man and his sons and grandsons, or to a man and sons and sons' sons, would, in the absence of anything showing a contrary intention, pass a general estate of inheritance according to Hindu Law. I believe the words usually used in Bengal are *putra poutradikrama* and in the Upper Provinces *naslan bad naslan*, the literal meaning of the former being to sons and grandsons, etc., in due succession, and of the latter in regular descent or succession." If I may say so with the utmost respect this is a very accurate statement of what those expressions import. The opinion of Sir Barnes Peacock was accepted by the Judicial Committee as the basis of their decision in *Ramlal Mookerji* v. *Secretary of State for India* (54). A Hindu died leaving a widow, a daughter's daughter and a brother. By his Will, he left his properties to his daughter's daughter in these terms:—"If no daughter or daughter's son of mine should be living at the time of the death of my wife then my grand-daughter (daughter's daughter) shall become the proprietress of my property and shall remain in undisputed possession thereof *putra poutradikrame*". The question raised in the appeal turned upon the construction of the terms of the gift to the daughter's daughter. Their Lordships quoted with approval the passage from the judgment of Sir Barnes Peacock in the *Tagore case* (53) and proceeded to say as follows:—"The correctness of these observations was not questioned in the judgment on appeal. It was not denied at the Bar that these words, though undoubtedly importing the male sex in their primary signification, would, in the case of a gift to a male, be read as words of general inheritance, and would include female as well as male heirs, *where by the law, his estate would descend to females.*" Stopping here for a moment, it is to be noted that the force of these words may be profoundly affected by the law by which the grantee may be governed, and that this is what their Lordships expressly decided. This is exactly what was decided by the Madras High Court in *Bhujanga Rau* v. *Ramayamma* (45). Their Lordships continued as follows:—"Their Lordships feel no greater difficulty in applying them to the female heirs of a female, *where, by law, the estate would descend to such heirs*, and see no sufficient reason for narrowing the construction of words which have been often recognized in India as apt for conferring an estate of inheritance." If there was nothing else in the judgment of their Lordships, it could not be contended that there is anything in the decision to encourage the argument that these words are regarded as apt for conferring an absolute estate. Mr. Hasan Imam, however, strongly, relies upon the next passage in the judgment which is as follows:—"They are of opinion that cl. (7), if it stood alone, would confer an absolute estate on Hari Dasi (the grand-daughter) upon the death of the widow."

Now, in my opinion, the decision of the Judicial Committee cannot be regarded as an authority for the proposition that the words, *putra poutradikrame* or *naslan bad naslan*, import, of their own force, an absolute estate. Their Lordships have already said that the force of these words may be qualified by the personal law of the grantee. Now, what is the actual decision? The exact signification of these words has already been considered; and their Lordships have said very definitely that these words are recognized "as apt for conferring an estate of inheritance." But then, in the passage which followed, their Lordships said that the terms of the gift conferred an absolute estate on Haridasi. And so they did, unless there was something in the personal law by which Haridasi was governed (which there was not) which prevented her from alienating the property which she

(53) 4 B. L. R. O. C. 103 at p. 182.
(54) 7 C. 304; 8 I. A. 46; 10 C. L. R. 349; 4 Sar. P. C. J. 225; 5 Ind. Jur. 327; 3 Ind. Dec. (N. S.) 744 (P. C.).

got from her grandfather. As I have said before, an estate of inheritance is *prima facie* an absolute estate; and Haridasi took an absolute estate, unless she suffered from a personal incapacity or was subject to a personal law which imposed a restriction on her right to alienate the property. Obviously there was no personal incapacity which affected her in any way; and the personal law by which she was governed imposed no restriction on her right to alienate: (see Dayabhaga 4-1-23, Setlur, Part 2, page 32).

The case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (55) does not carry us any further. A Hindu testator who had no children devised his estate to his nephew in these terms:—"If no children are born to me...then the eldest son born of the womb of my third sister Srimati Kshiroda, my nephew Sriman Lalit Mohon Roy..... becoming, on my death, my *sthulabhishikto* and becoming owner (*malik*) of all my estate and properties, etc., shall, remaining my *sthulabhishikto*, obtaining the management of the *Iswarshibas*.....keeping the estate *intact*, enjoy with son, grandson and so on in succession, the proceeds of my estate." The question raised in the appeal was whether Lalit Mohan took an absolute heritable and alienable estate, or whether there was an attempt by the testator to tie up the estate for ever, in which case the gift would fail, subject to a life-estate in favour of Lalit Mohan. Their Lordships said as follows:—"The words 'become owner (*malik*) of all my estates and properties' would, unless the context indicated a different meaning, be sufficient for that purpose even without the words 'enjoy with son, grandson and so on in succession' which latter words are frequently used in Hindu Wills and have acquired the force of technical words conveying a heritable and alienable estate." Their Lordships further said:—"Their Lordships do not find, any express prohibition in this Will against alienation of the estates, the beneficial enjoyment of which is given to the devisees, as there is of the estates appropriated to religious and charitable purposes. If there were such a clause added to a gift of a heritable estate, it would be repugnant and void."

I have no doubt whatever that their Lordships were dealing with the particular case before them, and not laying down a rule applicable to all cases. As I have said before, a heritable estate is *prima facie* alienable, and a clause prohibiting alienation added to a gift of a heritable estate would be *prima facie* void. In the case before their Lordships, the grantee took a heritable estate and, therefore, an alienable estate, because he was not affected by any personal incapacity nor subject to a personal law which imposed a restriction on his power of alienation. But supposing a gift was made to a person *naslan bad nalsan* on condition of rendering services of a public nature? If the wide interpretation sought to be placed on the decision of the Judicial Committee were to be accepted as correct, then obviously the grantee would have the right to alienate the lands. But exactly the opposite was held by the Judicial Committee in *Nilmoni Singh Deo* v. *Bakranath Singh* (56). Although the point is not made clear in the decision of their Lordships, there is no doubt that the grant was "*naslan bad naslan*". I may usefully refer to the argument of Counsel on this point. The argument was put as follows:—"Again it was to be noticed that it did not follow that, because the Government might disallow the succession of an unfit person, the *jagir* could not be hereditary. It was hereditary and *because it was hereditary, it was alienable.* Grants held '*naslan bad naslan*' *butnan bad butnan*', *as this jagir was*, were transferable by gift, sale, or otherwise, by the terms of Regulations XXXVII of 1793 and XII of 1805" (see page 13*). Their Lordships found that the *jagir* was hereditary, but came to the conclusion that it was inalienable. I take the basis of the decision to be that where the personal enjoyment of the property is essential to the performance of certain public duties, no alienation of such property can be made, although the grant may be hereditary. This is one instance where the words '*naslan bad naslan*' did not convey an alienable estate, though they did convey an heritable estate. Other instances may be cited; for instance in Raj Ramgarh, there is a well-understood custom that *jagirs* are resumable on failure of heirs male in the male line, though the grant may be to a person and his *putra poutradic*:

(55) 24 C. 834; 24 I. A. 76; 1 C. W. N. 387; 7 Sar.P. C. J. 155; 12 Ind. Dec. (N. S.) 1224 (P. C.).

(56) 9 C. 187; 9 I. A. 104; 5 Shome L. R. 68; 4 Sar. P. C. J. 335; 4 Ind. Dec. (N. S.) 777 (P. C.).

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see *Ram Narayan Singh* v. *Ram Saran Lal* (57). The Calcutta High Court, relying upon the decision of the Judicial Committee in *Ramlal Mookerjee v. Secretary of State for India* (54) and in *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy* (55) had come to the conclusion that those words imported an estate of inheritance. The decision of the High Court was, however, reversed by the Judicial Committee, so also the force of the words, "*putra poutradic*" may give way to a family custom. This was held by the Judicial Committee in *Ekradeshwar Singh* v. *Janeshwari Bahuasin* (58). The grant in that case was to a lady and in these terms:—"You and your sons and grandsons, etc., (*putra poutradic*) shall cultivate or get cultivated the *mouzah* aforesaid, and enjoy the usufruct thereof yourself." Their Lordships held that these words as used in the *sanad* must be regarded as words of limitation, *consistent with the custom*, and not as words of general inheritance.

I have laboured this point at unnecessary length because it was contended at the Bar that the decision of their Lordships in the two cases to which I have referred conclude the matter, and that the words, '*naslan bad naslan*' or words having the same signification, wherever used, must be regarded as conferring an estate of inheritance with power of alienation. In those cases, these words undoubtedly did confer estates of inheritance with power of alienation; but I am unable to read those decisions as establishing a fixed and unalterable rule applicable in every case, although the grantee may be prevented by personal incapacity from exercising the right of alienation, and although the personal law governing the grantee may impose a restriction, In *Ekradeshwar Singh* v. *Janeshwari Bahuasin* (58), their Lordships held that those words must be read as consistent with the custom and not as words of general inheritance. I am of opinion that, in this case, those words must be read as consistent with the personal law by which the Bahuasin was governed. That law imposed a restriction on her right to alienate the lands, and reading the words, "*ba farzandan naslan bad naslan*," as consistent with the *Mithila* Law, I must hold that these words, although they conveyed to her an estate of inheritance, did not confer on her the right to alienate the property.

It was lastly contended that it ought to be held, on a construction of the covenant for title, that an alienable interest was conveyed to the Bahuasin. The covenant is in these terms: "I, the declarant or my heirs and representatives (*quam moquaiman*) shall have no right or concern in demanding the subject of the *heba* or the consideration money from the aforesaid *Musammat* or her heirs and representatives. Should I, the executant my heirs and representatives make any claim or put forward any demand in respect of the gift properties or the consideration thereof, the same will be deemed null and void." It was contended that by the use of the words "heirs and representatives," the grantor clearly intimated that he had conferred the fullest proprietary rights on the grantee including the right to alienate the property. In my opinion the argument is without substance. I have expressed my opinion that in the actual dispositive words used by the grantor there is nothing to indicate that an alienable interest was conveyed to the grantee. That being so, can a covenant of this nature be construed as in any way enlarging the grant? In my opinion, the covenant secured the grantee in the possession of that which was previously granted, and gave an additional remedy, namely, an action for damages, if the grantee was deprived of that which was previously professed to be granted, but did not enlarge that which was previously granted: see *Leech* v. *Schweder* (59), and *Davis* v. *Town Properties Investment Corporation* (60). In *Nottidge* v. *Dering* (61), Cozens Hardy, M. R. said as follows:—"Covenants for title are really ancillary to the assurance of the property, and ought not, in the absence of clear words, to be extended so as to confer a larger estate than is expressly assured." This is a sufficient answer to the argument; but I think the argument must fail on

(57) 50 Ind. Cas. 1; 29 C. L. J. 332; 36 M. L. J. 344; 17 A. L. J. 398; 21 Bom. L. R. 597; 23 C. W. N. 866; 46 C. 683; (1919) M. W. N. 518; 26 M. L. T. 207 (P. C.).

(58) 29 Ind. Cas. 417; 42 C. 582; 18 C. W. N. 1249; 27 M. L. J. 373; 16 M. L. T. 382; 1 L. W. 863; (1914) M. W. N. 807; 12 A. L. J. 1217; 21 C. L. J. 9; 17 Bom. L. R. 18; 41 I. A. 275 (P. C.).

(59) (1874) 9 Ch. 463; 43 L. J. Ch. 487; 30 L. T. 586; 22 W. R. 633.

(60) (1903) 1 Ch. 797; 72 L. J. Ch. 389; 51 W. R. 417; 88 L. T. 665.

(61) (1910) 1 Ch. 297; 79 L. J. Ch. 439; 102 L. T. 145.

broader grounds. The estate which was expressly granted to the Bahuasin, was an estate of inheritance, that is to say, an estate of unlimited duration. Now whether a power of alienation is incident to such an estate must depend in my view, upon the personal law of the person who happens, for the time being, to be the holder of the estate. If the holder happened to be a person who is not subject to a law prohibiting him from alienating the land, clearly he could exercise the power of alienation, and the covenant would operate so as to prevent the grantor, his heirs and representatives from "demanding the subject of the *heba*" from the alienee. This is how I construe the covenant in question.

Mr. Hasan Imam referred to *Ram Narain Singh* v. *Peary Bhugut* (62) in support of his argument on this point. That was a case of a gift of immoveable property by a husband to his wife. The grantor stated in distinct terms that he was conveying *all his rights* to his wife *without exception* and that neither he nor his heirs shall at any time have any claim either to the property or to the price or value of it. The Calcutta High Court held that, looking at the fact that the husband divested himself of all his rights, and that he prohibited his descendants from claiming the property or its price, the gift was a gift "out and out." I do not see how the decision throws any light on the subject. The decision proceeded on the terms of the dispositive words used in the gift, and no other conclusion could be reached on the terms of the grant.

I have anxiously considered the terms of the *hebanama* and I am of opinion that the grantor has not, to quote the words of Lord Buckmaster, "made use of words of sufficient amplitude conveying in the terms of the gift itself the fullest rights of ownership, including the power to alienate." It must be remembered that the language used by Hindus in instruments relating to grants of immoveable property is very often merely descriptive of the course of legal succession. A grant of immoveable property by a Hindu husband to his wife is heritable under the *Mithila* Law. The words used by Durga Dutt do no more than describe the course of succession under the law by which he was governed. Such a grant is inalienable except under circumstances which are not present here. Durga Dutt was presumably aware of the restriction placed by law on the right of the wife to alienate immoveable property received by her as a gift from her husband. It is not disputed that Durga Dutt could, by use of apt words, convey the fullest rights of proprietorship in the property to his wife. The question is, has he done so? I have come to the conclusion that, reading the whole *hebanama* consistently with the law by which the parties were governed there is no indication in the terms of the gift that the fullest rights of proprietorship, including the right to alienate the property, were conferred on the Bahuasin. That being so, the plaintiffs are entitled to succeed in the action.

My learned brother and I wish to acknowledge the assistance we have received in this case from Counsel and Vakils on both sides. We in this Court are accustomed to get every assistance from the leading Counsel engaged in the case; and that assistance was ungrudgingly given. But we would especially like to express our appreciation of the industry and learning shown by Mr. Lachmi Kanta Jha himself a *Mithila Brahman* in his wide survey of the Hindu Law texts.

I would allow the appeal, set aside the judgment and the decree of the Court below, and give the plaintiffs a decree for possession with mesne profits which must now be assessed in the usual way. The plaintiffs are also entitled to their costs both in this Court and in the Court below.

As my learned brother and I differ in opinion on two points, both being points of law, namely, first, whether the present suit is maintainable by the plaintiffs, and whether it is barred by limitation and, secondly, whether on the interpretation of the *hiba-bil-ewaz* the fullest rights of ownership including the power to alienate the property were conveyed by Babu Durga Dutt Singh to his wife, this appeal must be heard, in accordance with s. 98 of the Code, on these points only, by one or more of the other Judges of this Court. The papers must be laid before the Chief Justice for the necessary orders.

Foster, J.—The following pedigree and statements appended thereto which I

(62) 9 C. 830; 13 C. L. R. 109; 8 Ind. Jur. 33; 4 Ind. Dec, (N. S.) 1202.

gather from the plaint will explain some of the facts of this case.

1. MAHARAJA MADHAB SINGH BAHADUR.

2. Maharaja Chattu Singh Bahadur.	3. Kirat Singh (had *babuana* properties Pargana Jabdi and purchased other properties including 16-annas Laheri)
4. Girdhari Singh.	5. Durga Dutt Singh, married to 6. Anuragin Kuer Bahuasin, plaintiffs.

I. No. 3 received from the Maharajah settlement of *babuana* properties in Parganah Jabdi and purchased (? *inter alia*) 16-annas Taluqa Laheri.

II. Nos. 4 and 5 partitioned Laheri, No. 5 getting as his separated share 7 annas 8 *gandas* 3 *kauris* share.

III. No. 5 made a gift of this Laheri share to No. 6 (1876).

IV. Nos. 5 and 6 executed a mortgage of the Laheri property in favour of No. 5's creditor to satisfy No. 5's debts (1890).

The plaintiffs, the eldest of whom was born about the year 1860, belong to a junior branch of the Darbhanga Raj family and are *Mithila Brahmins*. Their father Durga Dutt Singh after partition of *babuana* and other properties (which included Taluqa Laheri) in 1876 conveyed to his wife *Musammat* Anuragin Kuer, whom I shall call the Bahuasin, his share in Taluqa Laheri by way of *heba-bil-ewaz*. Whether this transaction was *benami* or genuine is an issue in this case. Plaintiffs say there was a complete change and transfer of ownership and possession, defendants say it was merely nominal. In 1890 Durga Dutt Singh, being in debt to the Maharaja to the extent of about Rs. 1,89,000 at the Maharaja's instance executed along with his wife a mortgage of the Laheri property aforementioned in favour of his creditor. The Maharaja had always been paying the land revenue of the *babuana* properties, and so a debt had accumulated. Whether this mortgage could affect the present plaintiffs' interest as heirs of the property is the main question in this case That the plaintiffs claim as heirs of their mother is stated in the plaint. In 1897 this mortgage was decreed, the Maharaja being plaintiff and Durga Dutt Singh and his wife defendants. In 1902 the whole interest in the Laheri property was sold in execution of the mortgage-decree and purchased by the Maharaja who is now defendant. In February 1904, the Bahuasin died, at a time when an application to set aside the sale made by her and her husband was pending; and her sons were at Durga Dutt's instance substituted as her heirs who had inherited the Laheri property. Two months or so later this application was rejected and the sale confirmed on the 2nd June 1904. In February 1906, the plaintiffs instituted Suit No. 19 of 1906, for a declaration of their title and confirmation of possession in Laheri, on the ground that the mortgage-bond was got by fraud without the knowledge of their mother the owner, and that the mortgage-decree was fraudulent. Durga Dutt Singh was *pro forma* defendant in this case; he died in July 1907. In June 1907 the plaintiffs withdrew the suit with permission to bring a fresh suit. On the 24th July 1918, the plaintiffs instituted the present suit. The cause of action in the previous plaint had been stated as having arisen in February 1906, when the frauds therein stated had been discovered. The cause of action in the present plaint is dated 16th December 1906, the delivery of possession to the Maharaja as auction-purchaser. The declarations sought in the plaint are that the property belonged to the plaintiffs' mother, and that Durga Dutt Singh had no right to execute the mortgage-bond: So the rights of the Bahuasin and the plaintiffs were not affected by the mortgage-suit, the decree, the sale and the delivery of possession. The plaintiffs pray for recovery of possession and mesne profits. It is important to note that there is no prayer for setting aside the mortgage-decree—seemingly because of limitation—and the word "fraud" does not occur in the statement of reliefs sought. It is also important to note that the plaintiffs sue not as reversionary heirs of their father, but as heirs of their mother, the position which in fact they had occupied in the execution proceedings. The present suit having been dismissed the plaintiffs are appealing and there is a cross-objection: all the important issues are thus re-opened.

It is obvious that the mortgage-decree obtained against Durga Dutt Singh and his wife must stand in this case as a fundamental fact. So long as the decree stands it must bind the heirs. The decree and the execution directed the sale of the whole

interest—not of a life-estate or any restricted interest in the Laheri property—and the decree has been accordingly enforced in the sale. But the plaintiffs' case which does not deny these facts, is that the decree and the sale could pass only the Bahuasin's estate: It is urged that she had a heritable but not an alienable estate and she had no power to mortgage the whole estate so as to disinherit her heirs. The contention purports to be based upon the *Mithila* Law.

Before proceeding to consider the main issue I wish for convenience sake to take up the issue raised by the Maharaja defendant whether the *heba-bil-ewaz* of 1876, was *benami*. I have had the advantage of reading my learned brother's judgment on this point and I need not repeat his arguments, with every one of which I am in agreement. I find that the *heba-bil-ewaz* was not a *benami* transaction and that the issue has been correctly decided by the learned District Judge.

It yet remains to see what was the legal result of this *heba-bil-ewaz* of 1876. It appears to be that if Durga Dutt Singh wanted to grant an estate with restrictions on alienation, he need merely have executed a *heba* or a simple gift. By making a transfer in the form of a *heba-bil-ewaz*, which ordinarily carries the incidents of a sale, he must be taken to have intended the usual legal consequences of such a common form of transfer. I admit that in this argument I am paying more attention to form than substance; but so, I think did Babu Durga Dutt, whose intentions I am attempting to discover. He, a *Mithila Brahmin* of wealth, having some knowledge himself and no doubt numerous advisers within reach, must have known the difference between a *heba* and a *heba-bil-ewaz*. Why did he choose the latter expression instead of *heba* or the corresponding term in *Hindi danpatra* especially if he intended that his wife should take the property as a *Mithila* Hindu wife? Are we justified in thinking that so much of the document was a pure mistake? After a careful examination of all the expressions of the document, I can find none which clearly indicate a limited estate. It is noticeable that the document mentions that the property transferred is to pass into the possession of the *Musammat* and the produce thereof is to be enjoyed generation after generation: "And I, the executant, and my heirs and representatives neither have nor shall have any demand or dispute with respect to the gift properties or consideration thereof as against the said *Musammat*, her heirs and representatives." The adjectival word "gift" is in the original "*Mahuba*", a term which is used to describe properties transferred by either a *heba* or (as in this case) a *heba-bil-ewaz*. Now, the noticeable points are firstly that no mention is made of any specified heir such as a daughter or son, though such existed: the expressions of the document in this respect are such as might be used in a transfer to an utter stranger; secondly, as the learned Judge remarks "the use of words" *warisan wa kaem mokamian*, in respect of both the donor and the donee shows that the donor contemplated that the donee may have "*kaem mokamian*, *i. e.*, representatives other than her heirs:" in the third place the passage quoted re-calls the case of *Ram Narain Singh* v. *Peary Bhugut* (62) and certainly supports the contention that this was an absolute transfer. No doubt the facts are not set out in this reported case, and at first sight the only question appears to have been whether the wife the donee took an estate of inheritance or for her lifetime. But the issue must have been also as to whether the gift conveyed an absolute estate ('a gift out and out'). For that is the conclusion arrived at, and the two Calcutta cases quoted dealt with what purported to be absolute alienations by a wife (devisee in one case, donee in the other). The issues governing those cases were whether she, the wife or widow, took an absolute and, therefore, freely alienable estate. The cases are *Koonjbehari Dhur* v. *Premchand Dutt* (63) and *Srimati Pabitra Dasi* v. *Damudar Jana* (64).

As I read the Privy Council decisions, they lay down uniformly the rule that the Courts should examine the documents of transfer with an eye to the ordinary Hindu's inclinations, he does not usually intend to make a wife absolute owner by a deed of transfer. In the earlier interpretations of this rule of the Privy Council the Courts went almost so far as to import a strong presumption that the grantee was to receive a limited estate, and it was held that something express is necessary

(63) 5 C. 681; 5 C. L. R. 561; 2 Ind. Dec. (N. S.) 1043.

(64) 7 B. L. R. 697; 2 W. R. 397 note.

to exclude what is tacitly implied. *Expressum facit cessare tacitum.* But I conceive that the rule adopted in modern times is that if by a construction of the document the grant of an absolute estate can reasonably be extracted there is no need to insist on an express and distinct grant of an absolute estate. *Expressio eorum quæ tacite insunt nihil operatur.* Express words are not essential; the fact that the donee is a *mithila* wife is not fundamental; it is to be seen if the words are of sufficient amplitude to convey an absolute estate: *Ramachandra Rao* v. *Ramachandra Rao* (44).

It appears from the pedigree and the statements given above quoted from the plaint that *Mauza* Laheri was (in spite of the recital in the *heba-bil-ewaz*) ancestral property held in co-parcenership by Durga Dutt and his sons. The gift of 1876, was made in the lifetime of some of the sons, but in the circumstances it must, I think, be held that the transfer, though effected by the father, was made by him as agent of the joint family who ratified and affirmed the transaction.

After a prolonged consideration of the document, I am disposed to think that this was the transfer of an absolute estate.

The *heba-bil-ewaz* was evidently, we see from its recital, rather an act of gratitude than a sale for value. In spite of its form, it seems to me to be reasonable to regard this transfer of the Laheri property as in substance a gift (*dattam*) within the meaning of the Hindu texts unless, of course, it be an absolute grant.

The learned Vakil for the appellants urges, that on the *Mithila* text, whatever immoveable property the husband grants to the wife, unless distinctly stated to be alienable, even though accompanied by express words of inheritance, cannot be alienated even with the consent of the husband. As he forcibly put it in his argument, so far as such property is concerned the husband is "as a dead man." The proposition is, of course, surprising, and it is unfortunate that it was not put forward in the plaint, for in a case like this evidence of local usage in *Mithila* tracts would have been of great value. My learned brother's discussion of the texts has entirely unsettled, my original impression that the *Mithila* Law had no divergence from the law of the other schools in regard to the alienation by a wife with her husband's consent of immoveable property granted to her by him in his lifetime. At the same time I am still impressed with some difficulties which do not amount to substantial doubts. As I have said, we have no evidence of local usage, a matter which is important when there is no authoritative text expressly and positively supporting the alleged *Mithila* rule. The rule is gathered by inference and is nowhere explicitly stated.

The ruling of the Madras Court, *Bhujanga Rau* v. *Ramayamma* (45) has been declared to be inconsistent with later Privy Council decisions and to be no longer law by the Editor of the 9th Edition of Mr. Mayne's Hindu Law (para. 397); but this statement is a marked departure from the 8th Edition. The case refers to alienations by the widow, not by a wife with her husband's consent. The form of alternative proposition in the Mitakshara School would I conceive be different from the form of alternative proposition in the *Mithila* School though both might be expressed loosely as "if not an absolute estate, inalienable." But it would have to be understood that in the Mitakshara Law the word "inalienable," in such a context would mean "inalienable without the husband's consent" and in *Mithila* Law "inalienable without legal necessity." That is how I understand the Smriti Chandrika (Ch. IX, s. 1, verses 13 and 14 and s. 2, verse 4 *et passim*) in regard to Mitakshara Law as applied in Madras. But on the whole I arrive at the conclusion that the rule that the wife must preserve the corpus of the property while her husband lives, spending only the income subject to his permission, and after his death must preserve it for her heirs, is fairly deducible from the *Mithila* texts; and I defer in this matter to my learned brother's arguments.

Reverting to the question whether the gift was absolute, as I understand *Bhaujanga Rao's case* (45), it laid down that gifts by a husband to his wife of immoveable property even though accompanied by express words of inheritance are not alienable by her unless distinctly stated to be so, though they descend to the wife's heirs. I think this is put forward as a rule of Mitakshara Law and I take the meaning to be that such a gift even though it creates an estate of inheritance does not free the wife in respect of alienation from her husband's tutelage, or after his death from the limitations of a widow's estate,

unless the matter is made distinctly clear. I am not convinced that such a demand for a distinct statement in the document could be applied in *Mithila* Law where the husband's tutelage can never exist in such circumstances and the grantor would (on one of the alternative constructions) be rendering his property absolutely inalienable. In *Mithila* Law the alternative is ordinarily between absolute alienability, and absolute inalienability where there are no special limitations reserving control by some one. So, I am not disposed to import the rule of *Bhujanga Rao's case* (45), as I construe it, into the present case. A husband, *karta* and father under *Mithila* Law would be taking a very serious step in making such a gift to his wife as is suggested on the plaintiffs' side: he would be surrendering his authority and control, and tying up the property for an indefinite period. In my opinion the *hebabil-ewaz* of 1876, was an absolute transfer, and I find that the intention, deducible from its expressions, was an absolute transfer. The finding is pertinent at this point because it shows why I think that the special rules of *Mithila* Law as to absolute inalienability remain outside the facts of the present case.

I now come to the questions that have arisen in connection with the execution of the mortgage-bond. In the first suit, it was the plaintiffs' case that the mortgage was fraudulently executed and that the Bahuasin never gave her consent at all. The discovery of this fraud was stated to have occurred in February 1906, (though the documentary and oral evidence show that three of the plaintiffs had a close connection with the document evidencing the transaction). The only evidence to suggest undue influence—which is all that is now asserted—is the statement that Babu Durga Dutt Singh when he was being pressed by the Maharaja sent a message to the Bahuasin through her own relative Raghunandan Jha (a very important fact in itself) that she ought to meet the decrees against her husband. On this point as to undue influence I entirely agree with the learned District Judge who finds that there was no undue influence and that the lady had her uncle's independent advice. The matter is not in fact within the legal scope of the present case.

The position of the plaintiffs is anomalous. From the facts set out in paras. 1 to 3 of the plaint (the details of which I have quoted at the commencement of this judgment), I gather that Taluqa Laheri was ancestral property. In para. 17 of the plaint the relief (E) is stated: "that should the Court for any reason hold that the said deed of gift was only a colourable transaction, the Court may be pleased to hold that the said mortgage-bond, the decree passed thereon in the absence of the plaintiffs Nos. 1 to 4 and the proceeding in execution thereof affected if at all, only the right, title and interest of the said Babu Durga Dutt Singh and not that of the said plaintiffs; and the said plaintiffs are entitled to recover possession of their legitimate share in the disputed property and with this declaration the Court may be pleased to pass in favour of the said plaintiffs a decree for possession of their legitimate share and for mesne profits with regard to that share from the date of this suit until the date of recovery of possession." Now the property being co-parcenary and having been, on the facts which are assumed in this relief and asserted in the plaint, mortgaged by the father for his previous debts which were neither immoral nor illegal, and the whole property having been sold in enforcement of the mortgage-decree, it is difficult to see what the plaintiffs expect to get under this prayer; but, as I have found that the property was sold in execution of a mortgage executed by their mother who was the absolute owner thereof, and as that mortgage was decreed against her and the whole property sold in execution, this relief need not be considered.

The next fact to note is that the mother was not a co-parcener or a manager or anything but absolute owner, and the sons, the present plaintiffs, were not co-parceners or reversionary heirs, but direct heirs who would have succeeded to the property, after the death of their mother, by simple inheritance; they derive title from their mother and are her heirs and legal representatives, they are, therefore, claiming under their mother. The mortgage-decree still stands good, therefore, the sale thereunder. In the previous suit, which was on a different cause of action from that of the present suit, as I have mentioned already, there was an express prayer for a declaration that the mortgage-bond and the decree were vitiated by fraud and

there was an express prayer for setting aside that decree. That suit was withdrawn and has never again been instituted. The opportunity passed away, and was lost. The present suit is quite different. I do not see how the question of undue influence can be raised in the present suit so as to have the effect of annulling the mortgage-decree and the sale thereunder. As I have said before, the plaintiffs have no title independent of their mother.

I agree with the learned District Judge that the plaintiffs could not sue for possession until they had cleared the way for such a suit by securing the annulment of the mortgage-decree and the sale thereunder. The point is raised in the written statement para. 3, in the Issues Nos. 2 and 4, and has found a place in the arguments in this Court. The policy of restraining multiplicity of suits is not merely a matter for parties to invoke in their own interest, but it is a matter of public concern, and, therefore, I have no hesitation in giving it importance. The contention of the plaintiffs is that they can ignore the decree and sale:—As they put it, "we are not bound by them." In my opinion, the property Laheri has passed away in the execution sale and it is now too late to set that sale aside, and so the suit is not maintainable. No doubt there are cases where a person's interests are not affected by Court sales; the commonest example is where the decree and sale were without jurisdiction, as when the property of a stranger to the suit is sold in execution, that property being outside the property ordered to be sold under the decree. *Kadar Hussain* v. *Hussain Saheb* (65). Another instance is, of course, where the sale has not passed any property; as in *Moti Lal* v. *Karrab-ul-din* (66). In that case there were two sales of the same property, and it was found that in the second sale there was no right, title or interest of the judgment-debtor left to be sold, so the first purchaser was secure. I do not find that the present case falls within this class. There is a second class of cases in which the Court sale is valid to the extent of the judgment-debtor's life-interest, but the reversioners can elect to avoid the sale and indicate their election by bringing a suit for possession. *Bejoy Gopal Mukerji* v. *Krishnamahishi Debi* (67).

But this latter rule must be subjected to weighty reservations. I venture to put forward in a lengthy sentence what I conceive to be an enunciation of the law governing this case: (Later I shall refer to this as my main proposition). I am assuming of course that the case falls under Hindu Law.

If the Bahuasin, as mortgagor-defendant, represented the whole estate in the mortgage-suit; if the trial of that suit has not been shown to have been unfair; and even if the Bahusain was personally estopped from raising certain pleas, for instance, the absolute inalienability of the Laheri property, still if the evidence before us shows that the debt was in fact due and if we find nothing to show collusion or fraud in the obtaining from the Court of the decree in that suit; then the plaintiffs are bound by it, unless and untill they get that decree set aside.

In order to be quite fair to the plaintiffs, I am assuming that they are in the favourable position in view of the peculiar provisions of *Mithila* Law accepted in this judgment—of reversioners, and, therefore, not "claiming under" the Bahuasin in the sense of s. 11 of C. P. C.

I have premised in my main proposition that there must be nothing to show collusion or fraud. We have before us the following facts: (*a*) intelligent adult members of the family, the father and three sons, either joined or took some part in the execution of the mortgage; (*b*) the father took a noticeable part in the litigation, and so did the son, after the sale in execution; (*c*) the oral evidence before us consists in mere negations: attesting witnesses know nothing of the contents of the mortgage-bond, processes were not served in the mortgage-suit, and so forth: there is no positive evidence of fraud having the effect of misleading the Court; (*d*) the suit to annul the mortgage decree was withdrawn by the present plaintiffs and never revived.

So, to come back to my main proposition. What weight are we to give to the fact that the Bahuasin was subject to a personal estoppel, when, so far as we can see in this suit, the mortgage debt was in

(65) 20 M. 118; 7 M. L. J. 52; 7 Ind. Dec. (N. S.) 82.
(66) 25 C. 179; 24 I. A. 170; 1 C. W. N. 639; 7 Sar. P. C. J. 222; 13 Ind. Dec. (N. S.) 121 (P. C.).
(67) 11 C. W. N. 424; 34 C. 329; 5 C. L. J. 334; 9 Bom. L. R. 602; 17 M. L. J. 154; 2 M. L. T. 133; 4 A. L. J. 329; 34 I. A. 87 (P. C.).

fact due and there was no proved fraud or collusion in the mortgage-suit? For the sake of brevity, I do not propose to go at length in the authorities. My findings of fact and law are that the Bahuasin in the mortgage-suit was the one person in the world capable of defending the property; that she was under a duty to protect it; and that she did not, because, so far as we know, she could not, contest the suit; and that her personal estoppel did not detract, so far as we know, from the fairness of the trial of the suit. I agree with the learned Judge's discussion of Issue No. 14. He might have quoted Ex. G-3. I find that the Bahuasin had due notice in the suit. These being my findings, I invite attention to Mayne's Hindu Law (9th Edition), s. 664 read with ss. 641 to 643, and Mulla's Commentary on the C. P. C., (7th Edition), pages 50 and 51. But I quote as authorities specially pertinent: *Subbammal* v. *Avudiyammal* (68) and *Gur Nanak* v. *Jai Narain Lal* (69).

I also quote the case of *Parekh Ranchor* v. *Bai Vakhat* (70), as I think it is useful to indicate my point of view. A widow, in spite of her duty to protect the estate, suffered a collusive decree and sale, and the nearest heir of the widow's husband brought a suit for a declaration that the sale was inoperative as against him. His suit was out of time under Art. 12, but timely under Art. 95 of the Limitation Act. It was held that Art. 12 did not apply to the case and he was entitled to a decree. Now, in the present case the plaintiffs do not allege that the mortgage-decree was collusive, and they are out of time under both Articles. In the previous plaint the fraud there alleged was stated to have been discovered in February 1906, and the present suit was instituted on the 24th July 1918.

If the plaintiffs assert, as they do in the plaint, that they are the heirs of the Bahuasin it is clear that the decree must bind them as her heirs and legal representatives. If they attempt to assert that, having regard to the special conditions of the *Mithila* Law, they are very much in the same position as reversioners, because it is the duty of the wife, to preserve the property for the heirs, I would refer to my previous discussion of the legal position of reversioners. As to their claim to ignore the decree and the sale, I refer to the Privy Council decision in *Malkarjun* v. *Narhari* (71). In that case, notice of execution of a money decree was issued upon the nephew of the deceased judgment-debtor as his heir and legal representative, when, in fact, the judgment-debtor had left his properties by Will to his two daughters. The daughters had no notice. It so happened that a mortgagee of the property sold had purchased the property in this execution. The daughters sued the mortgagee for redemption and possession. It was held that the plaintiffs must clear the ground for redemption by a suit to set aside the sale. The omission to serve notice on the two legal representatives, though a serious irregularity, did not operate to divest the Execution Court of jurisdiction. In such circumstances the plaintiff could not ignore the sale. The jurisdiction being there, the Court was empowered to decide wrongly as well as rightly. The case was barred under Art. 12 of the Limitation Act. There was a similar case in *Raghavendra Ayyar* v. *Karuppa* (72), a suit to recover land, with no prayer to set aside a sale effected under a Rent Recovery Act. The suit failed, being barred by Art. 12.

It is also to be remembered that the plaintiffs were present in Court as heirs and respresentatives of their mother and prosecuted her application to set aside the sale early in 1904. In their presence that application was rejected and the sale confirmed by the Subordinate Judge on the 2nd June 1904, and an appeal from that order was dismissed in the High Court in January 1906. The order of the 2nd June 1904, was an order "against" the present plaintiffs, in the sense of s. 312 of the old C. P. C. So the plaintiffs were by that enactment debarred from bringing a suit to set aside the sale on grounds which would re-open the questions decided in the proceedings under s. 311. It is clear that any suit to cancel the mortgage-bond would be barred under Art. 91 or Art. 125 of the Limitation Act and any suit to have the decree set aside on the ground of fraud would be barred under Art. 95. Article 141 is inapplicable, for at the death of the Bahuasin, the plaintiffs being equally-bound with her to submit to the mortgage-decree and sale, were not entitled to the property, in the sense of the Article. How could they

(63) 30 M. 3.
(69) 14 Ind. Cas. 814; 34 A. 335; 9 A. L. J. 375.
(70) 11 B. 119; 6 Ind. Dec. (N. S.) 79.
(71) 25 B. 337; 27 I. A. 216; 5 C. W. N. 10; 10 M. L. J. 353; 2 Bom. L. R. 927; 7 Sar. P. C. J. 739 (P. C.).
(72) 20 M. 33; 6 M. L. J. 278; 7 Ind. Dec. (N. S.) 23,

be when that sale was subsequently confirmed and certified? Article 142 cannot refer to mere possessory title (as it is called); there is a special provision for that in Art. 3. At the time of delivery of possession the plaintiffs were divested of all title. No other Articles of the Indian Limitation Act appear to me to be apposite.

In my opinion, with great respect to my learned brother, whose judgment I have had the advantage of reading, this appeal should fail on the two grounds that the mortgage of 1890, was a valid transfer made by the plaintiffs' mother, and that the present suit, which could not lie as long as the mortgage-decree and the sale thereunder remain in force, is now barred and not maintainable.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 172 OF 1923.

December 23, 1924.

Present:—Mr. Dalal, J. C., and Mr. Ashworth, A. J. C.

Musammat KANIZ ABBAS *alias* KAISAR BEGAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Lala BALADIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (11), O. XXII, r. 4, O. XXXIV, r. 3—Foreclosure suit—Preliminary decree—Death of judgment-debtor—Legal representatives, one of several, brought on record—Decree absolute, whether binding on other legal representatives.

Where a Court issues a notice to a person supposed to be the only legal representative of a deceased defendant or judgment-debtor who alone is in possession of the estate of the deceased, and holds that the service of notice was sufficient, any decree passed in the suit or proceedings taken in execution, will be considered sufficient to cover the entire estate of the deceased, including the shares of those heirs of the deceased who were not brought on the record and who had not received any notice. In this respect no distinction can be made between the estate of a deceased Hindu and that of a deceased Muhammadan inasmuch as under the Muhammadan Law suits and claims can be effectively brought by a creditor against those legal representatives of the deceased who are in actual possession of his assets so as to make the decrees in such suits binding on all the legal representatives including those who are not made parties to the suits. [p. 896, col. 2; p. 898, col. 2.]

In a suit for foreclosure a preliminary decree was passed but the judgment-debtor died before the decree could be made absolute. At the instance of the decree-holder a notice was served on the widow of the deceased who was in sole possession of the entire estate of the deceased and the decree was made absolute and the decree-holder obtained possession of the property:

Held, that the widow of the deceased effectively represented the estate of the deceased in the suit for foreclosure subsequent to the preliminary decree so as to make the absolute decree binding on all the legal representatives of the deceased. [p. 898, col. 2.]

Case-law reviewed.

Per *Dalal, J. C.*—By the definition of "legal representative" given in the C. P. C., 1908, the Legislature possibly desired to bring the procedure in India in conformity with that prevailing in England. [p. 898, col. 2.]

Per *Ashworth, A. J. C.*—The alteration of the definition of "legal representative" in the Code of 1908 by the addition of the words "and includes any person who intermeddles with the estate of the deceased" was merely designed to draw attention to the fact that in some cases a mere intermeddler may sufficiently represent the estate of the deceased person. [p. 899, col. 2.]

It cannot be laid down that one out of several heirs of a deceased defendant or judgment-debtor, although in sole possession of the entire estate of the deceased, can in no circumstances be deemed to have sufficiently represented the estate, so as to make a decree binding on other heirs of the deceased who are not parties to it. [p. 899, col. 2.]

Appeal against the decree of the District Judge, Rai Bareli, dated the 14th April 1923, modifying that of the Subordinate Judge, Rai Bareli, dated the 8th August 1922.

Mr. *Niamat Ullah*, for the Appellants.

Mr. *Wasim* holding brief of Mr. *A. P. Sen*, for Respondent No. 1.

ORDER.

Wazir Hassan, J. C., *(July 28, 1924).*—This appeal raises an important question of law which in my opinion should be decided by a Bench of two Judges. The facts of the case briefly stated are as follows:—

The plaintiff-respondent had brought a suit against one Muhammad Hasan Khan in the year 1919 for sale of a one anna share under a mortgage executed by Muhammad Hasan Khan. A preliminary decree was granted on the 2nd August 1919. In September 1919 Muhammad Hasan Khan died. The period for payment of the mortgage-money having expired the plaintiff applied on the 5th May 1920 for a decree absolute being made. To this application he impleaded *Musammat* Aziz-un-nisa, widow of Muhammad Hasan Khan, as the only legal representative of her deceased husband. Previous to the date of the application *Musammat* Aziz-un-nissa had obtained an order of mutation of names in

her favour alone from the Revenue Court in place of her deceased husband. The foreclosure decree was made absolute against *Musammat* Aziz-un-nissa on the 29th May 1920 and the plaintiff obtained delivery of possession on July 3rd, 1920. The plaintiff then went to the Court of Revenue for mutation of names on the basis of the foreclosure decree but on the objection of the defendants Nos. 2 to 5 in the present suit succeeded in obtaining mutation in respect of 4 pies only, which represented the share of the widow, *Musammat* Aziz-un-nissa, in her husband's estate. The suit out of which this appeal arises was brought by the plaintiff to recover posssession of the rest of the property subject to the foreclosure decree from the hands of the defendants Nos. 2 to 5. These defendants are admittedly co-heirs under the Muhammadan Law in the estate of Muhammad Hasan Khan deceased.

The Court of first instance dismissed the suit on the ground that the defendants being no party to the decree absolute were not bound by it. The lower Appellate Court has come to the conclusion that *Musammat* Aziz-un-nissa represented the entire estate of her husband both in law and in fact in the proceedings which terminated in the making of the decree absolute. In second appeal before me the view taken by the lower Appellate Court is challenged.

On behalf of the appellants reliance is placed on the decisions of the High Court at Allahabad in the case of *Kundan Singh* v. *Surja Kuar*. (1) and of this Court in the case of *Jadu Nath Singh* v. *Afzal Khanam* (2). The learned Judge in the Court below has distinguished the case last mentioned and I am disposed to think that there is a valid distinction. On behalf of the plaintiff-respondent the following cases are cited: *Amir Dulhin* v. *Baij Nath Singh* (3), *Pathummabi* v. *Vittil Ummachabi* (4) and *Khiarajmal* v. *Daim* (5). There is no reported decision of this Court on all fours with the facts of this case. It appears to me that the decision of the point under consideration may turn upon the definition of 'legal representative' given in the new C. P. C. I accordingly certify this case to be laid before a Bench of two Judges for decision.

(1) 37 Ind. Cas. 100; 39 A. 67; 14 A. L. J. 989.
(2) 57 Ind. Cas. 526; 7 O. L. J. 362; 2 U. P. L. R. (O.) 118; 8 O. L. J. 191.
(3) 21 C. 311; 10 Ind. Dec. (N. S.) 839.
(4) 26 M. 734.
(5) 32 C. 296; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.).

JUDGMENT.

Dalal, J. C.—This second appeal was heard by a Bench of two Judges on a reference being made by a learned Judge of this Court.

We shall decide this appeal strictly on the facts of the present case; so those facts may be given in some detail.

A 1-anna 4-pies share in *mahal* Mumtaz Ali Khan belonged to one Muhammad Hasan Khan. He mortgaged 1 anna share to the plaintiff Bala Din by a simple mortgage, dated 10th June 1916. There was a subsequent deed of further charge of the same year. Bala Din sued Muhammad Hasan Khan for foreclosure of the property on foot of the two-deeds and a preliminary decree was passed in his favour by the Subordinate Judge of Rae Bareli on 2nd August 1919. The date fixed for payment after the expiry of 6 months was 2nd February, 1920. Muhammad Hasan Khan died on 6th September 1919 and the claimants to his estate were his widow *Musammat* Aziz-un-nissa and his brother Khan Bahadur Mumtaz Ali Khan. According to the Muhammadan Law *Musammat* Aziz-un-nissa was entitled to $\frac{1}{4}$th share in her husband's property while Mumtaz Ali Khan, brother of the deceased was entitled to inherit the rest of the $\frac{3}{4}$ths share. The widow claimed mutation in the Revenue Court with respect to the entire share of her deceased husband and her application was granted by the Assistant Collector on 16th March 1920, on the basis of possession.

On 5th May 1920, Bala Din applied for a final decree to be passed under O. XXXIV, r. 3 of the C. P. C., with an application that the widow *Musammat* Aziz-un-nissa was the legal representative of the deceased defendant mortgagor of the suit. Notices were issued to the lady both with respect to the application to bring her on the record and to show cause why a final decree should not be passed against her. The notices were served on her *Mukhtar* and the Court made a note that the service was sufficient. She did not make an appearance, nor was any payment of the preliminary decree made. A final decree was, therefore, passed *ex parte* by the Subordinate Judge on 29th May 1920. Bala

Din took out execution of this decree under O. XXI, r. 35 of the Code and he was put in possession of the entire property by the Civil Court after proclamation on the spot on 3rd July 1920. Subsequently when Bala Din applied to the Revenue Court for mutation of names in his favour over the entire 1 anna share of Muhammad Hasan Khan that Court ordered mutation in his favour over 4 pies share only holding that the balance of 8 pies belonged to Mumtaz Ali Khan brother of the deceased. Mumtaz Ali Khan had appealed from the order of the Assistant Collector of 16th March 1920, and his appeal was allowed by the Deputy Commissioner on 15th May 1920. The order of the Appellate Court was that the widow should be recorded as owner of ¼th and Mumtaz Ali Khan as owner of the rest of the property of the deceased.

The plaintiff applied to the Subordinate Judge for a review of his decree of 29th May 1920, but that application was dismissed on 9th July, 1921. He thereupon brought the present suit for recovery of 8 pies share from the legal representatives of Mumtaz Ali Khan who died in the interval.

In our opinion the question at issue in this appeal is whether the widow effectively represented or not the estate of the deceased in the suit for foreclosure subsequent to the preliminary decree so as to make the decree binding on all the legal representatives of the deceased defendant. We think that the plaintiff's claim that she did is supported by pronouncements of their Lordships of the Privy Council.

The first case is that of *General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramaput Singh* (6) in which their Lordships made the now famous observation that the difficulties of a litigant in India begin when he has obtained a decree. The defendant in that suit had obtained a decree for arrears of rent against the estate of a deceased person Gur Prasad. He had sued both Chooharoo Kooer widow of Gur Prasad and his infant son Har Prasad under his mother's guardianship. It was a suit brought against those who were supposed to be the representatives of the debtor Gur Prasad. For some reason, the son was exempted and the decree was passed against the widow in her capacity as representative and sole heiress of her husband. The decree pointed to the realization of the demand out of the estate of the deceased Gur Prasad and showed that the decree was made against the person supposed to be the heir and representative of Gur Prasad. The defendant then purchased Gur Prasad's property in execution of the decree. The plaintiff subsequently took proceedings in execution of his own decree against Har Prasad and claimed Har Prasad's share of the property in the defendant's possession on the ground that the decree under which the defendant had purchased Gur Prasad's property was not passed against Har Prasad. The plaintiff succeeded in the High Court of Bengal but on appeal by the defendant that decree was set aside. Their Lordships observed at page 615 of the report:—"From the above statement it is clear, that unless there be some fatal irregularity in the mode in which the decree of the appellant was obtained or drawn up, or some fatal irregularity in the mode in which that decree has been prosecuted, the estates have been regularly sold and that the suit of the respondent seeking to set aside the order for sale and to get the benefit of his own execution as against Har Prasad as the heir of his father must fail." In giving their reasons that the suit must fail their Lordships observed at page 616:—"The whole proceeding (of sale), if fairly looked at, amounts to this,—that the estate of Gur Prasad was sold under that decree in execution for his debt, and that the interest of his widow, the registered proprietor and ostensible owner of the estate, and also the interest of his son, if he had any interest, was bound by that decree."

In this ruling their Lordships added that they were unable to see any substantial distinction between the case before them and that of *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (7) and that they entirely agreed in the principles expressed by Chief Justice Peacock in that case. The judgment referred to by their Lordships is of considerable interest in the present case. The suit there was brought by the plaintiff to recover property which he stated had descended to him from his father Jagmohan. The defendant defended

(6) 14 M. I. A. 605; 17 W. R. 459; 10 B. L. R. P. C. 294; 2 Suth. P. C. J. 575; 3 Sar. P. C. J. 117; 20 E. R. 912.

(7) Marsh. 614.

the suit upon the ground that Ram Chandra Day had sued Shoobatra, widow of Jagmohan and mother of the plaintiff, that he had obtained a decree in that suit for the amount of a bond which had been given to him by Jagmohan with interest amounting altogether to Rs. 4,802 and that the estate of Jagmohan was sold under that decree. The answer of the plaintiff to that defence was that although the property was sold under that decree against the widow, the advertisement of sale merely declared that the rights and interest of the widow were to be sold. The question before the Bench was whether the widow's interest was all that was sold. Chief Justice Peacock held that the entire interest of Jagmohan including the plaintiff's share was sold because the execution was levied upon the property of the deceased. He referred to the case of an executor and said: "supposing in an ordinary case a suit is brought against an executor and judgment is given against him as an executor, the purchaser under an execution buys not the personal estate of the defendant, but the property of the defendant in his representative character, for a debt which was due from him in that capacity. Looking, therefore, to the advertisement of sale which referred to the decree, we think it was perfectly clear that it was intended to sell the rights and interest of Jagmohan's representatives and the defendant had accordingly purchased that interest under the decree."

In the present case the proceedings in suit leading to the final decree and the execution proceedings clearly indicate that the widow was treated as the only legal representative of the deceased defendant against whose property the preliminary decree was passed.

The same reasoning was adopted by their Lordships of the Privy Council in a Bombay case: *Malkarjun* v. *Narhari* (8). The plaintiffs to the suit were the daughters of one Nagappa who mortgaged the property in question in that suit to the defendant's father in 1877. Subsequently one Vithal obtained a money decree against Nagappa but before it was executed Nagappa died having by his Will bequeathed all his property to the plaintiffs. After Nagappa's death Vithal applied for execution of the decree against defendant Nagappa deceased by his heir and nephew Ramalinga. The notice was issued to Ramalinga and not to the plaintiffs. He appeared and informed the Court that he was separated from the deceased and was not his heir, and that the plaintiffs were the heirs of Nagappa and also that he was not in possession of the estate. He was informed by the Court that the application was not against his property, but against the estate of the deceased Nagappa and that if his property should be attached he would have his remedy after attachment. The mortgagee of 1877 purchased the property (the equity of redemption) at sale and was put in formal possession. In 1889 the plaintiffs brought a suit as heirs of their father Nagappa for an account of the mortgage of 1877 and for redemption and the defendant relied upon the title which he had acquired by his purchase at the judicial sale in 1880. This defence was not sustained by the High Court of Bombay but on appeal their Lordships of the Privy Council accepted it. It was held by their Lordships that the judicial sale was not a nullity and could not be treated as invalid, notwithstanding this irregularity, even though a material one, for the jurisdiction of the Court to execute had been complete throughout. It had not been lost by reason of the above error and had empowered the Court to decide wrongly as well as rightly. They further held that on an irregularity such as this the aggrieved party had his remedy by taking within due time the course prescribed in s. 311 of the C. P. C. (corresponding O. XXI, r. 90) suing for getting the order set aside.

The later case of the Privy Council *Khiarajmal* v. *Daim* (5) was cited by the appellant as favouring the view that all the legal representatives of a deceased defendant or judgment-debtor should be brought on the record to make the execution of a decree effective. We do not think that this view can be supported. The cases of different parties were separately considered by their Lordships who decided in favour of or against the effective representation according to the circumstances of each case. Their Lordships pointed out that the question whether an estate is or is not properly represented in a suit is not a mere question of form but of substance. Two mortgages were executed by Nabi Bakhsh (for himself and his brother Ali Bakhsh) and by Nauroz, Bugro, Sanwan and Khan Mohammad in favour of Wali

(8) 25 B. 337; 27 I. A. 216; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 7 Sar. P. C. J. 739 (P. C.).

Ram, Tek Chand and Kodumal, both usufructuary mortgagees and the mortgagors owned the property in certain shares. There was a subsequent mortgage in 1878 in favour of Kodumal and Tek Chand alone.

Tek Chand and Kodumal sued on the mortgage of 1878 and obtained a money decree. The property was sold in execution of the decree.

In 1879 Wali Ram sued on his mortgage of 1874. To this suit Nabi Bakhsh, Bugro, Sanwan, Kadurbakhsh son of Khan Mohammad and Amir Bakhsh, minor son of Nauroz by his guardian Alahnawaz, were parties. A decree was obtained and the property sold in execution of the decree.

In 1894 Ali Bakhsh and the heirs of Bugro, Nabi Bakhsh, Sanwan and Khan Mohammad sued for redemption. The previous decrees and sales were then pleaded as a bar.

This contention was permitted in the case of the property of Nabi Bakhsh who was represented during execution proceedings by his two widows and a son Mohammad Hasan though his infant daughter was not brought as a party on the record. Their Lordships observed: "Nabi Bakhsh was a defendant to the suit No. 372 of 1879 and signed the agreement of reference. On his death very shortly afterwards his two widows and his son Mohammad Hasan, aged about 6 years, by his mother, one of the widows, were named as his legal representatives on the record. The Judge was satisfied by evidence that they were served with the summons to appear and that they were prepared to accept the award of the arbitrator, and they were also served with notice of the sale. Their Lordships think that Nabi Bakhsh's estate was sufficiently represented for the purpose of the suit although the name of his infant daughter was omitted, and that his share of the equity of redemption in the property sold in execution of the decree in No. 372 of 1879 is, therefore, bound by the sale and is irredeemable" (p. 313).

In the case of Ali Bakhsh their Lordships held that he was never represented in any of the former suits and as to Nauroz that there was no proper representation of his minor son Amir Bakhsh in the suit brought by Wali Ram. For these reasons their Lordships allowed redemption of the share of Ali Bakhsh and Nauroz.

We are of opinion that their Lordships observed the same principles in this decision as to effective representation as was done in the previous rulings quoted above. When a Court has issued notice to a person supposed to be the only legal representative of a deceased defendant or judgment-debtor and held that service is sufficient, the decree passed and the execution thereof will be considered sufficient to cover the entire estate including the shares of those heirs of the deceased defendant or judgment-debtor who were not brought on the record and who had not received notice. In the present case there was proper service on the person who was ostensible successor to the entire property and in sole possession on the date that the plaintiff applied to bring the legal representative of the deceased on the record. After his success it was the duty of the deceased by defendant's brother Mumtaz Ali Khan to appear in Court and offer to pay the amount due on the preliminary decree. He was one of the heirs of his brother and claimed a right to succeed to $\frac{3}{4}$ths of his brother's property. He could not have been unaware of the decree passed for foreclosure of the property which he desired to inherit. In our opinion the plaintiff acted with due care and caution in bringing on the record the one person who was held by the Revenue Court at the time to be the only person in possession of the property of the deceased which had been ordered to be foreclosed. The circumstances of the case, therefore, are such that in our opinion the widow effectively represented the entire estate of the deceased at the time of the final decree and its execution.

The argument of the appellant was that the opinion of the lower Appellate Court was in conflict with the decision of a single Judge of this Court in *Jadu Nath Singh* v. *Afzal Khanam* (2). We are not called upon in the present case to pronounce any opinion as to the correctness or otherwise of that ruling. The facts of that case were different in so far that the decree which was executed was a money-decree and the legal representative was not brought on the record in place of a defendant subsequent to a preliminary decree passed against specific property during the lifetime of the deceased Muhammadan. Different considerations as to effective representation will apply to the two cases.

We shall next consider the different cases

of the different High Courts of India quoted by the appellant's learned Counsel in support of his contention that the final decree only bound the widow's share of the property and not the entire estate of the deceased. In the case of *Jafri Begam* v. *Amir Muhammad Khan* (9) the suit was not originally brought against the deceased Muhammadan but was brought against some of his heirs who were in possession of his property. In that case there was no preliminary decree binding the estate of the deceased. The case of *Ghamandi Lal* v. *Amir Begam* (10) was one of abatement wherein an appeal was held to have abated when one legal representative out of several of the deceased appellant was brought on the record. The case of *Fazal Mohammad Khan* v. *Habibullah Khan* (11) was similar, and so was the case of *Haidar Husain* v. *Abdul Ahad* (12). In our opinion these cases are not helpful in deciding the present appeal.

The case of *Kundan Singh* v. *Surja Kuar* (1) deals with facts which approximate more to the facts of the present case. They are, however, not identical. In that case the preliminary decree was not passed against the owner of the estate. The owner of the estate was not sued but the person sued was one of two legal representatives. There was no evidence in that case the widow was in possession of the entire estate for the time being.

We may point out that the ruling in the case of *Ghamandi Lal* v. *Amir Begam* (10) was distinguished by another Bench of that Court in a subsequent ruling in *Ram Sewak* v. *Lambar Pande* (13). It was held there that it was not necessary that all the legal representatives of an appellant should be brought on the record when an appellant dies after filing an appeal.

Coming to the decisions of the Madras High Court the appellants' learned Counsel quoted the case of *Musala* v. *Ramayya* (14). The facts there also were similar to those of the case in *Ghamandi Lal* v. *Amir Begam* (10). Another case of the Madras High Court *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (15) supports the reasoning adopted by us above. Two Judges of the Court were of opinion that the cases reported in *Ghamandi Lal* v. *Amir Begam* (10), *Mohan Manor* v. *Togu Uka* (16) and *Musala* v. *Ramayya* (14) relate to the question of the abatement of an appeal when the appellant died pending the appeal and his legal representatives were not all brought on the record within the period of limitation and that those cases had no direct bearing upon the question under consideration before them. In that case the learned Judges held the share of the second son of a deceased person bound by the decree in the mortgage suit notwithstanding that the second son was not joined in that suit as one of the legal representatives of the deceased mortgagor. It was their opinion that where defendant in a suit dies and the plaintiff under s. 368 (O. XXII, r. 4) of the C. P. C., brings a person on the record whom he alleges to be the legal representative of the deceased defendant such a person sufficiently represents the estate of the deceased for the purposes of the suit and in the absence of fraud or collusion the decree passed in the suit will bind the estate. They relied, as we have done, on the Privy Council case reported as *General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramaput Singh* (6).

In the Bombay High Court the first case to be noticed is that of *Mohan Manor* v. *Togu Uka* (16). The report is not very clear but it appears that a suit for sale was brought against only some of the legal representatives of deceased mortgagor. There no preliminary decree for sale was obtained against the mortgagor during his life. This is the distinction and not the one pointed out by the learned Judges in *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (15). The following cases of the Bombay High Court will support the view we have taken of effective representation:—

Jairam Bajabashet v. *Joma Kondia* (17), *Khurshetbibi* v. *Keso Vinayek* (18), *Davalava* v. *Bhimaji Dhondo* (19) and *Devji* v. *Sambhu* (20).

(9) 7 A. 822; A. W. N. (1885) 248; 4 Ind. Dec. (N. S.) 636.
(10) 16 A. 211; A. W. N. (1894) 22; 8 Ind. Dec. (N. S.) 136.
(11) 20 Ind. Cas. 366; 11 A. L. J. 719.
(12) 30 A 117; 5 A. L. J. 62; A. W. N. (1908) 41; 3 M. L. T. 207.
(13) 25 A. 27; A. W. N. (1902) 171.
(14) 23 M. 125; 9 M. L. J. 313; 8 Ind. Dec. (N. S.) 483.
(15) 26 M. 230; 12 M. L. J. 368.
(16) 10 B. 224; 5 Ind. Dec. (N. S.) 536.
(17) 11 B. 361; 11 Ind. Jur. 427; 6 Ind. Dec. (N. S.) 236.
(18) 12 B. 101; 6 Ind. Dec. (N. S.) 553.
(19) 20 B. 338; 10 Ind. Dec. (N. S.) 787.
(20) 24 B. 135; 1 Bom. L. R. 627; 12 Ind. Dec. (N. S.) 628.

No doubt later there has been an inclination in the Bombay High Court to dissent from the views expressed in the above cases and a Bench of that Court discussed the ruling of *Davalava* v. *Bhimaji Dhondo* (19) in *Mirkha Imamkha* v. *Bhagirathi Mahadev Abhyankar* (21). That case also was one where the suit was originally brought against some of the legal representatives of a deceased debtor, and there was no preliminary decree for foreclosure or sale against the estate of the deceased.

Turning to the Calcutta High Court there was a difference of opinion between the Judges in the Full Bench decision in the case of *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh* (22). That case was similar to the one reported as *Devji* v. *Sambhu* (20) and the majority of the Bench held that the share of the legal representative of the deceased debtor was not affected by the sale in execution of the decree obtained against the other legal representatives. Markby, J., held a contrary opinion. In a subsequent case of *Muttyjan* v. *Ahmed Ally* (23) several of the creditors of a deceased Muhammadan sued his widow and daughter and obtained decrees against the assets of the deceased which had come into the possession of these defendants. The decrees were executed and the assets of the deceased sold. Thereupon two married sisters of the deceased sued as heirs of the deceased to recover their share of the property sold. A Bench of two learned Judges held that when a creditor of a deceased Muhammadan sues the heir in possession and obtains a decree against the assets of the deceased such a suit is to be looked upon as an administrative suit and those heirs of the deceased, who had not been made parties, cannot, in the absence of fraud, claim anything but what remains after the debts of the testator have been paid.

This view was followed in the case of *Amir Dulhin* v. *Baij Nath Singh* (3).

A Full Bench of the Calcutta High Court has held in *Khitish Chandra Acharjya Chowdhry* v. *Radhika Mohan Roy* (24) that under the Hindu Law as in English Law any one taking charge of property belonging to a deceased person renders himself liable for his debts. So an administrator *pendente lite*, who intermeddles with the estate of a deceased person after he ceases to be an administrator, can be sued as a *quasi* executor *de son tort*.

We have sufficiently indicated the ground for our decision and we do not feel justified in lengthening out this judgment by quoting various rulings reported in other than the authorised reports. Our examination of the case law of the different High Courts leads us to believe that our view is supported by decisions of the Calcutta High Court and by some of the decisions of the Bombay and Madras High Courts. The facts of the cases of this Court and of the Allahabad, Bombay and Madras High Courts quoted in support of the appellants' view are all in our opinion distinguishable from the facts of the case before us.

One main argument of the appellants' learned Counsel was that the cases which supported the view of the lower Appellate Court related to the estates of deceased Hindus to whom different considerations would apply from those applying to the case of a Muhammadan. We see no reason to make this distinction because under the Muhammadan Law suits and claims can be effectively brought by a creditor against those legal representatives of the deceased person who are in actual possession of the assets of the deceased so as to make the decrees in those suits binding on all the legal representatives including those who were not made parties to the suit. The Muhammadan Law on the subject is stated in the judgment of Abdur Rahim, J., in the case of *Abdul Majeeth* v. *Krishnamachariar* (25). We need not repeat here all the references given there to the Hedaya and the Fatawa Alamgiri.

As we think that we are supported in our opinion by the rulings of the Privy Council prior of 1908 we have not thought it necessary to consider the definition of "legal representation" given in the C. P. C., 1908 to which our learned brother has drawn the attention of the Bench in his referring order. Possibly the Legislature desired by this definition to bring the procedure in India in conformity with that prevailing in England. In Halsbury's Laws of England, Vol. 8, para. 992,

(21) 51 Ind. Cas. 18; 43 B. 412; 21 Bom. L. R. 329.
(22) 4 C. 142; 2 C. L. R. 223; 1 Shome L. R. 219; 2 Ind. Dec. (N. S.) 92.
(23) 8 C. 370; 10 C. L. R. 346; 4 Ind. Dec. (N. S.) 237.
(24) 35 C. 276; 3 M. L. T. 147; 12 C. W. N. 237.
(25) 40 Ind. Cas. 210; 40 M. 243; 32 M. L. J. 195; (1917) M. W. N. 346; 5 L. W. 767.

the procedure obtaining in England is stated as follows :—

"If in any action or matter it appears to the Judge that any deceased person who was interested in the matter in question has no legal personal representative, the Judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some proper person to represent his estate for all the purposes of the action or matter, on such notice to such persons, if any, as the Judge may think fit, either specially, or generally, by public advertisement, and the order so made and any order consequent thereon binds the estate of the decease person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the action or matter." We however, do not desire to give any opinion in the matter.

The grounds of appeal raise no other points for decision. I agree with the opinion of the lower Appellate Court and would dismiss this appeal with costs.

Ashworth, A. J. C.—I agree that the question is whether the widow sufficiently represented the estate of the deceased for the purposes of the proceedings ending in the final decree passed under O. XXXIV, r. 3 of the C. P. C., and that, in view of the exhaustive analysis of the rulings relevant to this question by the Judicial Commissioner it must be held that the finding of the lower Appellate Court, that the widow did do so, was correct. I hold, however, that there is nothing in O. XXII, or in the definition of "legal representative" as contained in s. 2 (11), of the C. P. C. to debar the appellant from maintaining the present suit. In a subsequent suit a party (in default of his, or his predecessor-in-interest, having been a party to a proceeding taken under O. XXII. r. 5) can maintain that a person brought on the record in a previous suit as the legal representative of a deceased party did not sufficiently represent the estate of that deceased party for the purposes of the previous suit. The Indian Legislature has not thought fit to incorporate in the C. P. C., the provision contained in O. III, r. 33 of the County Court Laws that an order of a Court appointing a proper person to represent the estate of a deceased litigant binds the estate of the deceased person to the same extent as if a duly constituted legal personal representative of the deceased had been a party. The alteration of the definition of "legal representative" by the addition of the words "and includes any person who intermeddles with the estate of the deceased" was, in my opinion, merely designed to draw attention to the fact that in some cases a mere intermeddler may, for the purposes of a particular suit, sufficiently represent the estate of a deceased person. To this extent I concur with the ruling of a single Judge of this Court reported as *Jadu Nath Singh* v. *Afzal Khanam* (2), but I do not concur with that ruling, so far as it can be construed to mean that one out of several heirs, although in possession can in no circumstances be deemed to have sufficiently represented the estate; so as to make a decree binding on other heirs who were not parties to it. I do not consider that it makes any difference whether a person is brought on the record as legal representative of the estate of a deceased person by the plaintiff, or by the Court, or before or after the passing of a preliminary decree against the deceased person.

I concur in the order of the Judicial Commissioner dismissing this appeal with costs.

By the Court.—For reasons given in our judgments, we dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 480 OF 1923.
November 29, 1924.
Present:—Mr. Baker, J. C.

VENKATRAO—DEFENDANT—APPELLANT
versus
BAPU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Easements Act (V of 1882), ss. 22, 27—Easement, exercise of—Dominant and servient owners, duties of.

Although under s. 22 of the Easements Act, the dominant owner must exercise his right of easement in the mode which is least onerous to the servient owner, the owner of the servient tenement must not, under s. 27 of the Act, so deal with the servient tenement as to render the easement incapable, or more difficult, of enjoyment by the owner of the dominant tenement. [p. 900, cols. 1 & 2.]

Clifford v. *Hoare*, (1874) 9 C. P. 362 at p. 364; 43 L. J. C. P. 225; 30 L. T. 465; 22 W. R. 828, *Tcolseemony Debee* v. *Jogesh Chunder Shaha*, 1 C. L. R. 425, relied on.

Raja of Venkatagiri v. *Raja Muddukrishna*, 28 M. 15, distinguished.

Appeal against the decree of the District Judge, Bhandara, dated the 10th August 1923, in Civil Appeal No. 37 of 1923.

Messrs. *D. T. Mangalmurti* and *V. D. Kolte*, for the Appellant.

Dr. *H. S. Gour* and Mr. *V. M. Jakatdar*, for the Respondents.

JUDGMENT.—The facts of this case are fully set out in the judgments of the Courts below. It has been found that the plaintiffs have a right to have their land irrigated by the water which passes through their land from the sluices in question and that the flow of the water to their land is obstructed by the channel which the defendant has dug at right angles to the existing channel. The lower Courts have ordered this to be removed.

It is now contended that instead of removing the channel the defendant should be ordered to construct, and is willing to construct a trough or aqueduct, which will carry the water to the plaintiffs' fields over the *nala* in dispute, and reference is made to ss. 22 and 23 of the Easements Act. It has been stated by the lower Appellate Court that it is not possible to carry the water across the *nala* in dispute by an aqueduct.

I may mention that during the pendency of this appeal a stay of execution was granted to the appellant on his agreeing to put in a wooden pipe of trough to carry the water in the way which he now proposes to do, and there has been a continual dispute over it on the ground that the respondents were not getting water. I do not think that the placing of a trough at the place in dispute is likely to prove satisfactory as the plaintiffs would complain that all the water to which they are entitled does not flow through it, and it is practically certain that in heavy rain it will either overflow or will be washed away. I do not see any reason for differing from the view of the lower Appellate Court, and although under s. 22 of the Easements Act the dominant owner must exercise his right in the mode which is least onerous to the servient owner, this does not appear to be a case where exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage. Under s. 27 of the Act the servient owner must not do any act tending to restrict the easement or to render its exercise less convenient. The case quoted by the learned Pleader for the appellant *Clifford* v. *Hoare* (1) followed in *Toolseemony Debee* v. *Jogesh Chunder Shaha* (2) do not seem to me to apply. The owner of the servient tenement must not so deal with the servient tenement as to render the easement incapable, or more difficult, of enjoyment by the owner of the dominant tenement.

The Counsel for the respondents relies on *Raja of Venkatagiri* v. *Raja Muddukrishna* (3), but this case is one where the water did not flow through any definite channel on to the plaintiff's land.

In these circumstances I do not think the order of the lower Appellate Court should be disturbed as I have sufficient reason to believe that the erection of the trough will lead to fresh disputes.

The question of whether the plaintiffs will be entitled to the water from the weir distinct from the sluice is not of much importance as what they get is the overflow of the water from the defendant's land through the channel which is fed from the tank by the weir or the sluice according to the level of the water in the tank.

Lastly as regards the question of damages I do not see any reason to differ from the lower Appellate Court. Although no particular amount of damage has been proved the stoppage of the water to the plaintiffs' fields must have caused damage to them, which they are entitled to recover.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) (1874) 9 C. P. 362 at p. 364; 43 L. J.C. P. 225; 30 L. T. 465; 22 W. R. 828.
(2) 1 C. L. R. 425.
(3) 28 M. 15.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 273 OF 1923.

January 19, 1925.

Present:—Mr. Dalal, A. J. C.

SAT NARAIN—PLAINTIFF —APPELLANT

versus

KRISHNA DUTT AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Gift during illness, validity of—Marz-ul-maut, *doctrine of, applicability of.*

Under the Hindu Law, a deed of gift executed by a person during illness is not invalid. The principles

of the Muhammadan Law of *marz-ul-maut* are not applicable to the Hindu Law.

(Mayne's Hindu Law, para. 376 (9th Ed.), referred to.)

Second appeal against the decree of the Subordinate Judge, Sultanpur, in Appeal No. 188 of 1922, dated the 31st May 1923, confirming that of the Munsif, Musafirkhana, dated the 27th November 1922.

Mr. *S. N. Roy*, for the Appellant.

Mr. *H. N. Das*, for the Respondents.

JUDGMENT.—The plaintiff Sat Narain is entitled as reversioner to succeed to ¼th of the property left by one Sheo Narain, who died childless and without leaving a widow. The impediment in his way was a deed of gift executed by Sheo Narain on 25th July 1921 in favour of Krishna Dutt defendant No. 1. The reason given by the plaintiff in para. 2 at first why this deed of gift was not binding on him was that Krishna Dutt had an illicit connection with *Musammat* Joggi widow of Sheo Narain's nephew and that with her help Krishna Dutt got a deed of gift executed in his own favour at a time when Sheo Narain was seriously ill and incapable of understanding the transaction. Subsequently a plea of undue influence was raised and an addition made to the plaint that Krishna Dutt and *Musammat* Joggi having taken undue advantage of Sheo Narain's weak intellect and illness and having brought undue pressure to bear upon him got it executed. The new plea is on the face of it inconsistent with the earlier one because if Sheo Narain was incapable of understanding the nature of the transaction of gift he would be equally incapable of being influenced by what *Musammat* Joggi may have told him. The First Court framed the following issue No. 2:—

"Was Sheo Narain seriously ill and incapable of understanding his affairs at the time of the execution of the deed of gift as pleaded in the amended para. No. 2 of the plaint; if so, what was the effect thereof?" It is clear that the Munsif had notice of the amendment and desired to include the amended plea in this issue.

Both the Subordinate Courts held that Sheo Narain was not unduly influenced and that he was not incapable of understanding what he was doing when he executed the deed of gift. These are clear findings of fact.

It was argued in second appeal that the plaintiff was prejudiced by the want of a separate issue as to undue influence. There is, however, no affidavit either by the plaintiff or by his Pleader who appeared in the First Court that by reason of the want of any issue the plaintiff or the Pleader refrained from producing certain named witnesses before the Trial Court. In the Trial Court the plaintiff himself raised the question of undue influence and his Pleader well knew that the burden lay on him to prove it. In fact two witnesses of the plaintiff were questioned on the subject. To pretend later on that the Pleader was so incapable of knowing his business that the want of the issue put him off and prevented him from producing necessary evidence will not be accepted by Appellate Courts without proper affidavit of an admision of the Pleader of his gross ignorance and carelessness, if such really existed There is absolutely no substance in this plea of prejudice.

The argument that the burden of proof shifted to the defence may be answered by pointing out that the defence did produce evidence to support proper execution of the document with due understanding by Sheo Narain. This evidence was believed by the two Subordinate Courts and nothing further need be said on this point in second appeal.

Ground of appeal No. 3 was abandoned.

A new ground was argued that under the Hindu Law a deed of gift made by a person during disease is invalid. This is a strange doctrine. The principles of the Muhammadan Law of *marz-ul-maut* are not applicable to the Hindu Law. In Mayne's Hindu Law in para. 376 (9th Edition) a quotation is made from Vrihaspati in support of the proposition that under Hindu Law a gift is invalid without possession. In the present case there was possession and the question does not arise There is no argument advanced by the learned commentator that Vrihspati's statement that a gift by a person during disease is void is adopted in anglo-Hindu Law. No authority of any Court was quoted on the subject.

I dismiss this appeal with costs.

G H. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2675 OF 1924.

March 25, 1925.

Present:—Mr. Justice LeRossignol.

PIRA—DEFENDANT—APPELLANT

versus

MELA—PLAINTIFF—RESPONDENT.

Punjab Tenancy Act (XVI of 1887), s. 59 (2)—Punjab Courts Act (VI of 1918), s. 41 (3)—Occupancy tenancy—Succession — Collaterals — Custom—Appeal, second—Certificate, whether necessary.

Under s. 59 (2) of the Punjab Tenancy Act, the right of succession to an occupancy tenancy must, where the collaterals are governed by custom, be regulated by the rules of Customary Law, and a finding with regard to such custom is not open to challenge in second appeal in the absence of a certificate under s. 41 (3) of the Punjab Courts Act.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 31st July 1924, reversing that of the Subordinate Judge, Fourth Class, Hoshiarpur, dated the 2nd February 1924.

Sheikh *Niaz Muhammad*, for the Appellant.

Sayed *Mohsin Shah*, for the Respondent.

JUDGMENT.—The property involved in this case consists of 14 *kanals*, 1-5/6 *marlas* of occupancy land left by Allu who died without issue. In 1911, Allu executed a Will by which he demised all his property to Mela, respondent. In 1912 Mela attempted to secure mutation on the Will, but Allu refused, alleging that he was not yet dead and that his property should remain in his name till he died, when it should go to whosoever tended him.

On his death in 1923 his land was mutated in favour of parties in equal shares, whereupon plaintiff raised this action based on the Will.

The Court below has held that Allu did not revoke his Will, and further that the plaintiff tended Allu upto his death. He also holds that Allu by custom had power to dispose of his land by Will.

On the first two points I agree with the Court below and there are, further, points of fact.

On the finding of custom, there is no certificate and as the parties do not include the landlords, s. 59 (2) of the Tenancy Act lets in custom.

For these reasons I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST MISCELLANEOUS CIVIL APPEALS Nos. 59 AND 66 OF 1924.

March 2, 1925.

Present:—Mr. Dalal, J. C., and Mr. Wazir Hasan, A. J. C.

Nawab SARWAR-UL-MULK SARWARJANG BAHADUR—APPELLANT

versus

Mirza WAKAR ALI BEG AND ANOTHER—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 17—Guardian, appointment of—Litigious disposition, whether disqualification.

The mere fact that a person who is otherwise a fit and proper person to be the guardian of a minor is of a litigious disposition is not a sufficient cause for refusing to appoint him guardian of the minor. [p. 903, col. 1.]

Appeal against an order of the District Judge, Lucknow, dated the 16th September 1924.

Mr. *A. P. Sen*, for the Appellant.

Mr. *H. K. Ghosh*, for Respondent No 2.

JUDGMENT.—These appeals arise out of proceedings under the Guardians and Wards Act, 1890. They related to the appointment of a guardian for the persons and property of four minors, Mirza Iqbal Ali Beg, Mirza Zulfiqar Ali Beg, Mirza Mahbub Husain Khan and Mirza Yusuf Husain Beg. These minors are the sons of Faiz Husain Beg, who died on the 28th January 1918. The mother of the minors survived her husband only a few years. After her death a dispute arose as to the guardianship of the minors mentioned above. The first man in the field was Nawab Sarwar-ul-Mulk Sarwar Jang Bahadur, the maternal grandfather of the minors. On the 9th November 1922 he made an application to the Court of the District Judge of Lucknow for his appointment as a guardian of the persons and the property of the minors. The second candidate for the same appointment was *Rani* Qamar Zamani Begam, aunt of the minors. The third applicant was the Deputy Commissioner of Sitapur, who held the superintendence of the estate of Mirza Waqar Ali Beg, the eldest son of Faiz Husain Beg, under the Court of Wards Act, 1912. Mirza Iqbal Ali Beg having attained majority during the pendency of the proceedings in the Court below also applied to be made a guardian of the persons and the property of the remaining three minors in

case the application of Nawab Sarwar-ul-Mulk Sarwar Jang Bahadur was not granted.

Rani Qamar Zamani Begam subsequently retired from the contest. The learned District Judge has rejected all the applications and refused to appoint any guardian either of the persons or of the property of any of the minors.

After the institution of the appeal in this Court the Court of Wards released the estate of Mirza Waqar Ali Beg from its superintendence and the Government Pleader on behalf of the Deputy Commissioner of Sitapur stated before us on the 19th January 1925 that the name of the Deputy Commissioner be removed from the array of parties. We granted this request but directed notice to issue to Mirza Waqar Ali Beg. Mirza Waqar Ali Beg has not appeared at the hearing of these appeals.

One of the appeals is by Nawab Sarwar Jang Bahadur and the other is by Mirza Iqbal Ali Beg. On behalf of Mirza Iqbal Ali Beg his Counsel stated that his client was agreeable to the appointment of Nawab Sarwar Jang Bahadur as guardian of the persons and of property of the minors. Mirza Zulfiqar Ali Beg has also attained majority. The appeal of Nawab Sarwar Jang Bahadur is, therefore, directed with respect to his appintment as the guardian of the persons and the property of the remaining two minors, Mirza Mahbub Husain Khan and Mirza Yusuf Husain Beg only.

From the statement of events as they have happened since the date of the applications it would appear that there is really no contest now and the sole applicant in the field is Nawab Sarwar Jang Bahadur. The learned District Judge has found that the minors have all along lived with the Nawab and that "there is nothing whatever on the file to show that he is not extremely fond of the minors, or that he is not actuated by what he believes to be his concern for their interest." He, however, declines to accede to the prayer of the Nawab's application on the ground that he is of litigious disposition.

We do not think that this is a sufficient cause for throwing out the application of the Nawab. We think that he is a fit and proper person to be appointed the guardian of the persons and the property of the two minors, Mirza Mahbub Husain Khan and Mirza Yusuf Husain Khan. We accordingly allow Appeal No. 59, set aside the order of the lower Court and appoint Nawab Sarwar-ul-Mulk Sarwar Jang Bahadur guardian of the persons and the property of the two minors mentioned above. In the circumstances we dismiss the other Appeal No. 66. No order as to costs in either appeal.

Appeal No. 59 allowed.
Z. K. *Appeal No. 66 dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 591, 592 AND 593 OF 1922.

January 14, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

NABIN CHANDRA CHAKRABARTI AND OTHERS—PLAINTIFFS—APPELLANTS IN ALL.

versus

IN No. 591 OF 1922

RUSTOM ALI CHOWKIDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 592 OF 1922

WAJADDI MIJI AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 593 OF 1922

HARA KUMAR ACHARYA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Landlord and tenant—Construction of document—*Kabuliyat—Raiyati *interest or tenure.*

A *kabuliyat* which was headed as a *raiyati kabuliyat* provided that the tenant shall plant 1000 betel nut trees per *kani* of *bhiti* land belonging to the *raiyati* within five years and thereby reclaim the land. The total area of the land demised was a little over three *kanis*. The person who executed the *kabuliyat* did not belong to the cultivating class:

Held, that the *kabuliyat* read as a whole indicated that the tenancy was *raiyati* and not a tenure and that the mere fact that the person who executed the *kabuliyat* did not belong to the cultivating class was not enough to prove that he was a tenure-holder. [p. 905, col. 1.]

Appeals against the decrees of the Special Judge, Tippera, dated the 29th of November 1921, modifying the decrees of the Assistant Settlement Officer, Chandpur, dated the 31st of May 1920.

Babus *Pyari Mohan Chatterji* and *Jatindra Mohun Ghose*, for the Appellants.

Babus *Nagendra Ch. Chowdhuri* and *Bepin Chandra Basu*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—These appeals arise out of applications made by the appellants under s. 105 of the Tenancy Act for enhancement of rents of the tenants under s. 30 of the Tenancy Act.

These appeals relate to several *khatians* but it is not necessary to refer to each one of them as we are of opinion that the find-

ings of the Courts below with reference to these *khatians* except *khatian* No. 50 are based upon facts and cannot be disturbed in second appeals.

With reference to *khatian* No. 50 the lower Appellate Court has held that the tenant is a tenure-holder. He was also so described in the finally published Record of Rights. The learned Special Judge has come to this conclusion on a consideration of the fact that the present tenant does not belong to the agricultural class. The Assistant Settlement Officer did not come to any definite finding upon the status of this tenant. The plaintiffs rely upon a *kabuliyat*, dated the 10th *Kartic* 1298 *B. S.* in order to show that the defendant is not a tenure-holder, but an occupancy *raiyat*. The *kabuliyat* is headed as a *raiyati kabuliyat*. It recites that the *jote* was originally held by Alabardi Molla who may be presumed to be cultivators and there is a further stipulation that the tenant "shall plant 1,000 betel nut trees per *kani* of *bhiti* land appertaining to this *raiyati* within five years and thereby re-claim the lands." The *kabuliyat* read as a whole is a good evidence that the tenancy was a *raiyati* and not a tenure. The area of it was given as 3 *kanis* 1 *gunda* and 3 and odd *karas*. In our opinion this *kabuliyat* does not show that the tenant was a tenure-holder. On the contrary it supports the plaintiff's contention that he was an occupancy *raiyat*. The mere fact that the person who executed this *kabuliyat* did not belong to the cultivating class is not enough to prove that he was a tenure-holder, for it is common knowledge that the people who do not belong to this class sometimes take lands for the purpose of cultivation through the agency of hired labour.

We accordingly allow this appeal and set aside the decree of the lower Courts with regard to *khatian* No. 50 and direct that the rent of that *khatian* be increased at the rate of five annas in the rupees as has been done in the other cases. The result is, that the Appeals Nos. 591 and 592 are dismissed, and the Appeal No. 593 is partly allowed and is dismissed as regard *khatian* Nos. 35, 40 and 49. We assess the hearing-fee at one gold *mohur* in each case to be paid to the respondents who have appeared.

Cuming, J.—I agree.

Z. K. *Appeal Nos. 591 and 592 dismissed. Appeal No. 593 allowed in part.*

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 15 OF 1924.

December 8, 1924.

Present:—Mr. Ashworth, A. J. C.

PARMESHWAR DEEN—DEFENDANT No. 2—APPELLANT

versus

CHHAB NATH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 107 (2), O. I, r. 9—Appeal—Non-joinder of necessary party, effect of—Limitation, period of, expiry of, effect of.

Order I, r. 9 of the C. P. C., read with s. 107 (2) of the Code, does not permit the non-joinder of any party being condoned by an Appellate Court, when such non-joinder makes it impossible for the Court to deal equitably and sufficiently with the matter in controversy between the parties to the appeal. [p. 905, col. 1.]

Where a decree was granted against several defendants and one of the defendants preferred an appeal against the decree so far as it affected him, and took up a position which, if accepted, would enhance the liability of the other defendants, but they were not made parties to the appeal:

Held, (1) that the plea urged by the appellant could not be entertained as it could not be disposed of in the absence of the other defendants whose liability would be enhanced as a consequence and who had had no opportunity of contesting the appeal; [*ibid.*]

(2) that the period of limitation for the appeal having expired, the Court could not permit the other defendants to be made parties to the appeal at a late stage. [*ibid.*]

Appeal against the judgment and decree passed by the First Additional District Judge, Bara Banki, dated the 12th March 1924, upholding that of the Honorary Assistant Collector, First Class, Bara Banki, dated the 9th January 1924.

Mr. *Gokul Prasad*, for the Appellant.

Messrs. *Ram Bharose Lal* and *Raj Narain Shukla*, for the Respondent.

JUDGMENT.—This second rent appeal arises out of a suit brought by the plaintiff respondent against the co-sharers of a certain *mahal* for a share in the profits on the basis of the plaintiff's 3-pies' share. The appellant-defendant maintained that he was in possession of two plots in respect of which the claim for a share of profits could not be maintained for a reason which it is not necessary to set out at present. The lower Courts have decreed the plaintiff's claim against such of the defendants as were found to have collected profits in excess of their share, including the appellant, and apportioned against these persons the amount payable respectively by them to the plaintiff. This appeal is brought by one of the judgment-debtors only. He says that he owns two plots in respect of which no share of profits should have been

given to the plaintiff. The plaintiff, however, must get his share of profits from some one, and if collections in respect of these two plots are not to be reckoned in calculating the share of profits due to the plaintiff, it will be necessary for the plaintiff to get a larger amount from the other defendants, and indeed also from this defendant, so far as he owns a share apart from the plots. No variation by this Court of the original decree can be made in the absence of the other defendants, who should have been joined as respondents. It is true that they were not joined as respondents in the appeal to the lower Court and that no objection was taken to this before the lower Appellate Court. But nonetheless it is not possible for this Court to decide the appeal in the appellant's favour without an opportunity being given to the other defendants to contest the appeal. The appellant's Counsel asks for permission to join the other defendants now. I cannot, however, understand how the appellant could fail to see the necessity for joining the other defendants and his failure to do so cannot be construed as a mere oversight. In the circumstances, I see no reason at this stage, when the limitation for an appeal has expired, to allow the joinder of the other defendants as respondents. Under O. I, r. 9 it is provided that a suit shall not be defeated by reason of non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. This rule, read with s. 107 (2) of the C. P. C. will not permit the non-joinder of any party being condoned by an Appellate Court when such non-joinder makes it impossible to deal equitably and sufficiently with the matter in controversy between the parties to the appeal.

The appeal is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 200 OF 1924.

July 2, 1924.

Present:—Mr. Rupchand Bilaram, A. J. C.

Pandit HARNAMDAS—PLAINTIFF—APPLICANT

versus

FIRM OF MAYADAS LAKHMICHAND—DEFENDANTS—OPPONENTS.

Contract Act (IX of 1872), s. 245—Liability by "holding out," extent of—Joint Hindu family—Manager entering into partnership—Family, whether becomes partner—Insolvency proceedings against partner—Partnership, whether dissolved.

Where the managing member of a joint Hindu family enters into a partnership with strangers he does not thereby make other members of the family partners in the business so as to clothe them with all the rights and obligations of a partner as defined by the Indian Contract Act. In such a case the family as a unit does not become a partner but only such of its members as in fact enter into a contractual relation with the strangers, will be governed by the Act. [p. 907, col. 1.]

The rule of liability "by holding out" contained in s. 245 of the Indian Contract Act can be relied on only by the persons to whom the representation has been made and who have acted on the faith of its being true. [p. 907, col. 2.]

In re Fraser, Ex parte Central Bank of London, (1892) 2 Q. B. 633, 67 L. T. 401; 9 Morrell 256, relied upon.

Mere institution of insolvency proceedings against the partners of a firm, or even the adjudication of a partner as an insolvent, does not by itself effect a dissolution of a partnership. [p. 906, col. 2.]

Mr. *Kimatrai Bhojraj*, for the Applicant.

Mr. *Ladharam Anand*, for the Opponents.

ORDER.—This is an application under O. XXI, r. 50, C. P. C., for permission to execute the decree against Lalchand and Motiram sons of Ramdittamal as partners of the Firm of Mayadas Lakhmichand. Both Lalchand and Motiram are brothers of Mangalsen who is admittedly a partner of this firm and the ground alleged against them in this application is two-fold, (*a*) that they were partners or at any rate they held themselves out as partners to the plaintiff, and (*b*) that they formed members of a joint Hindu family with defendant Mangalsen, that the business of the firm was carried on by Mangalsen for the benefit of the joint family and the members of the joint family worked and took part in the business. This application was originally directed not only against Lalchand and Motiram but also against their brother Bodraj and their nephew Malikchand who were subsequently given up.

Lalchand and Motiram have denied their liability both as members of a joint family

with Mangalsen and as partners. They have pleaded that the defendants' firm was started after the severance of the joint family tie between Mangalsen and his brothers and the partition of their property and have further pleaded that the defendants' firm was dissolved to the knowledge of the plaintiff before the institution of this suit and as both of them were not joined as defendants in the suit, the present application is incompetent.

The following issues were raised by the Court :—

1. Did Lalchand Motiram and Bodraj separate from Mangalsen on the 7th January 1917, as alleged?

2. Are they liable for the account in suit either as partners in the Firm of Mayadas Lakhmichand or as members of a joint family carrying on joint family business?

3. Was the firm of Mayadas Lakhmichand dissolved to the knowledge of the plaintiff before the institution of the suit?

4. If so, are Lalchand Motiram and Bodraj personally liable for the decree?

The facts of the present litigation appear to be somewhat as follows :—

The plaintiff had a commission agency account with the defendants on which he claimed a large sum. The defendants suffered heavy losses in 1917 and the plaintiff getting nervous about the chances of recovering his dues from the defendants applied to have Mangalsen and his brothers and also certain other persons whom he alleged to be partners in the defendant firm declared insolvents and an *interim* Receiver was appointed by the Court. As, however, some of the partners of the defendants' firm made a provisional settlement with the plaintiff, no adjudication order was passed, the insolvency application was dismissed and the property restored by the Official Receiver to the representatives of the defendants' firm. According to this settlement Mangalsen paid Rs. 10,000 to the plaintiff in cash and executed a *hundi* in his favour for Rs. 2,000. Doulatram passed a *hundi* for Rs. 1,700 and Mayadas and Lakhmidas executed a mortgage-deed in favour of the plaintiff for Rs. 17,000. Mangalsen and Doulatram subsequently failed to honour the *hundis* while Mayadas and Lakhmidas disputed the mortgage, and refused to have it registered. The plaintiff thereupon instituted this suit on the original cause of action, giving credit for the amounts recovered by him. He served Mangalsen, Mr. Ladharam, Doultram and Prajram as managing partners of the defendants' firm. Mr. Ladharam is the brother of Mangalsen. He appeared as one of the persons served as an alleged partner of this firm and also as Counsel for the firm and on 29th November 1923 he submitted to a consent decree under which he himself was given up. The decree *inter alia* provides that the plaintiff was at liberty to proceed against the other partners of the defendants' firm in execution under O. XXI, r. 50, C. P. C.

Mr. Ladharam now appears as Counsel for Lalchand and Motiram and also for Mangalsen.

He has offered no evidence to show that the firm of Mayadas Lakhmidas was dissolved prior to the institution of the suit or that it was so dissolved to the knowledge of the plaintiff. Mangalsen who was examined as a witness in these proceedings was not even questioned by the learned Counsel on this point. Mr. Ladharam relies on the institution by the plaintiff of the insolvency proceedings against the partners of the defendants' firm as effecting dissolution of the firm. The mere institution of these proceedings which were opposed by the partners and were ultimately dismissed *vide* Ex. 58, cannot effect a dissolution of the partnership. Even the adjudication of a partner does not by itself dissolve the partnership though it affords a ground for the Court to decree dissolution. *vide* s. 254, cl. 2, Indian Contract Act. Moreover the firm appears to have carried on business after the dismissal of this application and to have been dissolved on 27th April 1923, *vide* proceedings in Suit No. Ex. 22.

The question whether Mangalsen and his brothers formed members of a joint Hindu family when the business of Mayadas Lakhmidas was being carried on, is in my opinion irrelevant to the present inquiry. Admittedly this firm was not a joint family trading firm confined to the members of the family. Mayadas and Lakhmidas in whose names the business was carried on were strangers to the family of Mangalsen. It must, therefore, be proved as a fact that Mangalsen and his brothers agreed to be partners in the business or held themselves out as such. Even if it be proved that Mangalsen and his brothers formed members of a joint Hindu family and that Mangalsen as manager of such joint family entered into this partnership

on behalf of and for the benefit of the family, it would not help the plaintiff. Where the managing member of a joint family enters into a partnership with strangers he does not thereby make other members of the family partners in the business so as to clothe them with all the rights and obligations of a partner as defined by the Indian Contract Act. In such a case the family as a unit does not become a partner but only such of its members, as in fact, enter into a contractual relation with the strangers, will be governed by the Act. (Maynes Hindu Law, para. 300). This is not an application for execution of the decree against joint family property of Mangalsen and his brother on the ground that Mangalsen entered into the partnership on behalf of the joint family under such circumstances, as to render the joint family property liable for the debts of the partnership. The plaintiff seeks to hold the brothers personally liable as partners, under O. XXI, r. 50, C. P. C. Mr. Ladharam has relied on Ex. 35, a document written by him on Re. 1 stamped paper purporting to be executed on the 7th January, 1917, by Mangalsen and his brothers reciting that they had become separate on that date. The genuineness of this document has been challenged by Mr. Kimtarai. He contends that this document was forged on some date subsequent to January 1918 after the Firm of Mayadas Lakhmidas had sustained heavy losses and to protect the joint family property being attached by the creditors.

In the view I take of the case, it is not necessary to go into the question whether Mangalsen and his brothers became separate on 7th January 1917 or on a later date. There is much to be said in support of either theory. If Ex. 35 is a forgery, then Mr. Ladharam is a party to it. He is not only the writer but one of the executants. He has not been examined as a witness and it is not desirable that I should discuss the evidence on the point incomplete as it is, specially when in my opinion it is not necessary.

It is open to the plaintiff to prove affirmatively that Lalchand and Motiram were either partners in the defendants' firm or that they held themselves out to the plaintiff as such, *vide Davis* v. *Hyman & Co.* (1) and are, therefore, liable to him under s. 245, Indian Contract Act. The rule of liability by "holding out" is more fully stated in s. 14 of the English Partnership Act of 1890 which is as follows:—

"14. (1) Every one who by words spoken or written or by conduct represents himself or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the persons so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made."

As pointed out by Mulla in his notes to s. 245, Indian Contract Act the omission in s. 245 of the Indian Contract Act providing that the other party must in fact have given credit to the firm in the belief induced by the express or tacit representation of the supposed partners that he is a member of the firm though inelegant is harmless. This doctrine is a branch of the Law of Estoppal and can be relied on only by the persons to whom the representation has been made and who have acted on the faith of its being true. Lord Esher, M. R. *In re, Fraser, Ex parte, Centeral Bank of London* (2).

Bodraj has been given up. The case of Motiram is simple. He admittedly worked at the shop at Karachi in 1917 for ten or eleven months when the defendants' firm dealt for the plaintiff and took an active part in the management of the business. The explanation offered by Motiram and by his brother Mangalsen is, that Motiram was employed as a servant of Mangalsen. Mangalsen states, that Motiram represented him in the firm, that he had authority to sign for the firm, as he had given him this authority, that he had given him authority to do the work in the same way as he (Mangalsen) could have done if present and that he had the same powers to work in the firm as the other partners Parjaram and Doulatram had (lines 40 to 50). It appears that Motiram managed the business of the firm in the same way as any other managing partner, and the plaintiff who saw him acting when he dealt through the defendant's firm was within his rights to treat him as a partner and to act on it. Whether Motiram was employed as a paid servant of Mangalsen, or looked after the interest of his brother

(1) (1903) 1 K. B. 854; 72 L. J. K. B. 426; 51 W. R. 598; 88 L. T. 284; 19 T. L. R. 348.

(2) (1892) 2 Q. B. 633; 67 L. T. 401; 9 Morrell 256.

because he was joint with him, or because the business was being carried on for the benefit of the joint family by Mangalsen or whether he was really a partner in this business or not, is not material. I may, however, remark that no documentary evidence has been produced to prove that Motiram was engaged on Rs. 70 per month as alleged and the oral evidence of Allahdad, Ex. 54, who was brought down by Motiram to depose to the salary being settled at Rs. 70 through his intercession is not worthy of any belief.

In Suit No. 429 of 1918 filed by a creditor of the defendant's firm and referred to arbitration, Motiram has been held to be a partner.

I have no hesitation in holding that Motiram is liable as a partner, and I grant leave to the plaintiff to proceed against him.

The case of Lalchand is not so clear. There is no direct evidence to prove that either he or his brother Motiram were taken up as partners or what their shares were in the business. Nor is there any reliable evidence to show that Lalchand took part in the business or held himself out to the plaintiff as a partner in 1917-18 when the defendants' firm acted as the agents of the plaintiffs.

The plaintiff's own evidence is unsatisfactory. In his previous deposition recorded before the consent decree was passed, he did not allege that Lalchand was one of the persons who worked at the shop. Attarsing, Ex. No. 10, saw Lalchand in 1919. Vazirchand, Ex. 15, saw Lalchand sitting at the shop though he does not say that he saw him working there. He states that he made a settlement of his account with the defendants in 1918, but he is not certain of his dates. The insolvency application was withdrawn in November 1918, and the defendants appear to have made settlement with the Karachi merchants in 1919. It seems that he is mistaken about his settlement being made in 1918 very likely he saw Lalchand at the shop in 1919 about the time when Attarsing saw him.

The witnesses Desraj, Ex. 16, Takhtram Ex. 17, and Khanchand, Ex. 18, are petty brokers. Desraj is a debtor of the defendants and has a pending dispute with them. None of them say that they dealt with Lalchand. I am not prepared to accept their statement that in 1917-18 they saw Lalchand working at the shop when they visited the defendants' shop to secure work. It has not been seriously contested that Lalchand managed the business carried on at Bhaluval in the name of Mangalsen Lalchand. It is not, therefore, likely that Lalchand would work at Karachi during this period or be seen by the brokers. Lalchand and his brothers have sworn that Lalchand came to Karachi in 1919 for the first time. Though their demeanour in the witness-box was unsatisfactory, I am not prepared to disbelieve them on this point.

Mr. Kimatrai has contended with some considerable force that though the plaintiff's evidence is weak, it should be believed in preference to that of the other side as the account books of the defendants' firm which would have served as the best evidence, have been kept back. Mangalsen was served through his Counsel with a summons on 10th May 1924 to produce the books in Court at the date of hearing. He failed to produce them on the plea that he had filed the books in the Court of the Junior Sub-Judge, Rawalpindi. It is not certain when the books were filed in that Court or whether they have at all been filed there. According to Mangalsen he filed them one or two months before the 16th June. It was his duty to have got back the books in time or produced certified copies of the necessary documents to show that he could not get them back. I am of opinion that the books have been intentionally kept back by Mangalsen. He may, however, have reasons of his own for not producing them or may have been acting the fool, and though I am prepared to draw an adverse inference against him and his brother Lalchand I am not prepared to accept the evidence of the plaintiff and his witnesses as true, and to hold that Lalchand was at Karachi or that he represented himself to be a partner.

It appears from the evidence that in 1919 Lalchand helped his brother Mangalsen in settling claims against the defendants.

On 20th August 1919 the defendants settled their account with the firm of Dhanpatmal Diwanichand and paid them Rs. 8,250, *vide* Amirchand, Ex. 11 and the entry Ex. 12. On the same date Lalchand borrowed Rs. 8,300 from the Punjab National Bank on a *hundi* drawn by him at Karachi and payable by the firm of Mangalsen Lalchand at Sargoda, *vide* Tilokchand, Ex. 13 and the entry Ex. 14.

Lalchand admits that he borrowed Rs. 8,300 from the Bank, and spent Rs. 50 on his own account. He, however, denies that he paid this amount to Dhanpatmal Diwanichand and contends that on that date he started a new business at Karachi in the name of Lalchand Bodraj in partnership with one Bodraj Soori, and contributed Rs. 12,000 as his share of the capital made up of Rs. 4,250 brought by him from his native place and Rs. 8,250 borrowed from the Bank. The books of this firm of Lalchand Bodraj have not been produced nor Bodraj called as a witness. It has been asserted with some considerable force that the Firm of Lalchand Bodraj belonged to Lalchand and his brother Bodraj and this fictitious Bodraj Soori had no concern in it and no capital was advanced by Lalchand as alleged. I hold that Rs. 8,250 paid to Dhanpatmal Diwanichand were out of the Rs. 8,300 borrowed by Lalchand and that the denial of Lalchand is false. It does not, however, follow that Lalchand paid this sum as a partner. It may be that he and Mangalsen or all the brothers carried on business at Bhalwal in the name of Mangalsen Lalchand and that he borrowed this money to pay to Mangalsen. Nor can this payment be proof under s. 245, Indian Contract Act of any representation made to the plaintiff on which he acted, being long after the account had ended.

Lalchand has admitted in his evidence that the shop goods of the firm of Mangalsen Lalchand were attached in the execution of a decree against the defendants and that his attempt to raise the attachment failed. That again does not help the plaintiff's case. The goods were attached as the goods of Mangalsen and a suit challenging the validity of the order passed in execution proceedings is pending. The *hundi* drawn by Mangalsen on the Firm of Mangalsen Lalchand and handed over to the plaintiff which was subsequently dishonoured (Exs. 19 to 21) again cannot render Lalchand liable as a partner or as an ostensible partner.

Lalchand's case has to a great extent been prejudiced in the manner in which it has been handled and in attempting to deny facts which did not affect his case. After giving my careful consideration to the facts of the case, I have come to the conclusion that the evidence is not sufficient to hold him liable as a partner or as an ostensible partner.

My findings, therefore, are as follows:—

Issue No. 1: not necessary.

Issue No. 2 (1st part) Motiram is liable but not Lalchand or Bodraj who has been given up.

(2nd part.) The question cannot be gone into in this suit.

Issue No. 3: in the negative.

Issue No. 4: Motiram is personally liable.

I allow this application against Motiram with costs and dismiss it against Lalchand but in the circumstances of this case, I make no order as to costs in his favour.

P. B. A. *Application allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 341 OF 1923.

December 11, 1924.

Present:—Mr. Dalal, J. C.

MADHO SINGH AND ANOTHER—DEFENDANTS —APPELLANTS

versus

Musammat LACHHMIN—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 60—Mortgage—Redemption—Clog on equity of redemption—Long term, coupled with other conditions.

The ordinary rule relating to clogs on the equity of redemption is that wherever the bargain is unconscionable and makes redemption impossible the mortgagor is entitled to relief. [p. 910, col. 1.]

Kunj Behari Lal v. *Pandit Prag Narayan*, 68 Ind. Cas. 529; 9 O. L. J. 294; (1922) A. I. R. (O.) 283, *Parbati* v. *Muhammad Hadi*, 68 Ind. Cas. 534; 9 O. L. J. 304; (1922) A. I. R. (O.) 31 and *Sohan Lal* v. *Kunwar*, 61 Ind. Cas. 962; 8 O. L. J. 136, followed.

A long term is not by itself sufficient to constitute a clog on the equity of redemption but it is a factor to be considered in arriving at the conclusion where the terms of the mortgage amount to such clog. A term of seventy-five years by itself raises a strong ground for interference. [*ibid.*]

Under a deed of mortgage the mortgagee secured a profit at the rate of 25 per cent. and the period of redemption was fixed at seventy-five years. There was a further condition that if redemption was not effected in the 76th year, a further term of 75 years would be added:

Held, that the intention of the mortgagee was to make redemption impossible and that the mortgagor was, therefore, entitled to relief. [*ibid.*]

Second civil appeal against a decree of the Additional Sub-Judge, Lucknow, dated the 13th August 1923, preferred against that of the Munsif, North Lucknow, dated the 16th December 1922.

Mr. *Makund Behari Lal*, for the Appellant.

Mr. *Haider Husain*, for the Respondent.

JUDGMENT.—This is a second appeal by the defendant in a suit for redemption. As in the lower Courts, the plea here is that the suit was premature. The mortgage deed covenanted that no redemption shall be made before the expiry of 75 years from the date of the mortgage. The learned Judge of the lower Appellate Court has pointed out that the bargain was unconscionable in the sense that the profit secured was 25 per cent. and the period for redemption was so long as 75 years. There is a further stipulation which in the ordinary sense of the words would mean that if the mortgage is not redeemed in the 76th year it will enure for another term of 75 years. The learned Counsel for the appellant quoted rulings reported as *Kunj Behari Lal* v. *Pandit Prag Narain* (1) and *Parbati* v. *Muhammad Hadi* (2), and *Sohan Lal* v. *Kunwar* (3). They all lay down the ordinary well known rule that wherever the bargain is unconscionable and makes redemption impossible the mortgagor is entitled to relief. It is true that the long term by itself is not sufficient to constitute a clog on the equity of redemption, but a long term is also relative. I should say that a term of 75 years is so long that by itself it would raise strong ground for interference. When added to it the bargain is unconscionable and a further term of 75 years added if there should be failure of redemption in the 76th years, there can be no doubt that the intention of the mortgagee was to make redemption impossible. The opinion of the Subordinate Courts was perfectly correct and I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 68 Ind. Cas. 529; 9 O. L. J. 294; (1922) A. I. R. (O.) 283.
(2) 68 Ind. Cas. 534; 9 O. L. J. 304; (1922) A. I. R. (O.) 31.
(3) 61 Ind. Cas. 962; 8 O. L. J 136.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 51 OF 1923.

December 10, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

BHIKHALAL GIRDHARLAL—PETITIONER

versus

ACHARATLAL LALLUBHAI—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, Sch. II, para. 16—Award, decree on—Revision, whether lies—Interference by High Court—Discretion of Court.

It cannot be laid down that an application under s. 115 of the C. P. C. can under no circumstances be entertained against a decree passed in terms of an award. If the action of the lower Court can be brought within the purview of s. 115, an application for revision would be competent. [p. 910, col. 2; p. 911, col. 1.]

Ghulam Jilani v. *Muhammad Hussan*, 29 I. A. 51; 4 Bom. L. R. 161 at p. 166; 29 C. 167; 6 C. W. N. 226; 25 P. R. 1902; 12 M. L. J. 77; 8 Sar. P. C. J. 154 (P. C.), and *Merali Visram* v. *Sheriff Devji*, 12 Ind. Cas. 687; 36 B. 105; 13 Bom. L. R. 1017, relied on.

There is no obligation on the High Court to interfere with an application made under s. 115 of the C. P. C., even if facts are proved which bring the application within the section. It is purely a matter of discretion and no rules can be laid down as to how such discretion is to be exercised. Whether the Court will interfere or not is entirely for the Court which hears the application to decide on the particular circumstances of the case before it. [p. 911, col. 2.]

Civil Extraordinary Application against an order passed by the First Class Subordinate Judge, Nadiad, in Suit No. 333 of 1920.

Mr. *G. N. Thakor* (with him Mr. *M. K. Thakor*), for the Petitioner.

Mr. *H. C. Coyajee* (with him Mr. *H. V. Divatia*), for Respondent No. 2.

JUDGMENT.—This is an application by the petitioner asking this Court to interfere under its powers given by s. 115 of the C. P. C. with the order made by the First Class Subordinate Judge drawing up a decree in terms of the award, which was made in pursuance of an order of the Court, dated June 27, 1922, appointing the second opponent as arbitrator.

The first question is whether such an application is competent. We do not think that the authorities on the point go so far as to decide that no application can be entertained under s. 115 against a decree passed in terms of an award. It is true that the head-note in *Ghulam Jilani* v. *Muhammad Hussan* (1) is to this effect, but

(1) 29 I. A. 51; 4 Bom. L. R. 161 at p. 166; 29 C. 167; 6 C. W. N. 226; 25 P. R. 1902; 12 M. L. J. 77; 8 Sar P. C. J. 154 (P. C.).

it is not warranted by the terms of their Lordships' judgment, as we read it. At page 60 the judgment says:—

"The award having been duly made and not having been corrected or modified, and the application to set it aside having been refused, the Subordinate Judge had no option but to pronounce a decree in accordance with it. The Subordinate Judge does not appear to have exercised a jurisdiction not vested in him by law, or to have failed to exercise the jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with material irregularity. He appears to have followed strictly the course prescribed by the Code.

"Inasmuch as their Lordships hold that the application in revision was incompetent, it would be a work of supererogation to discuss the various objections raised by the appellants in the High Court."

The inference is clear, that if it had appeared that the Subordinate Judge had brought himself within the provisions of s. 115, the application for revision would have been competent. But none of the objections in that particular case were directed to those provisions. We cannot agree, therefore, with the expression of opinion of Mr. Mulla in his notes to paras. 15 and 16 of the Second Schedule to the, Code, that no application for revision should be admitted in the case of an award, and we agree with the decision of this Court in *Merali Visram* v. *Sheriff Devji* (2). In this case the petitioner raised certain objections to the award of the arbitrator, making various allegations against the arbitrator, which, it was contended, if proved, amounted to misconduct. It is true that the Judge, on the application to set aside the award, did not deal *seriatim* with all the allegations made by the petitioner against the arbitrator. He dealt with some of the objections, notably with regard to an item of Rs. 13,430, which the arbitrator, who had been a party to the partnership suit, had allowed himself, and an item of Rs. 14,862 which the arbitrator had allowed to another partner Pranjivan, and concluded by saying: "There is thus no misconduct proved and I hold the award cannot be set aside and should be filed and a decree drawn up in terms of the award."

It would have been better if the Judge had referred to all the objections in the petition, stating whether they had been relied upon or not when the matter was argued before him.

But we think the proper inference for this Court in revision to make is that the Judge acted properly in dealing with the objections, and that though he may not have made a reference to every one of them in his judgment, the omission points rather to the fact that those objections were not pressed before him. One of the allegations was that the arbitrator acted unfairly towards the petitioner in not hearing him or his evidence. Mr. Coyajee has pointed out to us that although a summons was issued to the arbitrator to be examined as a witness, yet no attempt was made to examine him, but that was not the fault of the respondent.

We think, therefore, that it is more probable that the petitioner felt that these objections could not be pressed, so that there are no grounds on which we should exercise our discretion by interfering under s. 115. In fact there are some reasons for believing that this application was simply made for delay.

It seems necessary to point out again, as has been done in many other cases, that there is no obligation on the High Court to interfere on an application made under s. 115, even if facts are proved which bring the application within the section. It is purely a matter of discretion, and we cannot lay down any rules how that discretion is to be exercised. Whether the Court will interfere or not is entirely for the Court which hears the application to decide on the particular circumstances of the case before it.

We would, therefore, discharge the Rule with costs.

Z. K. *Rule discharged.*

(2) 12 Ind. Cas. 687; 36 B. 105; 13 Bom. L. R. 1017.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 260 OF 1924.

December 9, 1924.

Present:—Mr. Baker, J. C.

GOVIND—DEFENDANT—APPLICANT

versus

Musammat VITHABAI—PLAINTIFF—NON-APPLICANT.

Court Fees Act (VII of 1870), ss. 7 (1), (2), 12—Maintenance, arrears of, suit to recover—Court-fee payable—Decision of First Court, whether final—Appeal, whether lies.

Section 12 of the Court Fees Act only applies to a

decision as to the valuation of a suit which falls within a particular class, and not to a decision as to the particular class in which a suit falls, that is to say, if there is no doubt as to the class in which a suit falls and the section of the Court Fees Act which applies to it, the decision of the First Court, as to valuation, which depends on the value of the property in suit, is final; but if there is a dispute as to the class in which the suit falls, that is to say, the section of the Court Fees Act, which applies to it, an appeal will lie from the decision of the First Court. *Dada Bhau Kittur* v. *Nagesh Ramchandra*, 23 B. 486; 12 Ind. Dec. (N. S.) 323, relied on.

A suit to recover arrears of maintenance, in which there is no prayer for declaration as to a right to future maintenance, falls within cl. (1) of s. 7 of the Court Fees Act.

Application for revision against the order of the District Judge, Nagpur, dated the 21st July 1924, in Miscellaneous Appeal No. 9 of 1924.

Mr. *A. V. Wazalwar*, for the Applicant.

Mr. *M. R. Bobde*, for the Non-Applicant.

ORDER.—This is an application for revision of an order, passed in Miscellaneous Appeal No. 9 of 1924, by the District Judge, Nagpur, against the order of a Second Class Subordinate Judge, Nagpur.

The plaintiff (non-applicant) sued for arrears of maintenance under an agreement and valued her suit for the purpose of Court-fees and jurisdiction under s. 7, cl. (1), of the Court Fees Act. The First Court held that the suit should be valued under s. 7, cl. (2), as a suit for declaration, and returned the plaint for amendment of the valuation for the purpose of Court-fees and jurisdiction. The Subordinate Judge further stated that on representation of the amended plaint he would pass the necessary order for presentation to the proper Court as he had no jurisdiction to try the suit, it being above the pecuniary limit of suit triable by him.

On appeal this order was reversed by the District Judge, holding that the First Court was wrong in holding that the claim for maintenance should have been valued at Rs. 3,008 and that it had no jurisdiction to try the suit. The lower Court was directed to take the plaint on its file and to dispose of it according to law. The defendant makes this application for revision.

Two points are raised. The first is that under s. 12 of the Indian Court Fees Act, 1870, there was no appeal against the decision of the First Court on the question of valuation; and the second point is that the suit should be valued both under s. 7 (1) and s. 7 (2) of the Court Fees Act, being a suit both for arrears of maintenance under cl. (1) and also for a declaration of the right to maintenance under cl. (2) of s. 7.

So far as the first of these contentions is concerned, the law is quite clear. Section 12 of the Court Fees Act only applies to a decision as to the valuation of a suit, which falls within a particular class, and not to a decision as to the particular class in which a suit falls, that is to say, if there is no doubt as to the class, in which the suit falls, and the section of the Court Fees Act, which applies to it, the decision of the First Court as to the valuation, which depends on the value of the property in suit, is final; but if, as in the present case, there is a dispute as to the class in which the suit falls, that is to say, the section of the Court Fees Act which applies to it, an appeal will lie. This has frequently been held by the High Courts, and I need only refer to one authority *Dada Bhau Kittur* v. *Nagesh Ramchandra* (1). The question in the present case is whether the suit should be valued under s. 7, cl. (1), or s. 7, cl. (2), or both, and an appeal will lie against the order.

I entirely agree with the reasons given by the learned District Judge for holding that the suit falls under s. 7, cl. (1). There is no prayer for a declaration in the plaint. The plaintiff sues for arrears of maintenance only. The effect of any decree she obtains in the suit, will only be to give her the arrears claimed and cannot by itself give her a right to future maintenance, for which she will have to bring a separate suit if the defendant does not pay her in future. It may be that the effect of the decree in this case would be to make the question of the agreement and the liability under it *res judicata* as between the parties, but that would not effect future proceedings, as this decree could only be executed in respect of the amounts claimed in this suit for the past and it would not operate with respect to the sums for the future, for which the plaintiff would have to bring a separate suit. Section 7, cl. (2) of the Court Fees Act, therefore, has no application. The suit is governed by s. 7, cl. (1), and the order of the lower Appellate Court, holding that the suit is properly valued and is within the jurisdiction of the First Court, is correct.

The application is dismissed with costs.

Z. K. *Application dismissed.*

(1) 23 B. 486; 12 Ind. Dec. (N. S.) 323.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 301 OF 1924.
January 30, 1925.
Present:—Mr. Prideaux, A. J. C.
Musammat INDRANI BAHU—
APPLICANT
versus
Musammat RANI BADI DULAIYA—
NON-APPLICANT.

Registration Act (XVI of 1908), ss. 82, 83—Prosecution for offence under s. 82—Sanction of Registering Officer, whether necessary.

The permission of the Registering Officer under s. 83 of the Registration Act is not a necessary condition precedent to the initiation of a prosecution by a private individual against a person for an offence under s. 82 of the Act.

Hussain Khan v. *Emperor*, 36 Ind. Cas. 145; 38 A. 354; 14 A. L. J. 412; 17 Cr. L. J. 465, *Queen-Empress* v. *Batesar Mandal*, 10 C. 604; 5 Ind. Dec. (N. S.) 405, *Emperor* v. *Jiwan*, 27 Ind. Cas. 208; 37 A. 107; 13 A. L. J. 4; 16 Cr. L. J. 144 and *Husain Khan* v. *Emperor*, 39 Ind. Cas. 690; 39 A. 293; 15 A. L. J. 136; 18 Cr. L. J. 546, referred to.

Gopinath v. *Kuldip Singh*, 11 C. 566; 5 Ind. Dec. (N. S.) 1136, and *In re Piramu Nadathi*, 38 Ind. Cas. 976; 40 M. 880; 21 M. L. T. 118; 5 L. W. 414; 18 Cr. L. J. 416, relied on.

Application for revision against the judgment of the Sessions Judge, Saugor, dated the 28th August 1924, in Criminal Revision No. 8 of 1924.

Mr. *G. L. Subhedar*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—In this case the complainant *Musammat* Rani Badi Dulaiya brought a complaint under s. 82 of the Registration Act stating that the accused *Musammat* Indrani Bahu of Barodia executed a sale-deed in her favour in respect of a third *patti* of *Mouza* Samaspur, on 19th July 1923, receiving Rs. 500 as earnest money, but that as she subsequently wished to sell the same *patti* to another, she denied the execution of the deed and the receipt of payment before the Sub-Registrar. An application was made to the Sub-Registrar for sanction to prosecute the accused but the Sub-Registrar refused to sanction the prosecution. The Trial Court, *i.e.*, the Tahsildar and Magistrate, First Class, Saugor, relying on the case of *Hussain Khan* v. *Emperor* (1) held that the permission referred to in s. 83 of the Registration Act, 1908, is a necessary condition precedent to the prosecution of any person for an offence mentioned in s. 82 of the Act. He, therefore, discharged the accused.

(1) 36 Ind. Cas. 145; 38 A. 354; 14 A. L. J. 412; 17 Cr. L. J. 465.

The Sessions Judge in revision holds a contrary opinion and has directed a further enquiry into the case. Hence the present application by the accused.

The question is a somewhat disputed one. The decision of two Judges of the Calcutta High Court in *Queen-Empress* v. *Batesar Mandal* (2) is in favour of the applicant; and that view is upheld in *Emperor* v. *Jiwan* (3). A single Judge of the same Court in *Hussain Khan* v. *Emperor* (4) finds that what is required for the initiation of a prosecution under the Registration Act is the permission of the Registration Officer.

I can find no published or other rulings of this Court on the point, but it seems to me that the decision in *Gopinath* v. *Kuldip Singh* (5) a Full Bench ruling, and *In re Piramu Nadathi* (6) correctly express the law on this subject. It has been held that permission under s. 83 of the Registration Act is not a preliminary requisite for the institution by a private person of proceedings for an offence under s. 82 of the Act.

It has to be noted that s. 83 of the Registration Act merely states that a prosecution for any offence under this Act *may* be commenced by the permission of certain officials named under the section. It does not say "must be." For these reasons I agree with the Sessions Judge in thinking that the previous sanction of the Sub-Registrar or any officer of the Registration Department is not necessary in the present case, and that the case has been rightly ordered to proceed.

I dismiss this application.

G. R. D. *Application dismissed.*
Z. K.

(2) 10 C. 604; 5 Ind. Dec. (N. S.) 405.
(3) 27 Ind. Cas. 208; 37 A. 107; 13 A. L. J. 4; 16 Cr. L. J. 144.
(4) 39 Ind. Cas. 690; 39 A. 293; 15 A. L. J. 136; 18 Cr. L. J. 546.
(5) 11 C. 566; 5 Ind. Dec. (N. S.) 1136.
(6) 38 Ind. Cas. 976; 40 M. 880; 21 M. L. T. 118; 5 L. W. 414; 18 Cr. L. J. 416.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 49 OF 1924.

June 30, 1924.

Present:—Mr Kennedy, J. C., and Mr. Lobo, A. J. C.

RAHIMTULLAH IBRAHIM—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 264 — Summary trial —Notes of evidence, whether part of the record—Important matter—Magistrate, duty of—Proper procedure—Ports Act (XV of 1908), s. 54—"Disobedience", meaning of.

Under s. 264 of the Cr. P. C. the judgment is the one and the only record in cases which are tried summarily and in which appeal lies and the rough and incomplete notes of evidence taken by the Magistrate cannot and should not be transcribed and attached to the record. [p. 914, col. 2.]

Where owing to the bulk of evidence or the complication of the matters or owing to the difficult nature of points at issue, it is not possible for the Magistrate to keep in his mind without making exhaustive notes the evidence of important facts, then, even though the offence may be technical and be punishable only with a slight sentence, the Magistrate is not acting properly if he applies the summary procedure to such a trial and should he in so important a case apply the summary procedure, then, no doubt, the appellate or revisional Court will re-direct the re-trial of the case in a more appropriate form. [p. 914, col 2; p. 915, col. 1.]

The word "disobey" in s. 54 of the Indian Ports Act does not mean "intentional disobedience." [p. 915, col. 1.]

Revision against the order of the City Magistrate, Karachi, dated the 17th January 1924.

Mr. *Tahilram Maniram*, for the Applicant.

Mr. *T. G. Elphinston*, Public Prosecutor, for Sind, for the Crown.

JUDGMENT.—In this case the accused Rahimtullah who is a Tindal of the country craft called 'Haripassa' has been convicted of various offences in respect of his navigation of the said vessel and sentenced to the total fine of Rs. 60. He comes here in revision.

'Haripassa' was a vessel of carrying capacity of about 170 tons which was berthed in the Napier Mole Boat Wharf, in the Port of Karachi. She was fully loaded with rice consigned to Maldev Islands and left the Wharf intending to proceed to Kiamari also within the limits of the Karachi Port for the purpose of taking on water. The nevigable channel near the Napier Mole Boat Wharf is narrow and apparently owing to very inexpert navigation the vessel grounded on a sand bank about 400 feet from the Wharf. The boat was seriously damaged and the cargo (much of it) was spoiled.

The specific offences which the accused is said to have committed are these:—

1. Infraction of Port Rule No. 8 inasmuch as he failed to give 24 hours notice of his intention to vacate his berth.
2. Infraction of s. 31 (1) of Act XV of 1908, in moving without a pilot, and
3. Committing an offence under s. 280, Indian Penal Code, for rash and negligent navigation.

Before going into the merits of this case, it is right that we should express our opinion as to the point raised and urged with considerable emphasis by the Pleader of the applicant and that is as to the form of the record. The trial was a summary trial and the complaint of the applicant's Pleader is that although the Magistrate had made some rough notes of the evidence, yet those notes have not been transcribed and are not attached to the record. Now, there is indubitably a considerable amount of judicial authority in support of the proposition that where a Magistrate tries a case summarily and does as a matter of fact take rough notes, those rough notes should be transcribed and attached to the record. But we are of opinion that that course is not one contemplated by the law and it is otherwise inconvenient. Section 264 of the Cr. P. C. says distinctly that the judgment in a summary case shall be the one and only record in cases coming within the section, that is to say, in cases in which an appeal lies. It, therefore, appears to us that an attempt to increase the record will be illegal. Moreover it seems to us clear that to attach to the record fragmentary and incomplete notes which are intended not to form the full record of evidence but merely to supplement the defective memory of the trying Magistrate will certainly embarass an Appellate Court. And it will be inconvenient because it is found by experience that the admission of such evidence which may be likened to the adminicles of evidence familar to certain judicial systems does in the long run cause harm to accused persons. Having said so much, it is necessary, on the other hand to express strongly our opinion that a summary trial is meant to be a summary trial and that where owing to the bulk of the evidence or the complication of the matters or owing to the difficult nature of points of issue, it is not possible for the Magistrate to keep in his mind without

making exhaustive notes the evidence of important facts, then even though the offence may be technical and be punishable only with a slight sentence, the Magistrate is not acting properly if he applies the summary procedure to such a trial and should he in so important a case apply the summary procedure, then no doubt the appellate or revisional Court will direct the re-trial of the case in more appropriate form. In the present case, we do not find that there is any valid objection to be taken to the procedure of the learned Magistrate. The judgment is very full, contains all salient facts. The question now is whether on the facts so given, the offences charged against the accused have been committed.

As regards the third charge, that is to say, in respect of rash and negligent navigation, it does not appear to us that on the facts given in the judgment, the conviction can be sustained. No doubt the accused navigated the ship in an extremely slovenly manner but it is necessary to prove that he navigated it so as to endanger human life or in a manner which was likely to cause hurt or injury to other persons, or property. And this does not appear from the finding of the Magistrate on this point of the case. We, therefore, set aside his conviction under s. 280, Indian Penal Code, and direct the fine of Rs. 50, if paid, to be refunded.

As regards the first charge, that is to say as regards the 24 hours notice of vacation of the berth, it seems quite clear, he has committed this offence. It was urged that this was a mere fiscal regulation. It is clearly nothing of that sort. Section 8 of the Port Rules of the 16th September 1915 makes it quite clear that the object of the Rule is to enable the Port Authorities to inform the Master as to whether the state of the tide is such that it is safe for him to navigate or move about the harbour, for the benefit not only of the Master but also for that of persons in other ships who do not wish to be exposed to the risk of colliding with derelicts. He is, therefore, rightly convicted as to this. It is preposterous to argue that the word "disobey" in s. 54 connotes intentional disobedience for it is obviously the duty of persons navigating in Ports to acquaint themselves with the Rules of the Port and to comply with them.

As regards s. 31 (1) the rule appears to have not been rigidly in force and apparently since three or four years it has been the habit of tindals of all country crafts to move in the harbour without any permission of the Port Trust or with the Pilot or Harbour Master. It is strongly urged that this rule is a very unreasonable rule which throws heavy expense on the owners of small country crafts. With the policy of the rule we have nothing to do. We have no doubt that the Port Trust are the best judges of the advantage of any particular policy. All we are concerned with is to see whether s. 31 (1) is in force or not...The question is whether Karachi is a notified Port under s. 31 of the Act. Section 31 reproduces with a certain modification the provision of a parallel section in Act XII of 1875. Karachi is a notified Port for the purposes of that Act by virtue of Government Resolution of 16th of October 1877. The previous proclamations are kept in force not only by the General Clauses Act but also by s. 2, cl. 2 of the Indian Ports Act, X of 1889. It is true that in the present section there is a limitation not only on moving the ship within the limits of the Port but also with respect to entering and leaving it, which latter conditions did not exist in the previous sections. And it might be urged that as regards entering and leaving there has been no effectual notification of this Port under s. 31 (1). But that cannot be said to apply in the present case when the Master was, neither leaving nor entering the Port but merely moving within it. The accused was, therefore, bound unless he had any written permission of the Superintendent not to move without a pilot or similar officer on board. The rule is a salutary one and desuetude cannot be treated as an equivalent to repeal. Of course a prosecution for infraction of a rule which has fallen into desuetude might work hardship and it is for that reason the Magistrate has very wisely inflicted merely a nominal fine. That fine is sufficient to indicate to people that they must acquaint themselves with the law and obey it.

We think, therefore, that there is no ground shown to interfere in revision in regard to offences committed by the accused under ss. 54 and 31 (1) of Act XV of 1908.

K. S. D. *Order accordingly.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 270 OF 1924.
(CRIMINAL REVISION PETITION No. 226 OF 1924.)
December 18, 1924.

Present:—Mr. Justice Srinivasa Iyengar.

In re SONAIMUTHU AMBALAM—ACCUSED—PETITIONER.

Arms Act (XI of 1878), s. 19 (e)—"Going armed," meaning of—Intention to use weapon.

The expression "going armed" within the meaning of cl. (e) of s. 19 of the Arms Act indicates, first, an intention to use the weapon as a fire-arm, and secondly, the possibility of using it. For the purpose of a conviction under cl. (e), there must be some clear evidence of intention on the part of the accused to use the weapon.

Where in a prosecution under the section, it was found that the accused had only one empty cartridge in his fire-arm and no cartridges at all were found on the person of the accused and there was no proof of the accused having ever previously used the fire-arm:

Held, that the accused could not be convicted of an offence under s. 19 (e) of the Arms Act.

Petition, under ss. 435 and 439 of Cr. P. C., 1898, praying the High Court to revise the conviction and sentence of the Court of the Sub-Divisional Magistrate, Ramnad, in C. C. No. 8 of 1924.

Messrs. *C. Narasimhachariar* and *V. Raghavachariar*, for the Petitioner.

The Public Prosecutor, on behalf of the Crown.

ORDER.—The question in this case is whether the accused was properly convicted of the offence of "going armed" within the meaning of cl. (e) of s. 19 of the Indian Arms Act (Act XI of 1878). It would appear that he has been discharged under cl. (f) of the same section of being in possession of arms in contravention of the provisions of s. 14 or 15. I should have thought that the offence of going armed with fire-arm was considerably more narrow than the offence of being in possession merely of fire-arms. The expression "going armed" clearly indicates two things, namely, firstly, of an intention to use it as a fire-arm, and secondly, the possibility of using it. In this case there was only one empty cartridge in the weapon and no cartridges at all have been found on the person of the accused. This alone would show that, in the circumstances under which he was found to be in possession of the fire-arm, it would not be possible for him to use the weapon as a fire-arm. Further, in my judgment, for the purpose of conviction under cl. (e) of that section, there must be some clear evidence of intention on the part of the accused to use the weapon. That element is absolutely lacking in the present case. If there had been some evidence of his having at least previously used it, there would have been proof of an intention at the time when the accused was charged with having committed the offence. But in the absence of any evidence whatever bearing on the intention of the accused to use it as a fire-arm, I think it is clear that the conviction of the accused under that clause was wrong. The conviction and sentence are, therefore, set aside and the fine, if already paid, will be refunded to the accused. The order of confiscation, dated the 29th February 1924, will be set aside and the fire-arm will be restored to its owner if he has still got a license.

V. N. V.
Z. K.

Conviction set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

ACQUITTAL APPEAL No. 88 OF 1924.
August 28, 1924.

Present:—Mr. Kennedy, J. C.
and Mr. Aston, A. J. C.

EMPEROR—APPELLANT
versus
SUNDERDAS AND ANOTHER—ACCUSED.

Accomplice, evidence of—Penal Code (Act XLV of 1860), s. 216A, applicability of.

The evidence of an approver, who owns himself to be a scoundrel and is also a traitor must be received with caution but not rejected totally. It is enough if after considering such evidence and the general corroborative evidence the Court is of opinion that the whole body of evidence put together proves the guilt of the accused person. [p. 917, col. 2.]

To attract the penalty of section under s. 216A, Penal Code, it is not enough that a person should be harbouring dacoits in general but the section renders it penal to harbour persons who intend to commit a particular dacoity. [p. 918, col. 1.]

Appeal against an order of the Sessions Judge, Sukkur, dated the 27th February 1924.

Mr. *T. G. Elphinston*, Public Prosecutor for Sind, for the Crown.

Mr. *Jhamatmal Valiram*, for Accused No. 1.

Mr. *Hassamal M. Gurbuxani*, for Accused No. 2.

JUDGMENT.—This is an appeal by

Local Government against the order of acquittal passed by the Sessions Judge of Sukkur in the case of two persons Sunderdas and his brother Nandlal who were charged with having committed offences under ss. 118 and 216 A of the Indian Penal Code.

We are very reluctant to interfere with an order of an acquittal and we do not do so unless necessity is clearly made out. In the present case, however, it appears to us that the learned Sessions Judge has approached this case from a wrong angle and the consequence has been that he has come to a decision to which as it would appear from his judgment he certainly would not have come, had he not approached the case in the manner as stated.

A serious dacoity took place in a village called Maruwala about 40 miles from Sukkur where the accused reside. This dacoity was indubitably committed by a band of Punjabi dacoits. It is clear that both the accused were old friends and intimates of this band of dacoits in their native habitat, that the dacoits' band in coming to Sukkur required the aid of the accused, that the dacoits' band sold at the *kothi* of these accused persons considerable quantity of gold and pearls and stones which they had recently acquired by dacoity committed on tour and that at the commission of this Maruwala dacoity the servant-employee of the accused persons took part. Now, this evidence without more seems to make a case of circumstantial evidence so strong that on that alone, it would be possible to find that the accused were all aware of the intention of the dacoits to commit the Maruwala dacoity and I think it is quite likely on their evidence alone, the Court would be justified in finding that the accused were well aware of the intention of the dacoits to commit a dacoity. If that was so, it was their duty under the Cr. P. C. to give information to the Police. They did not do so. If they were in no way connected with the dacoits and this duty lay upon them, yet they both have failed to give that information, it might well have been found on that evidence alone they were guilty of an offence under s. 118. But in the present case the circumstantial evidence is very much strengthend by the evidence of Habib. Habib of course is a person whose evidence must be accepted with care. It is not necessary to go deeply into the law of approvers and of accomplices because common sense at the first glance shows that a person who owns himself to be a scoundrel and in addition to that is also a traitor is a person whose evidence must be received with caution. Nevertheless it is not our opinion that the Statute Law requires the total rejection of accomplice's evidence except in such particulars, as there is such evidence in support of it as to make the evidence of one informer unnecessary but it is enough if after considering the evidence given and the general corroborative evidence the Court is of the opinion that the whole body of evidence put together proves the guilt of the accused person. The learned Sessions Judge appears first to have considered the evidence of the approver as he may be called and then to have sought the corroboration of each individual statement in the circumstantial evidence. Whereas the correct way of dealing with the questions in the present case is to consider the circumstantial evidence first, then see whether the approver's evidence fits in with that. It seems clear to us that the learned Sessions Judge did himself actually believe the approver but thought he was forbidden by some rule of law from acting on his belief. It is this procedure which seems to us to have vitiated the arguments of the learned Sessions Judge in favour of the acquittal of the accused.

Taking the evidence of Habib along with that circumstantial evidence. it appears perfectly certain, as before without that evidence, it would appear highly probable that the accused Sunderdas, at any rate, was well aware of the intention, of these people to commit this dacoity inasmuch as he was present at a meeting held to settle precisely what dacoity should be committed. That being so, it seems to us clear as regards Sunderdas he should have been convicted of an offence under s. 118.

And as regards the younger brother Nandlal, in the first place the question of his knowledge about the intention of the dacoits is not so clear and in the next place it can hardly be expected that the younger brother would interfere in the arrangement of his elder brother and it is on the elder brother as the manager of the house that the burden in the first place lay to give information of the intended plan of the crime known both to the

brothers. We are of opinion, on the whole, therefore, that the case under s. 118 is not made out against Nandlal. We do not say that a younger brother is excused from his duty, but it is certain that it may well be that a younger brother may be in perfect innocence less vigilant than the brother on whom the primary responsibility rests.

As regards the charge under s. 216A, the drafting of the section is such that it appears to us in the present case the offence under section is not made out in the case of either of the accused. The section requires that no one should harbour any persons who are about to commit a dacoity with the intention of facilitating the commission of such dacoity. It would appear, therefore, it is not enough to attract the penalty of the section that a person should be harbouring dacoits in general but the section renders it penal to harbour persons who intend to commit a particular dacoity. I at least interpret the section in this way. Now, in the present case although it is quite likely there may have been a general talk as to the commission of some dacoity while these people were staying in the house of the accused yet it appears that the dacoits never returned to this house after the final meeting at which the commission of this particular dacoity was settled. This meeting was held in the bed of a river and the dacoits along with Doulat went off at once to commit it. If that be the case, it would appear that strictly speaking no offence under s. 216A is committed.

The result of all this is, that we think that the appeal should be admitted as regards Sunderdas in respect of the charge under s. 118 and should be dismissed against Nandlal altogether.

We have considered what punishment should be inflicted on Sunderdas. The offence was actually committed so that the case falls under first part of s. 118. We are by no means inclined to encourage persons who have abetted serious dacoities even though while sharing in the profits with the dacoits they may not share with them the dangers. On the other hand, the accused was under detention for over ten months as appears from the judgment of the learned Sessions Judge. We think, therefore, that a sentence of three years rigorous imprisonment would be sufficient.

We set aside the order of acquittal in respect of Sunderdas and direct that he should undergo rigorous imprisonment for three years under s. 118, Indian Penal Code.

S. D. *Order set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 127-B OF 1924.

January 23, 1925.

Present:—Mr. Baker, J. C.

FAKIRA SAMBHAJI—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Forest Act (VII of 1878), s. 25 (d)—Berar Grazing Rules- Grazing license—Cattle belonging to licensee trespassing into reserve forest— Licensee, whether criminally liable—Master and servant—Master, criminal liability of, for acts of servant.

A master is not criminally responsible for the acts of his servant unless he expressly commands or personally co-operates in them or such responsibility is expressly imposed on him by Statute or contract. [p. 920, col. 1.]

There is nothing in the Grazing Rules for Berar framed under the Forest Act, that imposes criminal liability on a licensee for grazing for the acts of his servant. [p. 919, col. 2.]

A person who has obtained a grazing license under the Forest Act cannot be convicted of an offence under s. 25 (*d*) of the Act in the absence of evidence that he pastured the cattle in the reserve forest himself or permitted them by some overt act or negligent omission to trespass in the reserve forest. [p. 919, col. 1.]

Criminal revision against an order of the District Magistrate, Yeotmal, dated the 26th June 1924, in Criminal Case No. 1846 of 1924.

Mr. *A. C. Roy*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—This application raises an important point of law. The applicant in this case has been convicted under s. 25 (*d*) of the Indian Forest Act of 1878, of allowing his cattle to trespass in a reserved forest and sentenced to pay a fine of Rs. 150 by the Second Class Magistrate, Kelapur. The conviction and sentence were upheld on appeal by the District Magistrate, Yeotmal.

The applicant applies in revision.

It is not disputed that the cattle were found grazing in the reserved forest, but the defence was that they were frightened by a bear and ran away from the grazier who was in charge of them. This story has been disbelieved by the Courts below and the finding of the First Court is that the cattle strayed into the reserved forest

through the negligence of the accused's grazier, for which he is criminally responsible.

It is admitted that the accused was not personally present, the cattle being sent out to graze in charge of the grazier. The accused holds a license for grazing cattle in the forest in the form given at page 300 of the Central Provinces Forest Manual. 4th edition. I had adjourned the hearing of the case in order that the license might be produced.

The applicant relies on the case of *Saiyyad Rahim* v. *Emperor* (1), in which it was held that "a master is not criminally responsible for the acts of his servant unless, (1) he expressly commands or personally co-operates in them; and (2) such responsibility is expressly imposed on him by Statute, or contract. The owner of cattle found grazing in a Government Forest Reserve cannot be convicted under s. 25 (*d*), Indian Forest Act (VII of 1878) in the absence of evidence that he pastured the cattle, or permitted them by some overt act or negligent omission to trespass in the reserve."

The learned District Magistrate in showing cause has distinguished the case, quoted above, on the ground that in it the cattle were in charge of an adult herdsman, whereas in the present case "the cattle were not found in the custody of anybody. Secondly, in *Saiyyad Rahim* v. *Emperor* (1) the owner had not obtained a grazing license or in the words of Sir Henry Stanyon 'had not bound himself by any contractual obligation to use or abstain from using the reserved forests in a particular way'. In this case the applicant had taken out a grazing license, and even admitting that the act of trespass is by the grazier the master is liable." The District Magistrate relies on the observations in *Saiyyad Rahim* v. *Emperor* (1) at page 81*, where Sir Henry Stanyon said: "I am perfectly clear that a licensee under the Indian Forest Act would be liable *criminaliter* for every act of his agent, done in carrying on the business delegated to him which amounts to a breach of the conditions of the license made criminally punishable by the Act or any rule thereunder."

It is contended on behalf of the applicant that the word "licensee" in this passage means a forest contractor or something of the kind. At page 82* of the judgment it is stated that "The words of s. 25 (*d*) of the Indian Forest Act clearly apply only to the person who does any of the acts mentioned therein. Supposing the language to be ambiguous, it must be construed in the manner most favourable to the liberties of subjects: *Reg.* v. *Bhista Bin Madanna* (2)." I am led to think that the expression "license" used at page 81 of this judgment refers to other than the grazing license, for the cases referred to at page 80 are all cases of licenses to sell arms, liquor drugs and the like, and in view of the clear statement referred to above that s. 25 (*d*) of the Indian Forest Act refers only to the person who does any of the acts mentioned therein, I do not think the learned Judge intended to include a person holding a license for grazing in his remarks at page 81 referring to a licensee under the Indian Forest Act. At page 82* of this judgment it is stated "that if the Legislature had intended to fasten upon owners such responsibility as has been laid upon the applicant in this case—forming as it does an exception to the general rule of law that a person's criminal responsibility is confined to his own acts—it would not have left its intention to be gathered by mere doubtful inference, or have conveyed it in 'cloudy and dark words' only, but would have made it manifest with reasonable clearness. The liability is expressly declared in the rules under which grazing licenses are issued by the Forest Department, and the tendency is to make clear by express words or necessary implication the exceptional cases where a principal is criminal responsible for offences committed by his agent without his knowledge and connivance."

I have been unable to find anything in the grazing rules for Berar, given in Appendix XV of the Central Provinces Forest Manual which impose any liability such as is referred to in this judgment, that is to say the liability imposed for the acts of his servants, nor has the learned Counsel for the Crown been able to point to any such rule.

The form of pass, which is Appendix C to Appendix XV, at page 300 of the Forest Manual, contains only the following conditions: "(1) All cattle taken into or allowed to stay in the forest shall be accompanied

(1) 29 Ind. Cas. 325; 11 N. L. R. 76; 16 Cr. L. J. 485.

(2) 1 B. 308 at p. 311; 1 Ind. Jur. 245; 1 Ind. Dec. (N. S.) 205.

*Pages of 11 N. L. R.—[*Ed.*]

by a herdsman in charge of them. (2) The herdsman will take this license with him whenever he takes the cattle into the forests and will then produce it on the demand of any forest official." There is no clause that the owner is liable when his herdsman grazes cattle in a Government Reserved Forest. In the circumstances, I am of opinion that this license does not impose any liability on the owner for the acts of his herdsman unless it is proved that he expressly commanded or personally co-operated in them.

I am of opinion, therefore, that the accused is not criminally responsible for the acts of his servant. It has been found by the First Court that there was a criminal negligence on the part of the grazier, and there is evidence that the cattle were sent out in charge of a grazier, nor is it likely that any man would send his cattle out to graze in the forest alone. In these circumstances I am of opinion that the case is governed by the general rule that the master is not criminally responsible for the acts of his servant and that no responsibility is expressly imposed by the Statute itself or the license on the owner of the cattle.

I, therefore, set aside the conviction and sentence and direct that the fine if paid be returned to the applicant.

Z. K. *Conviction set aside.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 522 OF 1924.

January 16, 1925.

Present:—Mr. Justice Newbould and Mr. Justice B. B. Ghose.

MESER BEPARI AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 342, 364—Examination of accused—Statement made by Pleader, whether compliance with section—Omission to comply with provisions of s. 364, effect of.

One of the essential points for which s. 342 of the Cr. P. C. provides is that the accused himself should have an opportunity of making his statement directly to the Court and not through the intervention of a Pleader. A statement made by the Pleader on behalf of an accused person does not constitute compliance with the provisions of that section. [p. 920, col. 2.]

The provisions of s. 364 of the Cr. P. C., are mandatory and an omission to comply with those provisions vitiates a trial. [p. 921, col. 1.]

Mr. *B. M. Sen* and Babu *Monmotha Nath Ray*, for the Appellants.

Mr. *Khundkar*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—In this appeal the learned Counsel appearing for the appellants has succeeded on preliminary point and it is not necessary to deal with the facts. It is contended that the trial was vitiated owing to the failure of the learned Sessions Judge to comply with the provisions of s. 342 and s. 364, Cr. P. C. As regards non-compliance with s. 342 the affidavit filed on behalf of the appellants is in a form which this Court has more than once taken serious objection. The statement in the affidavit is as follows:—"That during the trial before the Court of Session at the close of the prosecution case and before the accused were called on to enter upon their defence the accused were not examined under s. 342, Cr. P. C." This statement leaves in doubt whether the accused were examined at all or whether they were examined but not at the right stage of the trial, or whether they were examined at the right stage of the trial, and it is contended that that examination was not in compliance with the provisions of s. 342, Cr. P. C. In argument we are told that what happened was that at the close of the prosecution case the accused's Pleader and not the accused themselves were asked if they wished to make any statement and the accused's Pleader stated that they would not do so. If that is what happened it was certainly not compliance with s. 342, since one of the essential points for which that section provides is that the accused themselves should have an opportunity of making their statements directly to the Court and not through the intervention of a Pleader. On behalf of the Crown it is stated that information has been received that the accused themselves were questioned. Had the appeal depended solely on this point we should have thought it our duty to enable the Crown to give evidence in the form of an affidavit on this point and should have adjourned the appeal for this purpose. But it appears that the objection as to the procedure under s. 364, Cr. P. C., is sound. All that appears on the record as regards the examination of the accused is contained in the order sheet, the relevant portion being as follows:—"Trial resumed to-day. The statements of the accused recorded in the Committing Magistrate's Court are put in by the Public

Prosecutor. The accused do not make any further statement in this Court and decline to examine any witness". No record of the accuseds' examination was recorded and the provisions of s. 364, Cr. P. C., on this point are mandatory, and in two recent unreported cases it has been held that similar omission to comply with the provisions of this section vitiated the trial. These unreported cases are Criminal Reference under s. 307, Cr. P. C., *Emperor* v. *Nani Mandal* (1) and Criminal Appeal No. 348 of 1924 decided on the 3rd November 1924. Following these decisions we must hold that the trial of the appellants was not in accordance with law.

We accordingly allow this appeal. We set aside the convictions and the sentence passed on the appellants and direct that the case be re-heard according to law.

Z. K. *Conviction and sentence set aside: Re-trial ordered.*

(1) 86 Ind. Cas. 345; 41 C. L. J. 50; (1925) A. I. R. (C.) 575; 26 Cr. L. J. 761.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 119-B OF 1924.

November 4, 1924.

Present:—Mr. Kinkhede, A. J. C.

BHAU—COMPLAINANT—APPLICANT

versus

SYED CHAND AND ANOTHER—ACCUSED —NON-APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 250—Compensation, order directing payment of, when to be made—Vexatious charge—Falsity of charge, whether must be established.

In order to justify an order for payment of compensation to the accused person under s. 250 of the Cr. P. C. there must be a finding that the charge against the accused is false, besides being frivolous or vexatious. A vexatious charge may be partly true and the idea conveyed by the word is that the object of the person making the accusation should be primarily to harass the accused person. [p. 922, cols. 1 & 2.]

Case-law referred to.

Criminal revision against an order of the District Magistrate, Buldana, in Criminal Appeal No. 7 of 1924, dated the 20th March 1924.

Mr. *N. G. Sarkar*, R. B., for the Applicant.

Mr. *Atmaram Bhagwant*, for the Non-Applicants.

ORDER.—This petition is made for revision of an order under s. 250, Cr. P. C., directing the payment of Rs. 30 as compensation to the two accused.

The facts as found by the District Magistrate are that the complainant is a leader of the Hindu section of the community and the accused of the Muhammadan community of Sindkhed. That the first incident which took place between the complainant and Syed Chand on 13th March 1923, was some altercation between the two rival leaders. The District Magistrate finds that there is nothing improbable in the story told by the prosecution witnesses, so far as the incident which occurred at the Parappa's shop in the morning on 13th March 1923.

As regards the second incident which took place in the *galli*, shortly afterwards, the District Magistrate thought it to be of a more doubtful character and "the prosecution version" * * * * * did not appear to him to "read convincingly".

He further observes:—"The evidence also reads as if it was manufactured". His conclusions are thus expressed:—

"The conclusion which I have come to after studying the evidence is that though the assault may have occurred as stated it cannot be held to be proved that it did occur and that all the probabilities are that the only scene that did occur occurred at the Parappa's shop and that this is the nucleus on which the exaggerated complaint has been lodged. The prosecution, therefore, has failed to prove the case."

As to the merits of the defence he remarks:—

"I am not quite convinced how far this *alibi* has been established. * * * * If the *alibi* be held to be established I agree with the lower Court that it is most improbable that the accused Syed Chand could possibly have been in Sindkhed on the morning of the next day. The lower Court has held this *alibi* to be proved and though I have still some doubt in the matter, I am not prepared to hold that it has been disproved".

These findings and observations were quite sufficient for dismissing the complaint and acquitting the accused. I do not find fault with it.

It is, however, complained before me that the District Magistrate has gone wrong

in confirming the order of the Trying Magistrate under s. 250, Cr. P. C.

The District Magistrate has rightly pointed out that the "the judgment of the Magistrate offends against every accepted principle on what a judgment should be based. * * * in any case a judgment ought not to consist of inferences, but of a statement of the proved facts and the findings of the Court on what those proved facts constitute."

The District Magistrate has not, in my opinion, given sufficient attention to the provisions of s. 250, Cr. P. C., as amended by the Amendment Act of 1923; otherwise he would have come to definite findings on the points which are required to be established as a basis for an order for compensation under that section. His finding is thus expressed:—

"Taking all the facts of the case into consideration I have come to the conclusion that the incident so far as the Bhoy *galli* affair is concerned did not occur and that complaint in any case was a purely vexatious one lodged in order to further the enmity which has for long admittedly existed between the two parties, and in these circumstances I am not prepared to modify the order passed by the lower Court".

It is contended before me on behalf of the applicant and I think rightly, that these findings were not sufficient to dispose of the question raised in appeal regarding compensation. The District Magistrate's order so far as it holds that *the complaint in any case was a purely vexatious one* ignores the further element that the complaint must be found to be 'false'. Under the old law if the charge was frivolous or vexatious, this was sufficient to entitle the accused to compensation and if over and above, the charge was false as well, the accused was equally entitled to compensation.

Beni Madhub Kurmi v. Kumud Kumar Biswas (1), *Adikkan* v. *Alagan* (2), *In re Gopala Bhau Changula* (3), *Emperor v. Bindesri Prasad* (4). Under the present law the charge must be false, besides being frivolous or vexatious.

The Select Committee's report contains the following important remark:—

"We do not think that the procedure of s. 250 should be used in every false case unless the case is *also* either frivolous or vexatious." The words 'purely vexatious' used by the District Magistrate clearly show that in his opinion the complaint indicates an accusation merely for the purpose of annoyance.

A vexatious charge may be partly true and the idea conveyed by the word is that the object of the person making the accusation should be primarily to harass the persons accused: per Drake-Brockman, J.C., in *Bakaji v. Mukundsingh* (5) decided on 28th November 1919.

The wording of old section 250 was:—

"* * * and is satisfied that the accusation * * * was frivolous or vexatious the Magistrate may * * direct the person * * * to pay * * such compensation etc."

The newly amended section runs as under:—

"And is of opinion that the accusation * * * was *false and either frivolous or vexatious* the Magistrate may * * call upon him forthwith to show cause why he should not pay compensation."

This clearly lays down two elements: one of falsity and the other of either frivoluosness or vexatiousness, as being essentially necessary to base an order for compensation.

The District Magistrate has thought fit to find only one element to be existing in the case, but he has not affirmatively found as a fact that the other element also is present namely that the accusation was false besides being vexatious.

For these reasons I think the order sought to be revised is bad in law and must be set aside. I accordingly allow the petition and set it aside and direct that the compensation if any realized must be refunded to the complainant.

I think in view of this illegality I should not hesitate to interfere although the revision petition was lodged rather very late. The delay has been sufficiently explained.

Z. K. *Application allowed.*

(1) 30 C. 123; 6 C. W. N. 799.
(2) 21 M. 237; 2 Weir 312; 7 Ind. Dec. (N. S.) 523.
(3) 18 Ind. Cas. 411; 37 B. 376; 15 Bom. L. R. 49; 14 Cr. L. J. 75.
(4) 26 A. 512; 1 A. L. J. 234; A. W. N. (1901) 116; 1 Cr. L. J. 433.
(5) 55 Ind. Cas. 8; 3 N. L. J. 106; 21 Cr. L. J. 226.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 229 OF 1925.

April 17, 1925.

Present:—Mr. Justice Broadway.

SHUGAN CHAND AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 537, 540—Criminal trial—Additional evidence called by Court after close of defence case—Opportunity of rebuttal, absence of—Procedure.

After the close of the defence evidence in a criminal case the Magistrate called the Sub-Inspector of Police as a Court witness as he considered him a material witness to help him in the elucidation of the case. After recording the evidence of this witness in the absence of the Counsel of the accused, who were not asked as to whether they wished to rebut this additional evidence, the Magistrate proceeded to deliver judgment on the same day without hearing any further arguments:

Held, that the omission of the Magistrate to give an opportunity to the accused to call evidence in rebuttal of the additional evidence and to hear arguments thereon, was an illegality which was not curable under s. 537 of the Cr. P. C., and which vitiated the trial.

Case reported by the Sessions Judge, Ambala, with his No. 184 of 31st January 1925.

FACTS.—Appeal rejected by the District Magistrate, Simla, on 25th November 1924.

Sant Lal brought a complaint under s. 448, Indian Penal Code, for house trespass against Shugan Chand and Suraj Bhan. It was alleged that Shugan Chand accused was employed by Sant Lal complainant in shops Nos. 23 and 24 in Sabathu up till *Daserah* 1923. That Sant Lal then got rid of Shugan Chand, took over the goods in part payment of a debt and sold the goods to one Chattar Bhuj who then rented shop No. 23 from about the end of October 1923. That shop No. 24 was locked up till early April 1924 and that on 4th April 1924 while repairs and white washing were being carried out Shugan Chand, Suraj Bhan and one Kishori Lal (originally an accused but afterwards struck out of the case) entered the shop forcibly and took possession thereof.

GROUNDS.—After the close of the defence evidence arguments were heard on 27th September 1924 by the Honorary Magistrate, Second Class, Simla, (Major Wallis). But on the 16th October 1924, he called the Sub-Inspector of Police as a Court witness as he considered him a material witness to help in the elucidation of this case. His evidence was recorded on that date in the absence of the Counsel for the accused who were not asked as to whether they wished to rebut this additional evidence. The Magistrate then proceeded to judgment on the same date without hearing any further arguments. In his order convicting the present petitioners the Magistrate has laid great stress on the evidence of this additional witness. The petitioners have been very much prejudiced in the Trial Magistrate's Court by the additional evidence called at the instance of the Court after hearing arguments on a date when their Counsel was absent and which had been tacitly reserved for pronouncing judgment. The omission of the Honorary Magistrate to give an opportunity to the petitioners to call evidence in rebuttal of the additional evidence and to hear arguments thereon is an illegality which is not curable under s. 537, Cr. P. C. [*Allu* v. *Emperor* (1).]

The proceedings are submitted to the High Court with a recommendation that the conviction and sentence be set aside and the case be sent back to enable the defence to produce rebuttal evidence and to address arguments on the whole case. Fines have been paid.

Mr. *Shamair Chand*, for the Petitioners.

Mr. *G. S. Salarya*, for the Government Advocate, for the Respondent.

ORDER.—The procedure adopted by the Trial Magistrate was certainly against law. For the reasons given in the referring order I set aside the conviction and sentence and return the case to the Magistrate concerned who will give the petitioners an opportunity of producing such evidence in rebuttal as they may think necessary.

Z. K. *Case returned; Conviction set aside.*

(1) 75 Ind. Cas. 980; 4 L. 376, (1924) A. I. R. (L.) 104; 6 L. L. J. 103; 25 Cr. L. J. 63.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISIONS NOS. 199-B, 210-B AND 211-B OF 1924.

January 27, 1925.

Present:—Mr. Baker, J. C.

RAMCHANDRA AND OTHERS—APPLICANTS

versus

GANPAT—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 145—Order, whether binding on persons not parties—Remedy—Breach of peace, likelihood of, grounds for.

An order under s. 145 of the Cr. P. C. is not

binding against persons who are not parties to the proceedings under the section and their remedy is not by an application for revision against the order.

A Magistrate has no jurisdiction under s. 145 of the Cr. P. C. to make any enquiry as to possession still less any final order, unless and until he is satisfied of the likelihood of a breach of the peace and it is absolutely essential that the facts and the grounds of his being so satisfied should appear in his first order directing issue of notice and the ground must be such as to satisfy a Court of Revision.

Applications for revision of an order of the Sub-Divisional Magistrate, Yeotmal, dated the 10th November 1924.

Mr. *R. R. Jayavant*, for the Applicants.

Mr. *W. R. Pendharkar*, for the Non-Applicant.

ORDER.—These three applications are closely connected and may be disposed of in one order. They arise out of an application under s. 145, Cr. P. C., made by Ganpat complaining that he had been forcibly dispossessed of his tenancy land by the *Izardar* Ramchandra and that there was danger of a breach of the peace. The Sub-Divisional Magistrate passed an order under s. 145, Cr. P. C, that Ganpat was entitled to possession of the fields in dispute and ordered that his possession should not be disturbed until he was evicted therefrom in due course of law.

The *Izardar* pleaded that he was not in possession of the land which was in possession of his tenants Lachhma and Kanchetti, who are the applicants in the other two revision applications. The Magistrate, however, found that Ganpat had been evicted wrongfully by the *Izardar* and the possession should be restored to him.

The applicants in the other two cases, who claimed to be in possession of the land in dispute, were tenants of the *Izardar* and were examined as witnesses in the case, and they now apply that the proceedings should be set aside and they should be put in possession of the fields in dispute and the standing crops. Their allegation was, and that is also the allegation of the *Izardar*, that Ganpat who had been in possession of the fields in dispute for a number of years had exchanged them for the fields formerly held by Lachhma and Kanchetti, who are now in possession of the fields in dispute.

After taking evidence the Magistrate altogether disbelieved the story of the alleged exchange. He further found that there had been a wrongful dispossession of the non-applicant Ganpat. I do not propose in revision to interfere with the finding of fact as to poseession. But it is contended that no order should be passed against the *Izardar* because he was not in possession. The finding of the Magistrate is that Ganpat was dispossessed by the *Izardar*.

So far as the other two applicants Lachhma and Kanchetti are concerned, they were not parties to the proceedings in the lower Court and are not bound by the order, which is not against them. Their applications must be dismissed. It is open to them, if they are dispossessed, to take such steps as they are advised.

It is contended that there is no evidence that there is any likelihood of a breach of the peace, which is necessary in order to give a Magistrate jurisdiction: *cf. Tularam Sao* v. *Bheoram* (1), in which it is held that a Magistrate has no jurisdiction to make any enquiry as to possession still less any final order, unless and until he is satisfied of the likelihood of a breach of the peace, and that it is absolutely essential that the fact and the grounds of his being so satisfied should appear in his first order directing the issue of notice, and the grounds must be such as to satisfy a Court of Revision. The Police report has been held not to be such a ground.

In the present case there is evidence that both parties are attempting to cultivate the land, the sowings of one party having been ploughed up by the other. This is likely to cause a breach of the peace and though the learned Magistrate has not made this clear in his order I do not think I ought to interfere in the circumstances of the present case.

All three applications will, therefore, be dismissed.

G. R. D. *Applications dismissed.*

(1) 12 C. P. L. R. Cr. 2.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 423 OF 1924.
(CRIMINAL REVISION PETITION No. 351 OF 1924).

December 11, 1924.

Present:—Mr. Justice Srinivasa Iyengar.

In re THIRUPPAL KADALNATHA PILLAI—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 423—

Madras Local Boards Act (XIV of 1920), ss. 159 (1), 163 (1)—Conviction under s. 159—Appeal—Conviction, whether can be changed to one under s. 163.

Petitioner was convicted of an offence under s. 159 (1) of the Madras Local Boards Act. On appeal the Appellate Court found that the section under which the accused had been convicted had no application but it went on to convict the accused under s. 163 (1) of the Act. On revision:

Held, that the petitioner not having been charged with or tried for or convicted of an offence under s. 163 (1) of the Madras Local Boards Act, the Appellate Court had no jurisdiction to change the conviction to one under that section.

Petition, under ss. 435 and 439, Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Joint First Class Magistrate, Shermadevi, in Criminal Appeal No. 3 of 1924, preferred against the judgment of the Court of the Stationary Sub-Magistrate, Nanguneri, in Calendar Case No. 254 of 1923.

Mr. *K. V. Sesha Iyengar*, for the Petitioner.

Mr. *J. C. Adam*, Public Prosecutor, for the Crown.

ORDER.—The order of the Appellate Magistrate is clearly wrong. After having found that s. 159 (1) had no application, he went on to convict the accused under s. 163 (1). No charge was framed under this latter section. The accused was not tried for that offence, or convicted by the lower Court for any such offence. I cannot possibly see what right the Appellate Magistrate had to confirm the conviction, on the ground that the offence under a different section, not charged against the accused was made out. Further, there is absolutely no evidence that an offence even under the section, he referred to, had really been committed by the accused, because there is no reliable evidence that what was done by the accused caused any obstruction on the road. In these circumstances, the conviction of the accused is clearly wrong. The Public Prosecutor has also fairly intimated to me that he cannot possibly support the conviction. In these circumstances, the conviction is set aside and the fine, if levied, will be refunded to the accused.

V. N. V. *Conviction set aside;*
Z. K. *Accused acquitted.*

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 478 AND 485 OF 1924.

January 15, 1925.

Present:—Justice Sir Babington Newbould, Kt., and Mr. Justice B. B. Ghose.

IN CRIMINAL APPEAL No. 478 OF 1924

LEDU MOLLA AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

IN CRIMINAL APPEAL No. 485 OF 1924

ASMATALI MIRDHA AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 400—Habitually associating for the purpose of committing dacoity—Previous conviction or order directing security to be of good behaviour, whether admissible.

In a trial in respect of an offence under s. 400 of the Penal Code, evidence of the commission of an offence by the accused or that the accused were bound down under s. 110 of the Cr. P. C. is admissible for the purpose of proving habit as well as association. [p. 925, col. 2]

Case-law reviewed.

Babus *Suresh Chandra Talukdar* and *Mahendra Kumar Ghose*, for the Appellants in No. 485 of 1924.

Mr. *Khundkar* and Babu *Lalit Mohan Sanyal*, for the Crown in both Appeals.

JUDGMENT.—The 18 appellants before us in these two appeals have been convicted of an offence punishable under s. 400, Indian Penal Code, namely, of belonging to a gang of dacoits. One of the appellants Ledu Molla was convicted on his plea of guilty. The other 17 have been convicted on a unanimous verdict of guilty by the Jury. In this case 171 witnesses were examined for the prosecution, 35 witnessess were examined for the defence and one witness was examined by the Court. There were also 69 documents exhibited on behalf of the prosecution. As there is no appeal on the facts it is unnecessary for us to discuss this evidence. The learned Sessions Judge has dealt with it carefully and at sufficient length in his charge to the Jury.

On behalf of the appellants the points taken are that there has been misdirection and also wrongful admission of evidence on certain points. The first point raised is that in a trial for an offence punishable under s. 400, Indian Penal Code the evidence of commission of an offence or that the accused were bound down under s. 110, Cr. P. C. is not admissible. Some support to

this contention is to be found in the case of *Kasam Ali* v. *Emperor* (1) following an earlier decision of this Court in *Mankura Pasi* v. *Queen-Empress* (2). But these cases have been decided on the point that evidence of previous conviction could not be used for the purpose of proving character. In the latter of these cases, a doubt was expressed whether they might not be used for proving association, and further, the attention of the learned Judges who decided the last of these two cases was not drawn to other cases of this Court in which it was distinctly held that such evidence was admissible. The cases in which a contrary view was taken are *Bhona* v. *Emperor* (3) and *Kader Sunder* v. *Emperor* (4) and in both these cases it was held that such convictions can be proved for the purpose of proving habit as well as association. In the case *Bhona* v. *Emperor* (3) several unreported cases are cited in support of the view that was taken, and in the present case our attention has been drawn to a more recent unreported case *Emperor* v. *Arajulla Pramanik*, decided by Walmsley and Pearson, JJ. on the 17th November 1921. We are in entire agreement with the authorities which hold that such evidence is admissible for this purpose and overrule this objection.

The next point taken is that the Jury were not properly charged as regards certain circumstances under which the approver who gave evidence in this case first conferred. It is not alleged that the facts proved as to these circumstances have not been correctly stated to the Jury. What is urged is that the learned Judge should have told the Jury that these circumstances made the approver's evidence unworthy of credit. It would appear, however, that the learned Judge himself was of opinion that the approver was a witness of truth and he could not therefore have told the Jury that in his opinion the approver should be disbelieved on account of these circumstances. In this connection it is said that the Jury were misdirected as to the failure of the prosecution to call as witness the C. I. D. Inspector, Akhoy Kumar Gupta who had interviews with the approver on two occasions. We agree with the learned Sessions Judge that it is very doubtful as to the point on which this witness could give evidence of any value and that the settlement made by the approver to this witness could not have been proved by the prosecution. The learned Judge told the Jury that they might draw an inference adverse to the prosecution if they held that this Inspector was an important witness and had been deliberately withheld, and that under the circumstances was quite sufficient.

As regards the general direction as to the evidence of the approver the learned Sessions Judge gave the ordinary direction in a manner to which no objection can be taken. It is said that he was wrong in telling them that if the approver was corroborated on some points they might believe him on other points in respect of which he was not corroborated. The Jury were told, however, that the condition of believing him on these uncorroborated points, was if they thought it reasonable. It is not necessary that the approver should be corroborated as regards every single statement that he makes and as we read the charge in this respect we hold that the Jury were rightly directed.

Objection has been taken to the evidence as to the verification of his confession by the approver. It is said firstly that the learned Sessions Judge attached too much weight to this evidence and was too dogmatic in telling the Jury his own opinion as to its value. The passage to which objection has been taken is in the following terms:—"I would suggest to you that it would be possible for Asmat Ali to be tutored to this extent by the Inspector in the course of two interviews in the Jail; but it appears to me that the results of the verification of the confession of Asmat Ali prove without doubt that Asmat Ali Sheikh did himself take part in the dacoities which he describes." That passage by itself might be objectionable. But reading the charge as a whole we find over and over again that the Judge impressed on the Jury that they were to form their own opinion on questions of fact, and in this particular passage he told the Jury that the matter was one for them to decide.

It is further urged that the procedure adopted in verifying the confession had been condemned in this Court. Our attention has been drawn to certain decisions,

(1) 55 Ind. Cas. 994; 47 C. 154; 31 C. L. J. 192; 21 Cr. L. J. 386.
(2) 27 C. 139; 4 C. W. N. 97; 14 Ind. Dec. (N. S.) 92.
(3) 9 Ind. Cas. 555; 38 C. 408; 15 C. W. N. 461. 12 Cr. L. J. 97.
(4) 13 Ind. Cas. 279; 16 C. W. N. 69; 13 Cr. L. J. 39.

but those decisions do not lay down as a general rule that in no case can the statement of a confessing accused be verified by enquiry on the spot. They are rather condemnatory of the procedure which was in fact followed in those individual cases. They cannot be held to support the contention that the identification proceedings in the present case were of no value as corroboration of the accomplice evidence.

Some other points were urged, but on our expressing the opinion that they are untenable they were not pressed by the learned Vakil for the appellants.

The sentences passed on several of the accused are severe, but the learned Sessions Judge has given good reasons for severity of these sentences.

The appeals are dismissed.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 121 OF 1925.

March 24, 1925.

Present:—Mr. Justice Stuart.

AMIR—APPLICANT

versus

EMPEROR—RESPONDENT.

Arms Act (XI of 1878), ss. 14, 19 (f)—Empty cartridge cases, whether ammunition—Possession—Offence.

The possession of empty cartridge cases which are incapable of being re-loaded in India does not amount to an offence under s. 19 (*f*) of the Arms Act.

Criminal revision from an order of the Sessions Judge, Cawnpur, dated the 22nd October 1924.

REFERENCE.—Accused is charged with the possession of two 405 rifle cartridge cases in contravention of the provisions of s. 14 of the Arms Act. On 15th August 1924, Sub-Inspector Wajid Ali with one Constable was searching accused's house for stolen property in some cycle thefts. After the Police party had been searched by accused, the Sub-Inspector found a locked box in a *kothri*. Accused supplied the key of the box and on its being opened the cartridge cases were found inside it.

There are two witnesses of the search. Abdul Baqi states that all the party were searched in front of accused, but, that he himself did not search the others' trouser pockets. Accused, however, searched all the party thoroughly, even their trousers. Witness saw the cartridge cases taken from a box of which accused supplied the key. Budgu Lal saw the cartridge cases recovered from the box. He and Baqi felt the pockets of the Sub-Inspector and the Head Constable and felt them from head to foot. Accused was present.

Accused states that he was not allowed to search the Sub-Inspector and his party. The room in which the cartridge cases were found was that of his son, Nazir. Accused cannot say if the cartridge cases are his—he has neither a gun nor a license. He insinuates that the Police planted the cartridge cases in his box—this is absurd, for they were not even searching for cartridge cases but for stolen bicycles. Accused owns the whole house.

He produces two witnesses.

His son Nazir states that he occupies the second story of accused's house and that the room where the cases were found is his. The key of the box was taken from witness's wife. No one's person was searched according to the witness.

2. Narain, a neighbour, says that the second story is Nazir's. Witness did not enter accused's house during the search, so cannot say what was done or not done inside. As he last went into the house six months ago, he cannot know whether Nazir occupies the second story now.

There is no doubt whatever that the cartridge cases were found in the box and were not brought by the Police. It is also clear that as accused produced the key of the box, he is the owner of the box and its contents. Were Nazir the owner, it is strange that he, who was present, did not possess the key. I find that the accused was in possession of two empty 405 rifle cartridge cases. The interpretation clause of the Arms Act of 1878 defines as ammunition "all parts of ammunition" therefore the accused was in possession of ammunition in contravention of the provisions of s. 14, Arms Act. I find accused guilty of an offence under s. 19 (*f*) of the Arms Act, but as the offence is not a serious one I fine him Rs. 50 only or in default one month's rigorous imprisonment.

Mr. *Saila Nath Mukerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—I am of opinion that there is considerable force in Mr. Saila Nath Mukerji's argument that no offence

has been committed because the empty cartridge cases in question are incapable of being re-loaded in India. In any circumstances I regret the zeal which has caused the prosecution of this particular applicant. While the Police were searching his house for stolen property (which was not present), they discovered in a locked box two empty brass 405 used cartridge cases. It seems almost impossible to suggest that the man could have retained these cartridge cases for an improper purpose and he probably was retaining them owing to the incurable reluctance common to so many of his countrymen which prevents the throwing away anything, however useless it may be. He may have kept them as curious or possibly he thought that some day he might add them to a collection of rubbish and obtain something of the nature of one pice for their value as brass. In any circumstances it is difficult to understand why any Police Officer or Magistrate should have looked askance at his action.

I set aside the conviction and sentence and direct the fine to be refunded.

Z. K.

Conviction set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 257 OF 1924.

January 22, 1925.

Present:—Mr. Baker, J. C.

ASHGAR ALI—ACCUSED—APPELLANT

versus

AKBAR ALI—COMPLAINANT—NON-APPLICANT:

Criminal Procedure Code (Act V of 1898), s. 259—Dismissal of complaint—Fresh complaint, whether entertainable.

A complaint dismissed under s. 259, Cr. P. C., can be revived on a fresh complaint as the dismissal does not amount to an acquittal. The fresh complaint need not be filed before the same Magistrate who dismissed the previous complaint but may be entertained by any other Magistrate having jurisdiction to entertain it.

Application for revision against an order of the Magistrate, First Class, Nagpur, dated the 25th August 1924.

Mr. *W. G. Joshi*, for the Applicant.

Mr. *S. R. Mangrulkar*, for the Complainant.

ORDER.—The facts of this case are that the non-applicant made a complaint against the applicant of cheating under s. 420, Indian Penal Code, in the Court of Mr. Vyas, First Class Magistrate. There were several hearings and then the case was dismissed for the absence of the complainant under s. 259, Cr. P. C. Subsequently a fresh complaint was made by the complainant in the Court of Rao Bahadur Deshpande on the same facts. The accused contended that the complaint would not lie, but this contention was overruled by the Magistrate and the case was ordered to proceed. The applicant files an application for revision of this order on two grounds: first, that if the complaint had been dismissed by Mr. Vyas it could only be entertained by him and not by another Magistrate, and, secondly, on the ground that the facts of the case show that it is of a civil nature.

As far as the first point is concerned, the applicant relies on *Queen-Empress* v. *Adam Khan* (1) which, however, is a case of dismissal on the merits. It is settled law that a complaint dismissed under s. 259, Cr. P. C., can be revived on a fresh complaint as it is not an acquittal: *cf. Chinnathambi Mudali* v. *Salla Gurusamy Chetty* (2), *Emperor* v. *Chinna Kaliappa Gounden* (3) and *Dwarka Nath Mondul* v. *Beni Madhab Banerjee* (4), and it is admitted that, if the complaint had been made to Mr. Vyas no objection could have been taken to it. It appears, however, that Rao Bahadur Deshpande is the Magistrate who entertains cases arising in the City of Nagpur and that the case was originally taken up by Mr. Vyas only owing to Mr. Despande's absence on leave. I do not, therefore, think that Mr. Deshpande should be regarded as incompetent to take up the complaint.

With regard to the question of the complaint being of an offence which is of a civil nature, that is a question of merits into which I cannot go at the present stage.

The application is dismissed.

Z. K. *Application dismissed.*

(1) 22 A. 106; A. W. N. (1899) 211; 9 Ind. Dec. (N. S.) 1100.

(2) 28 M. 310; 2 Weir 325A; 2 Cr. L. J. 758.

(3) 29 M. 126; 16 M. L. J. 79; 1 M. L. T. 31; 3 Cr. L. J. 274.

(4) 28 C. 652; 5 C. W. N. 457 (F. B.).

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 330 OF 1922.

December 5, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

MOHANLAL MOTILAL SHAH—
PLAINTIFF—APPELLANT

versus

HARILAL BHOGILAL SHAH—
DEFENDANT—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909)—Insolvency—Transaction between insolvent and creditor, validity of—Fraud—Transaction, whether can be enforced against third party.

A transaction between an insolvent and one of his creditors conducted behind the back of the Official Assignee and without informing the Court is null and void. Any such transaction is wholly repugnant to the scheme of the Presidency Towns Insolvency Act, inasmuch as the whole of the insolvent's estate vests in the Official Assignee, his affairs have to be investigated by the Official Assignee and by the Court which deals with his discharge, and there is nothing left for the insolvent to do except to perform his duties which are prescribed by the Act by giving information and assistance to the Official Assignee, and to proceed to take the steps necessary to obtain his discharge.

Plaintiff obtained a decree against the first defendant who was subsequently adjudged insolvent. Plaintiff thereupon compromised his claim against the first defendant by accepting a cash payment of a certain amount from the first defendant and taking promissory notes for a portion of the balance. The second defendant was induced to sign the promissory notes without receiving any consideration for them. In a suit to recover the amount of the promissory notes:

Held, (1) that the transaction between the plaintiff and the first defendant was null and void as against the Official Assignee, as being fraudulent;

(2) that as the whole transaction was tainted with fraud the plaintiff could not succeed as against the second defendant either.

First appeal from the decision of the First Class Subordinate Judge, Nadiad, in Suit No. 70 of 1922.

Mr. *G. N. Thakor* (with him Mr. *M. H. Mehta*), for the Appellant.

Mr. *H. V. Divatia*, for Respondents Nos. 1 and 2.

JUDGMENT.—The plaintiff brought this suit to recover Rs. 8,100 on three promissory notes of Rs. 2,700 each, signed by the first and the second defendants, with interest thereon. The promissory notes were signed on October 12, 1921.

The plaintiff had got a decree for Rs. 14,517 in the High Court in Suit No. 2756 of 1919 against defendant No. 1, who was adjudged insolvent by an order of the High Court on October 4, 1921, under the Presidency Towns Insolvency Act, and consequently any dealings thereafter between the plaintiff and the insolvent with regard to his property, his assets or estate would be null and void as against the Official Assignee, and also as against the Court which had the conduct of the insolvency proceedings. According to the evidence it seems that the plaintiff had compromised his claim of Rs. 14,517 by accepting a present payment of Rs. 1,100, taking promissory notes for Rs. 8,100 and relinquishing the rest of his claim.

The whole proceeding was tainted with fraud. The first defendant being insolvent could not make any payment to his creditors, and Rs. 1,100 paid by the insolvent to the plaintiff was money vested at that time in the Official Assignee. The second defendant was induced in some way to be a party to the fraud, and signed the promissory notes without receiving any consideration whatever. It has been contended that unless we find from one of the sections of the Presidency Towns Insolvency Act some authority for the proposition that any transaction between the insolvent and the creditor, conducted behind the back of the Official Assignee and without informing the Court, must be considered as null and void, we cannot set it aside. There is no necessity to refer to any particular section in the Act, because any such transaction would be wholly repugnant to the scheme of the Act, since the whole of the insolvent's estate is vested in the Official Assignee, his affairs have to be investigated by the Official Assignee and the Court which deals with his discharge, and consequently there is nothing left for the insolvent to do except to perform his duties which are prescribed by the Act by giving information and assistance to the Official Assignee, and proceeding to take the steps necessary to obtain his discharge.

The suit was clearly bad against the first defendant because no leave of the Court was obtained, and there was a very good reason for not asking the Court's leave, because if the Court had been aware of all the circumstances from which the claim arose in the plaintiff's suit, it would certainly have declined to give the leave asked for, and would probably have ordered the plaintiff to pay into Court Rs. 1,100 which he had received from the insolvent. The Judge was, therefore, clearly right in dismissing the suit against the first defendant.

With regard to the second defendant the plaintiff cannot separate the transaction and say that it was good as against the second defendant, although it was bad as against the first defendant, as the whole transaction was tainted with fraud. Therefore, the decision of the Court below was right and the appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 1341 TO 1344 OF 1922 AND 2721 TO 2729 OF 1923.

January 14, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

IN Nos. 1341 TO 1344 OF 1922

INDRA NARAIN MANNA AND OTHERS DEFENDANTS—APPELLANTS

versus

Srimati SARBASONA DASI—PLAINTIFF—RESPONDENT.

IN Nos. 2721 TO 2729 OF 1923.

Srimati SARBASONA DASI—PLAINTIFF—APPELLANT

versus

JATINDRA NATH SAMANTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Surrender, what amounts to—Gift in favour of reversioner, validity of—Family arrangement, scope of—Landlord and tenant—Suit for rent—Plea of jus tertii*—Procedure—Title, question of, whether can be investigated.*

In a rent suit where the defendant pleads the right of a third party, the Court ought not to make such a third party a party to the suit and thus convert a suit for rent into a complicated title suit. [p. 931, col. 2.]

Lodai Mollah v. *Kally Dass Roy*, 8 C. 238; 10 C. L. R. 581; 4 Shome L. R. 275; 4 Ind. Dec. (N. S.) 152, followed.

Where, however, the plaintiff's title is a derivative one and the defendant denies the existence of the relationship of landlord and tenant between the plaintiff and himself there must be an enquiry into the plaintiff's title in order to determine this question. The relationship of landlord and tenant is not established merely because the plaintiff alleges that he derives his title from a person to whom the tenant had attorned. [p. 931, col. 2; p. 932, col. 1.]

In order to make a surrender of her estate by a Hindu widow with the consent of the next heir valid, the surrender must be total, not partial, and it must be a *bona fide* surrender, not a device to divide the estate with the reversioner. [p 933, col. 1.]

A gift made by a Hindu widow even in favour of the next reversioner if it does not amount to a complete surrender of the widow's estate, is not valid according to Hindu Law and does not pass any title to the donee. It may be operative during the lifetime of the widow but after her death it ceases to have any legal effect. [p. 934, cols. 1 & 2.]

Case-law reviewed

A family arrangement requires some consideration and under the guise of a family arrangement a party cannot enter into a transaction which he is not under the law competent to enter into and which may be beyond his disposing power. [p. 933, col. 2.]

IN Nos. 1341 TO 1344 OF 1922.

Appeals against the decrees of the Subordinate Judge, Second Court, Howrah, in Hughly, dated the 21st March 1922, (In Nos. 1341, 1342 and 1344) and 24th March of 1924 (In No. 1343) reversing those of the Munsif Second Court at Uluberia, dated the 28th of April 1921.

IN Nos. 2721 TO 2729 OF 1923.

Appeals against the decrees of the Addition Subordinate Judge, Howrah in Hughly, dated the 24th September 1923, reversing those of the Munsif First Court at Uluberia, dated the 30th of September 1921.

Mr. *Amarendra Nath Bose* (with him Babu *Rupendra Kumar Mitter*), for the Appellants.

Babus *Sudhansa Sekhar Mookerjee, Mahendra Nath Roy* and *Charu Chandra Ganguli*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—These two groups of appeals arise out of rent suits brought by the plaintiff in respect of the 16-annas rent for 1326 and a portion of 1327 B. S. The defence of the tenants was that the plaintiff was not entitled to more than 8-annas share of the rent. In the first group of cases the Court of first instance dismissed the plaintiff's suit on the ground that she had not acquired a title in respect of 8-annas of the property, and with reference to the other 8-annas the claim was dismissed as the plaintiff failed to prove separate collection. On appeal by the plaintiff the learned Subordinate Judge decreed the plaintiff's suit for the entire 16-annas of the rent. The first group of appeals, therefore, are from the decrees of the lower Appellate Court by the tenants-defendants. In the second group of cases the Court of first instance (presided over by a different officer) decreed the plaintiff's suit in full and on appeal by the tenants the Subordinate Judge (who was a different officer) dismissed the plaintiff's suit on the ground that the plaintiff was not entitled to 8-annas share of the rent from the defendants and with regard to the remaining 8-

annas she failed to prove separate collection. The second group of appeals is by the plaintiff-landlord; and as the two sets of appeal raise the same question they were heard together.

Before considering the points that arise in these cases it is necessary to give a brief history of the litigation. There was a *putni* under the seal *zemindars* held by two brothess Aghore Dutt and Sarat Dutt. Aghore died in 1876 leaving a widow Binodini. In 1877 Binodini made a gift of 8-annas share in the *putni* which she inherited to Sarat retaining some other properties for her own maintenance and use. In 1901 Sarat took a fresh *pottah* (for reasons not disclosed in the case) from 9-annas 12 *gandas* co-sharer landlord. In 1908 he took another *pottah* from 3-annas 4 *gandas* co-sharer landlord. There was no fresh settlement in respect of the remaining 3 annas 4 *gandas*. In execution of rent decrees obtained by the co-sharer landlords the *putni* was sold and purchased by the plaintiff in July 1919. The decrees were obtained against Sarat but before the property was brought to sale Sarat died in April 1918. Benodini died in March 1919. On these facts the tenants contend that the plaintiff did not acquire the whole interest in the *putni* inasmuch as on Binodini's death Aghore's share vested in his reversioners and the sales did not pass their interest.

In the first set of appeals the learned Subordinate Judge allowed the plaintiff's appeals and decreed the rent suits on two grounds; first, that the tenants should not be allowed in a rent suit to introduce complicated questions of title and thus convert a simple suit for rent into a title suit; and as the learned Judge was of opinion that the plaintiff's purchase created the relationship of landlord and tenant as between the plaintiff and the defendants the plaintiff's suits ought to be decreed without entering, into the question whether or not she had acquired a right to the property. For this view he has relied upon the decision in the case of *Lodai Mollah* v. *Kally Dass Roy* (1). As we understand this judgment in a way different from the way in which the learned Subordinate Judge has understood it, it is necessary to examine the effect of that decision. Field, J., in his learned judgment lays down the true scope of a suit for rent and the appropriate defences that may be raised by the tenants in such a suit. He mentions the different circumstances in which different defences may be taken one of such circumstances being where the plaintiff sues for rent on a derivative title. To such a suit of the defences as suggested by the learned Judge is that the defendant may deny the circumstances from which the plaintiff alleges that the tenancy is inferrible or has been created by implication; and to elucidate this point the learned Judge observes that there may be denial of the facts which constitute the derivation or denial of the assignment. At page 244* of the report there is the following pertinent observation: "Where there has been no attornment (as in the present case) the plaintiff must prove his title as a condition precedent to establishing the relation of landlord and tenant between himself and the defendant; and if there be none of the other defences already referred to, this may be the only point to be decided." Then the learned Judge proceeds to examine the English Law on the point and comes to the conclusion that there is no authority for the procedure adopted by the Court, in the circumstances, of adding a third party to a rent suit for the purpose of determining the question of title raised. That case lays down the very sensible and salutary principle that in a rent suit where the defendant pleads *jus tertii* or right of a third party, the Court ought not to make such a third party a party in the suit and convert a suit for rent into a complicated title suit. The reasons given in support of this view are very cogent and need not be repeated here. It will be a misreading of the case if it is supposed to be an authority for the view that in no case can the tenant plead title in a third person in a rent suit and in no case can such a question be decided in a suit for rent. The learned Subordinate Judge presumes that by the plaintiff's purchase the relationship of landlord and tenant is established. We do not think that there is any anthority for this presumption. If the only question in a suit for rent, as Field, J., observes in *Lodai Mollah's case* (1) is whether there exists the relationship of landlord and tenant between the plaintiff and the defendant in order to determine this question there must be an enquiry into

(1) 8 C. 238; 10 C. L. R. 581; 4 Shome L. R. 275; 4 Ind. Dec. (N. S.) 152.

*Page of 8 C.—[*Ed.*]

the plaintiff's title when it is derivative. To hold that such a relationship is established merely because the plaintiff alleges that he derives his title from a person to whom the tenants had attorned is to beg the whole question. The case of *Lodai Mollah* v. *Kally Dass Roy* (1) was considered and explained in the case of *Rahimunnessa Bibee* v. *Mahadeb Das* (2), Mukerjee, J., says as follows: "We may also observe that as explained by this Court in the case of *Lodai Mollah* v. *Kally Dass Roy* (1), the plaintiff cannot possibly maintain the position that the defendant is not entitled to question his title. As was pointed out by the learned Judges in the case last mentioned even where the plaintiff claims by a derivative title and the defendant has attorned to him, the defendant is not thereby estopped from showing that the title is really not in the plaintiff but in some other person." That case is direct authority for the view we take and it must be understood that *Lodai Mollah's case* (1) not only lays down that in a suit for rent a third party set up by the tenants should not be dragged to convert it into a title suit but it also holds that the question with regard to the plaintiff's right cannot only be raised but must be raised where it is denied by the tenant. This ground, therefore, on which the learned Judge bases his judgment fails.

The second ground on which he founds his judgment is that the transaction between Sarat and Benodini was a family arrangement and that this deed of gift should not be considered to be void but only voidable. It will be necessary to consider this question in detail in connection with the other group of appeals.

In those appeals the learned Subordinate Judge has found that at the time when the sale took place half of the *putni* had vested in the reversionary heirs of Aghore then in existence. It is not disputed that on Binodini's death the share of Aghore passed to his reversioners who are other than the heirs of Sarat. The learned Subordinate Judge has held that the deed of gift could not enure beyond the lifetime of Benodini and that it was not surrender of the widow's life-estate in favour of the reversioners. This view of the law has been challenged before us on the ground that the learned Subordinate Judge misinterpreted the deed of gift and should have held that it was a surrender of the life-estate of the widow to the reversioner and that it conveyed to Sarat a valid title to the 8-annas share of Aghore. In support of this view reliance has been placed on the decision of their Lordships of the Judicial Committee in the case of *Sureshwar Misser* v. *Maheshrani Misrain* (3). In that the reversioners had brought a suit against the widow to set aside the Will. The parties entered into a compromise under which the widow surrendered all rights of succession to the immoveable property to the plaintiff reversioner and the plaintiff transferred a portion of such property to the daughters and the plaintiff and the daughters each gave a small portion of the land to the widow for her life. This transaction was held by the Judicial Committee to be valid according to Hindu Law on the ground that there was a surrender of the entire property in which the widow had her life-interest to the reversioner and the subsequent transfer by the plaintiff of a portion of that property to the widow for her life did not affect the surrender by the widow of her life-estate. The ground upon which the surrender of the life-estate by the widow to the next reversioner is upheld is the principle of acceleration and the Judicial Committee followed the earlier decision of their Lordships in *Rangasami Gounden* v. *Nachiappa Gounden* (4). In that case all the decided cases on the point were considered and the result of such consideration was formulated by their Lordships thus: "(1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances, the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, and not a device to divide the estate with the reversioner. (2) When the alienation of the whole or part of the estate is

(2) 7 Ind. Cas. 846; 12 C. L. J. 428.

(3) 57 Ind. Cas 325; 47 I. A. 233; 48 C. 100; 25 C. W. N. 194; (1920) M. W. N. 472; 39 M. L. J. 161; 28 M. L. T. 154; 2 U. P. L. R. (P. C.) 128; 12 L. W. 461; 18 A. L. J. 1069; 41 C. L. J. 433.

(4) 50 Ind. Cas. 498; 46 I. A. 72; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 1 U. P. L. R. (P. C.) 66 (P. C.).

to be supported on the ground of necessity, the consent of the reversioner will be held to afford a presumptive proof which will validate the transaction as a right and proper one". In *Sureshwar Misser's case* (3), the law is thus summarised: "Now there are two conditions which must be fulfilled to make a surrender by the widow, with consent of the next heir (necessity being out of the question), valid. The first is that the surrender must be total, not partial. The second is that the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner". It is, therefore, incumbent upon the plaintiff to prove that the transaction between Binodini and Sarat in 1877 was a complete surrender by Binodini of her life-interest in all the properties left by her husband to Sarat who was admittedly the next reversioner. This leads us to an examination of the document on which this contention is founded.

The document divides the properties left by her husband into two Schedules *ka* and *kha*. As to the properties mentioned in Schedule *ka*, the lady made a gift of the 8-annas share of the *putni* on the following terms: "You have from this day become entitled to half the share left by my husband in the properties mentioned in Schedule *ka* empowered to make a gift or to sell and enjoy the same down to your sons, grandsons, etc." With reference to the property of Schedule *kha*, the following terms are inserted in the document: "Out of 211 *bighas* 2 *cottas* and 10 *chittacks* of rent free lands of Schedule *kha* leaving aside your half share of 105 *bighas* 1 *cotta* 5 *chittacks* I shall keep in my possession my own half share, 105 *bighas* 1 *cotta* and 5 *chittacks* for the period of my life for pious and religious purposes as well as for my maintenance.....Out of the income of half the properties of Schedule (*kha*) which remains in my possession, I shall so long as I live perform pious and religious works. If owing to disagreement with you I separate from you I shall not be competent to claim maintenance from you. Even if I do the same it will be entertained.....After my death these rooms as well as half the properties of *kha* which are left in my possession would belong to you,.....After my death you, down to your sons and grandsons, etc., will enjoy my half share in the properties of Schedule *kha* being entitled to sell, make a gift or otherwise to alienate the same" There are other expressions also to the same effect. Reading this document as a whole it is manifest that the transaction was a gift by the lady of her one-half share in the *putni* to Sarat retaining Aghore's 8-annas share in certain properties mentioned in Schedule *kha*. The gift, therefore, was not a surrender of the whole life-interest in the whole estate as laid down by the Judicial Committee in the cases cited above. It was a surrender of a part of Aghore's estate, the other part was to come to the possession of the reversioners after the death of the lady; such a surrender is not valid according to law and it vested no title in Sarat. But at the same time it could not be questioned so long as the lady was alive: on her death admittedly some other persons have succeeded to Aghore's share in the *putni*. The conclusion we come to is that by the deed of gift of 1877 Sarat did not acquire an absolute title to Aghore's share and the sale of the *putni* which took place after his death in execution of the decrees against him with his widow as representing his estate on the records did not pass any interest beyond his share in the *putni*.

The next question that calls for decision is the second ground in which the learned Subordinate Judge in the first group of cases allowed the plaintiff's suits. We cannot uphold the view taken by the learned Judge that the deed of gift of 1877 was in the nature of a family arrangement. A family arrangement requires some consideration and under the guise of a family arrangement a party cannot enter into a transaction which he is not under the law competent to do and which may be beyond his disposing power. It is not suggested that after Aghore's death there was a difference between Sarat and Bindoini which was settled by the deed of gift, an unilateral disposition. As a matter of fact recitals in the deed show that Binodini and Sarat were living together and Binodini was under the protection of Sarat.

The question that really requires consideration is whether the alienation in favour of Sarat was voidable at the instance of the reversioners or whether it terminated with the life of Binodini. It has been laid down by the Judicial Committee in the case of *Bejoy Gopal Mukerji* v. *Krishna Mahishi*

Debi (5), that an alienation by a Hindu widow is not absolutely void but is *prima facie* voidable at the election of the reversioners who may affirm it or treat it as a nullity without the intervention of the Court or may retify it. It is, however, argued by the tenants that the principle of *Bejoy Gopal's case* (2) is available to transferees for value and does not extend to volunteers and that the gift in favour of Sarat became inoperative after the death of Binodini and in support of this view reliance is placed upon the case of *Khawani Singh* v *Chet Ram* (6), where the law is expounded as follows: "That a transfer made by a Hindu widow with the consent of the nearest reversioner will take effect as against the more remote reversioner, is applicable to cases of transfer for consideration. It has not been extended to a case where a transfer has been made by way of gift." The same view was taken in the case of *Pilu Appa Nalvade* v. *Babaji Naru Mang* (7), where the law is thus enunciated: "The operation of the principle which prohibits a Hindu widow's alienation of immoveable property otherwise than for legal necessity is relaxed in cases where the consent of the whole body of persons constituting the next reversion has been obtained...is ordinarily limited to transfers for consideration and cannot be extended to voluntary transfers...where there is no room for the theory of legal necessity. It should not be extended to cases where the widow has made only a partial relinquishment of the estate." This principle is based on the theory that the widow can sell the property in which she has acquired a widow's estate only for legal necessity. In the case of a gift the hypothesis of legal necessity does not exist and, therefore, she has no right of alienation of such property. The result of these authorities is that a gift made by a Hindu widow even in favour of the next reversioner, if it does not amount to a complete surrender of the widow's estate, is not valid according to Hindu Law. The gift in the present case, therefore, was invalid and did not pass any title to Sarat. It might have been operative during the lifetime of Binodini but after her death it ceased to have any legal effect. This disposes of all the points raised before us by the parties. The result of the view we take of the questions argued before us is that the plaintiff is not entitled to recover rent in respect of the 8-annas share of the *putni* belonging to Aghore.

In the above view the first group of appeals must be allowed, the decrees of the lower Appellate Court are set aside and the plaintiff's suit dismissed with costs. The second group of appeals fails and is dismissed with costs.

Cuming, J —I agree.

Z. K. *Appeals Nos. 1341 to 1344 allowed: Appeals Nos. 2721 to 2729 dismissed.*

(5) 34 C. 329; 5 C. L. J. 334; 11 C. W. N. 424; 9 Bom. L. R. 602; 17 M. L. J. 154; 2 M. L. T. 133; 4 A. L. J. 329; 34 I. A. 87 (P. C.).

(6) 37 Ind. Cas. 86; 39 A. 1; 14 A. L. J. 972.

(7) 4 Ind. Cas. 584; 34 B. 165; 11 Bom. L. R. 1291.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 438 OF 1923.

December 8, 1924

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump

MANILAL JIBHAI—PLAINTIFF—APPELLANT

versus

ISHVARBHAI SAMALBHAI—DEFENDANT—RESPONDENT No. 1.

Civil Procedure Code (Act V of 1908), s. 91—Nuisance—Encroachment on public street—Private person, suit by, whether maintainable—Special damage, proof of.

Plaintiff brought a suit for a declaration that certain land was street land and for an injunction directing the defendant to remove an *otla* made by him on the land:

Held, that the plaintiff could not sustain the suit in the absence of evidence to show that as a consequence of the encroachment he was unable to use the road, nor could he seek the assistance of the Court to get the *otla* removed, merely because he wanted to walk over that portion of the street occupied by the *otla* unless he proved special damage.

Appeal from the decision of the First Class Subordinate Judge, A. P., at Ahmedabad, in Appeal No. 224 of 1922, reversing the decree passed by the Joint Subordinate Judge, at Nadiad, in Suit No. 391 of 1920.

Mr. *H. V. Divatia*, for the Appellant.

Mr. *M. H. Mehta*, for Respondent No. 1.

JUDGMENT.—The plaintiff filed this action to have a declaration that the land described in the plaint was street land and to obtain a mandatory order directing defendant No. 1 to remove an *otla* made by him on the land. The Municipality of Nadiad City, in which the property was situated, was made a party defendant,

Defendant No. 1 asserted that his *otla* existed since a long time; that plaintiff had no interest in the land; that the land was held to be of his ownership by the City Survey Officers and that no damage was caused to the plaintiff.

The Trial Court held that the suit land was a public street and that plaintiff was entitled to sue to have the encroachment made by defendant No. 1 thereon removed.

The first defendant appealed. In his judgment, the Judge said :—

"Assuming that the *otla* land forms part of a public street land, the question is whether defendant No. 1's act amounts to a public nuisance. I think, it does, *vide Queen-Empress* v. *Virappa Chetti* (1) and *In re Kariyappa Ningappa* (2) which lay down that appropriation of a part of a public road or building on it, amounts to a public nuisance. Plaintiff is, therefore, not competent to sue without complying with the provisions of s. 81 of the C. P. C."

Accordingly he allowed the appeal and reversed the decree of the Trial Court.

The appellant contends that although the *otla* was a public nuisance, the plaintiff was entitled to an injunction restraining the defendant from using that part of the road occupied by the *otla* without proving special damage. He relies upon the decision of this Court in *Baslingappa Parappa* v. *Dharmappa Bassappa* (3).

"Plaintiffs sued on behalf of themselves and of other members of a religious community to have a declaration of their right of marching in procession with a car along a particular public road to certain temples and for an injunction restraining the defendants from interfering with the plaintiffs. The defendants contended that the plaintiffs had no right to march along the road. The lower Courts dismissed the suit on the ground that the road being public the plaintiffs could not sue unless special damage were shown and proved.

On second appeal by the plaintiffs it was held, reversing the decree and allowing the claim, that the suit was not for removal of a public nuisance but for a declaration of the right of an individual community to use the public road. Every member of the public and every sect has a right to use the public streets in a lawful manner and it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege."

The question here is an entirely different one. The plaintiff does not seek for a declaration that he has a right to use a public road, nor can he say that such a right has in any way been obstructed. But he wishes to make a claim to a right to pass over the particular portion of the road occupied by the *otla*, though his right to use the rest of the road has not been interfered with. He cannot sustain the suit, as he has not been able to show that he is unable to use the road, nor can he seek the assistance of the Court to get the *otla* removed, merely becuse he wants to walk over that portion of the street occupied by the *otla*, unless he proves special damage.

The appeal is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 20 M. 433; 1 Weir 233; 7 Ind. Dec. (N. s.) 307.
(2) 68 Ind. Cas. 619; 24 Bom. L. R. 807; 23 Cr. L. J. 587; (1922) A. I. R. (B.) 384; 47 B. 89.
(3) 7 Ind. Cas. 663; 34 B. 571; 12 Bom. L. R. 586.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 57 OF 1924.

January 30, 1925.

Present:—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.

Babu BANWARI LAL BHARGAVA—PURCHASER—DECREE-HOLDER—APPELLANT

versus

Rai Sahib BISHAMBHAR NATH TANDAN AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Presidency Towns Insolvency Act (III of 1909), ss. 55, 56—Transfer by insolvent, validity of—Purchaser in good faith and for valuable consideration—Burden of proof.

Section 55 of the Presidency Towns Insolvency Act is quite general and a transfer of property made by an insolvent falling within the provisions of that section is void altogether as against the Official Assignee unless it is shown by the transferee that he is a purchaser in good faith and for valuable consideration.

Appeal against an order of the Subordinate Judge, Lucknow, dated the 26th May 1924.

Mr. *A. P. Sen*, for Mr. *Bisheshar Nath Srivastava*, for the Appellant.

Mr. *P. D. Rastogi*, for the Respondents,

JUDGMENT.—One Rai Saheb Bisham-bhar Nath Tandon obtained simple money decree against Syed Ali Haider for a sum of Rs. 13,726-10-8. The decree-holder was subsequently declared an insolvent by the High Court of Calcutta. On the 7th November 1922 he transferred the decree now under execution to Babu Banwari Lal Bhargava for a sum of Rs. 700. Babu Banwari Lal Bhargava has applied under O. XXI, r. 16, of the C. P. C. for the execution of the decree. The insolvent is represented in these proceedings by the Official Assignee of Calcutta. The Official Assignee took objection to the application of Babu Banwari Lal Bhargava on the ground that the transfer of the 7th November 1922 was not in good faith and for valuable consideration within the meaning of s. 56 of the Presidency Towns Insolvency Act and was, therefore, void as against him under s. 55 of the same Act. The Court below has upheld the objection and dismissed the application for execution. This is an appeal against that order.

We are of opinion that the decision of the Court below is correct. Section 55 of the Presidency Towns Insolvency Act is quite general and under it we must hold that the transfer under consideration is void altogether as against the Official Assignee unless it is shown by the transferee that he is a purchaser in good faith and for valuable consideration under s. 56. The Court below has given good reasons for the view that the transfer was neither in good faith nor for valuable consideration. It is proved on the evidence that the judgment-debtor owns 30 or 35 villages. It is admitted that the decree which the insolvent held against Ali Haider was for a sum of Rs. 1,300 odd. When these facts are placed side by side with the fact that the transferor was an insolvent and the fact that the appellant obtained the transfer of that decree for a sum of Rs. 700 only the irresistible conclusion is that there was neither good faith nor valuable consideration.

At the hearing of the appeal the learned Pleader for the respondents raised a preliminary objection that the appeal was barred by the rule of *res judicata*. As we have decided the appeal on its merits against the appellant we express no opinion on this objection.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 357 OF 1922.

December 10, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

JADAVBAI LAKHICHAND—DEFENDANT —APPELLANT

versus

MULTANCHAND HARAKHCHAND—PLAINTIFF—RESPONDENT.

Hindu Law—Partition—Grandsons, whether remain joint with their father—Presumption—Divided co-heirs, whether tenants-in-common or co-parceners.

In ordinary cases of partition between a Hindu father and his sons, the grandsons, though they take an interest in the family property as from their birth can only derive that interest through their father, with whom the presumption is that they remain joint after partition. [p. 937, col. 1.]

A Hindu father has no right to release his son's interest in the family property while the grandfather is alive. Where, however, the father obtains his share in the joint family property from the grandfather and is released of his liability in respect of the debts of the family, the arrangement amounts to a partition between the father and the grandfather and the grandsons must abide by it unless it can be set aside on the ground of fraud or for other good reason. [*ibid.*]

Where a Hindu is succeeded by heirs who have already separated from each other, the heirs take the property as tenants-in-common and not as co-parceners. [p. 937, col. 2.]

First appeal from the decision of the First Class Subordinate Judge at Jalgaon, in Suit No. 415 of 1920.

Mr. *K. H. Kelkar*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.—One Hasraj had four sons, Fulchand, Lakhichand, Harakchand and Chunilal. Fulchand passed a *farkhat* in 1904 to his father, which was in effect a partition deed. In 1907, the remaining three sons also passed *farkhats* to their father, which were in effect documents of partition. Chunilal died about 1907 leaving no heirs and we are not concerned with his estate. Harakchand died in 1912 leaving his son, the plaintiff. Fulchand died in 1916 leaving a widow. Then Hasraj died in February 1918 and Lakhichand died on March 22, 1918, leaving a widow.

Plaintiff claimed that he was entitled to the suit property on the ground that he remained joint with his grandfather after his father Harakchand had separated. He made an alternative claim that if he did not remain joint with Harakchand, he was entitled to the property left by Hasraj because he inherited it with his uncle Lakhichand and he became entitled to the

whole by survivorship on Lakhichand's death.

The plaintiff has succeeded in the lower Court. We do not think that on the facts the learned Judge realized the true legal position. Fulchand separated in 1904. The Judge held that he re-united with Hasraj sometime before 1907, because in the *farkhat* passed by Harakchand to his father, Fulchand was a party and Harakchand said that Hasraj and Fulchand were joint. It is an undoubted fact that Fulchand became separated in 1904, and, therefore, in my opinion a mere statement by Harakchand that in 1907 Fulchand and Hasraj were joint was not by itself sufficient to prove re-union. It might be a strong corroboration of any direct evidence that Fulchand and Hasraj re-united. Therefore, Fulchand's widow is entitled to the property, if any, which Fulchand received when he separated. If the widow demands it there must be an enquiry whether any of the suit property belonged to Fulchand.

With regard to the plaintiff we cannot say that there is any evidence that when his father separated in 1907, he remained joint with his grandfather. In ordinary cases of partition between a Hindu father and his sons, the grandsons, though no doubt they take an interest in the family property as from their birth, can only derive that interest through their fathers, with whom the presumption is that they remain joint after partition.

There is a distinction between a release and a partition. It may well be said that a father has no right to release his son's interest in the family property while the grandfather is alive. But it has happened in this case that Harakchand obtained his share in the joint family property and was released of his liability for certain debts. Therefore it is clear there was a partition and his son must abide by it unless it can be set aside on the ground of fraud or for other good cause Therefore when Hasraj died his property went to his son Lakhichand and his grandson the plaintiff as his co-heirs. The plaintiff has next contended relying on para. 31 of Mulla's Hindu Law that according to the Mitakshara such co-heirs will take as co-parceners, and, therefore, on the death of Lakhichand plaintiff would be entitled to the property as against his widow. But Mr. Mulla is referring to sons in a joint Hindu family who inherit the self-acquired property of their father. In that case they take it as co-parceners and if they continue as a joint family such property would go by survivorship. It is different, however, when the family is already separated. Then the heirs take the property as tenants-in-common. Therefore we allow the appeal to this extent as far as the widow of Fulchand, defendant No. 1 is concerned. She will be entitled to such part of the suit property which she can prove was taken by Fulchand in 1904. The second defendant will be entitled to half the property left by Hasraj to which her husband Lakhichand became heir, and the plaintiff will be entitled to the other half.

We, therefore, send back the case to the Trial Court for proper enquiries to be conducted in accordance with our judgment.

All costs to come out of the estate in both the Courts.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 515 OF 1921.

April 20, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

Musammat SURJO—PLAINTIFF—APPELLANT

versus

Musammat DALELO AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation by widow—Widow, whether can challenge alienation.

The restrictions imposed by the Hindu Law on a widow's power of alienation of her husband's estate are inseparable from her estate and their existence does not depend on that of heirs capable of taking on her death. Therefore, a Hindu widow is entitled to restrain an alienation of immoveable property held by another widow on the usual life-tenure, where the former is entitled to succeed to the estate on the death of the latter.

Lahori v. *Radho*, 72 P. R. 1906; 108 P. L. R. 1907; 125 P. W. R. 1906, followed.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 24th August 1920, affirming that of the Munsif, First Class, Kangra, dated the 15th March 1920.

Messrs. *Sagar Chand* and *C. L. Gulati*, for the Appellant.

Lala *Mehr Chand Mahajan*, for the Respondents.

JUDGMENT.—This appeal arises out of an action brought by the appellant *Musammat* Surjo to contest a sale of agricultural land by one *Musammat* Dalelo, the widow of her deceased husband's brother. The parties are *Brahmans* of the Tahsil Dehra Dun in the Kangra District; and the question for determination is whether a widow is entitled to restrain the alienation of immoveable property held by another widow on the usual life-tenure. Now, the learned District Judge holds that the plaintiff is entitled to succeed to the estate in the event of her surviving *Musammat* Dalelo, but that she has failed to establish a custom empowering her to contest an alienation made by the latter.

Upon the evidence produced by the plaintiff, it is impossible to hold that any custom, such as has been relied upon by her, has been established. It is true that a Division Bench of the Punjab Chief Court in *Lahori* v. *Radho* (1) held that among the *Girths* of the Kangra District there is a custom authorizing a widow to impeach an alienation of immoveable property made by the widow of her husband's collateral, but we cannot extend the rule laid down in that judgment to *Brahmans* in the absence of any evidence showing that they are governed by a similar custom.

The plaintiff, however, invokes also the Hindu Law, and it is beyond dispute that under that law a widow takes only a life-interest in the estate of her husband, and that the nature of her interest can never alter, even though there be a complete want of heirs. As laid down in *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (2), "the restrictions imposed by the Hindu Law on a widow's power of alienation of her husband's estate are inseparable from her estate, and their existence does not depend on that of heirs capable of taking on her death." It accordingly follows that the plaintiff, who, under the Customary Law, is entitled to succeed to the estate on the death of *Musammat* Dalelo, has the power to impeach an unauthorized alienation made by her.

Accordingly we accept the appeal, and, setting aside the judgments of the Courts below, remit the case to the Court of first instance for re-decision with reference to the remaining issues. The Court-fees on the memorandum of appeal in this Court as well as on that in the Court of the District Judge shall be refunded, and other costs shall abide the event.

Z. K. *Appeal accepted.*

(1) 72 P. R. 1906; 108 P. L. R. 1907; 125 P. W. R. 1906.

(2) 8 M. I. A. 529; 2 W. R. (P. C.) 61; 1 Suth. P. C. J. 76; 1 Sar. P. C. J. 820; 19 E. R. 631.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 212 OF 1921.

March 14, 1924.

Present :—Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.

SHIB DEO MISRA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Adoptive father and adopted son belonging to different sub-castes, effect of—Civil Procedure Code (Act V of 1908), s. 11, O. VI, r. 15—Suit by widow to challenge adoption—Decision, whether binding on reversioners—Res judicata—*Arbitration, reference to—Award, evidentiary value of—Plaint—Verification, absence of—Subsequent verification, effect of—Limitation Act (IX of 1908), Sch. I, Art. 141, —Suit by reversioners to recover property on death of widow—Limitation—Transfer of Property Act (IV of 1882), s. 41—Transferee from Hindu widow, whether can claim benefit of section—Evidence Act (I of 1872), ss. 35, 79—Death register, entries in, admissibility of —Official document—Certified copy—Presumption of correctness.*

A plaint which does not contain the verification clause as required by r. 15 of O. VI of the C. P. C. is not void. The omission to verify the plaint is a mere irregularity which can be cured at a later stage, and a subsequent verification does not amount to an amendment of the plaint. [p. 940, col. 1.]

Rajit Ram v. *Katesar Nath*, 18 A. 396; A. W. N. (1896) 102; 8 Ind. Dec. (N. S.) 971, *Basdeo* v. *John Smidt*, 22 A. 55; A. W. N. (1899) 172; 9 Ind. Dec. (N. S.) 1068 and *Mohini Mohun Das* v. *Bungsi Buddan Saha Das*, 17 C. 580; 5 Sar. P. C. J. 498; 8 Ind. Dec. (N. S.) 926 (P. C.), followed.

Where on the death of a Hindu his widow takes possession of his estate, it is not incumbent upon his reversioners to bring a suit for a declaration that a certain person who claims to be the adopted son of the deceased was not in fact adopted by him. The reversioners are entitled to wait till the death of the widow and then bring a suit for recovery of possession, and if such a suit is brought within twelve years of the death of the widow it cannot be held to be barred by time. [*ibid.*]

A death register kept at a Police station is an official book and the entries in it are admissible in evidence under s. 35 of the Evidence Act. [p. 942, col. 1.]

Sampat v. *Gauri Shankar*, 10 Ind. Cas. 713; 14 O. C. 68, *Habib Ullah* v. *Emperor*, 18 Ind. Cas. 653; 15 O. C. 351 at p. 356; 14 Cr. L. J. 93, *Bisheshar Dayal* v. *Hira-*

Lal, 36 Ind. Cas. 941; 19 O. C. 221; 4 O. L. J. 49, *Mohammad Jafar* v. *Emperor*, 54 Ind. Cas. 166; 22 O. C. 250; 6 O. L. J. 577; 21 Cr. L. J. 22, *Tamiz-ud-din Sarkar* v. *Taju*, 46 Ind. Cas. 237; 46 C. 152; 22 C. W. N. 822, *Zaibunnissa* v. *Hasaratunnissa*, 52 Ind. Cas. 162; 22 O. C. 124; 1 U. P. L. R. (O.) 1 and *Devarapalli Ramalinga Reddi* v. *Srigiriraju Kotayya*, 41 Ind. Cas. 286; 41 M. 26; 22 M. L. T. 17; 33 M. L. J. 60; (1917) M. W. N. 558; 6 L. W. 246, referred to.

The correctness of a certified copy of an official document must be presumed under s. 79 of the Evidence Act. [p. 943, col. 1.]

Decrees of Courts are not to be lightly treated on a mere suspicion or on a mere supposition based on no special evidence that they are collusive. [p. 944, col. 1.]

A suit brought by a Hindu widow to challenge an adoption alleged to have been made by her late husband must be regarded as a representative suit and the decision arrived therein is, in the absence of collusion, binding upon the reversioners and operates as *res judicata* between them and the adopted son. [*ibid.*]

Under the Hindu Law for the purposes of inheritance each primary caste must adopt within its own limits and an adoption would not be invalid so long as the adoptive father and the adopted son belong to sub-castes of the same primary caste. [p. 946, col. 1.]

Narain Singh v. *Shiam Kali Kunwar*, 25 Ind. Cas. 45; 17 O. C. 186, relied on.

Where the question of the factum and validity of an adoption is referred to arbitration, the award made by the arbitrators is, apart from its being *res judicata*, a weighty piece of evidence in a subsequent suit between the parties in which a dispute arises as to the alleged adoption. [p. 944, col. 2.]

A Hindu widow enters into possession of her husband's estate by right and not with any express or implied consent of the reversioners. While she is alive the reversioners have no voice in the matter and have no right to intervene. She can continue in possession in spite of their protest. A transferee from the widow, who is in possession by her own right and as to whose possession no consent of the reversioners can be implied by law, cannot claim the protection of s. 41 of the Transfer of Property Act. [p. 948, col. 1.]

First appeal from a decision of the Subordinate Judge, Agra, dated the 11th of April 1921.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for recovery of possession on the allegation that the plaintiff No. 1 is the reversionary heir of Kallu Misra deceased, the last male owner of the property. Plaintiffs Nos. 2 and 3 are transferees from plaintiff No. 1. In the plaint it was alleged that on the death of Kallu Misra his widow *Musammat* Mohini entered into possession as a Hindu widow for her life, that she unlawfully made various transfers and ultimately died on the 15th of December 1907. The suit as brought was just within limitation of this date as the Courts were closed on the 15th and 16th December 1919. The defendant No. 1 claims to be the adopted son of Kallu Misra. The other defendants are transferees either from *Musammat* Mohini or from the defendant No. 1, who are now in possession of the bulk of the property in dispute.

On behalf of the defendants there were several pleas taken. There was a denial of the pedigree set up by the plaintiffs. There was a plea that the claim was barred by time, that Ram Prasad defendant No. 1 was the adopted son of the deceased, that the claim was barred by the principle of *res judicata* and that it was also barred by estoppel.

In the pleadings or at the time when the issues were settled there was no suggestion that the deceased Kallu Misra had left any Will. On the other hand, the plaintiffs' Vakil admitted that Shib Deo Misra, plaintiff No. 1, had other brothers alive and also stated that he would not amend his plaint. As matters stood on the pleadings it is clear that in any event Shib Deo Misra not being the sole surviving reversioner at the time of the death of *Musammat* Mohini, the entire claim could not be decreed. At a late stage in the case Ram Prasad defendant No. 1 filed a number of papers among which there was a document purporting to be a Will of Kallu Misra and bearing the date 4th October 1887. Under it, with the exception of a temple and rights connected therewith which were to go to Ram Prasad himself, the rest of the property was on the death of *Musammat* Mohini to go to Shib Deo Misra to the exclusion of his other brothers.

The learned Subordinate Judge came to the conclusion that the plaintiffs' pedigree was established, that Ram Prasad's adoption had not been established, and that the claim was not barred by *res judicata*. He, however, found that the plaintiffs had failed to prove that *Musammat* Mohini died within 12 years of the suit, that the Will produced by Ram Prasad was a forgery and that the claim was barred by the principle of estoppel.

The plaintiffs have come in appeal and challenged the findings arrived at against them. The learned Advocate for the respondents has not only supported the decree on the findings in his favour but has also supported it on the other pleas raised. Thus all the important issues of fact and law have been re-argued before us and we propose to dispose of all of them.

The first question is one of limitation.

This plea was based on three grounds, (1) that the alleged adoption of Ram Prasad not having been set aside within six years the claim was barred by time, (2) that the plaint when originally filed was not verified at all and this defect was not cured till long after the expiry of the period of limitation, and (3) that *Musammat* Mohini had not died on the 15th of December 1907 but died either on the 9th or 10th of December of that year and the claim was beyond time.

We agree with the learned Subordinate Judge that the six year's rule has no application to this case. The reversioners were not bound to bring a suit for a declaration that the alleged adoption had in fact not taken place. They were entitled to wait till the lady died and then bring a suit for recovery of possession. The present claim is not one for a mere declaration but is for a possession. If it is brought within twelve years of the death of *Musammat* Mohini it cannot be held to be barred by the six year's rule.

We, however, do not agree with the view taken by the learned Subordinate Judge that the verification having been made after the expiry of twelve years the suit itself was barred by time. It appears that the plaint was actually presented in Court on the 17th of December 1919, but though it bore the signatures of all the plaintiffs it did not contain any verification by them. This defect was brought to the notice of the *munsarim* by one of the defendants and subsequently to that of the Court. Under an order of the Court the verification was ultimately made, but it was some months afterwards. We are, however, of opinion, that the plaint was not a void plaint merely because it did not contain the verification clause as required by the C. P. C In our opinion the omission to verify it was a mere irregularity which could be cured even at a later stage. Merely on the ground of such a defect the plaint cannot be treated as altogether invalid. The subsequent verification was not an amendment of it. This has been the view consistently followed in this Court and we may refer to the cases of *Rajit Ram* v. *Katesar Nath* (1) and *Basdeo* v. *John Smidt* (2) which follow the case of *Mohini Mohan Das* v. *Bungsi Budan Saha Das* (3) decided by their Lordships of the Privy Council.

The main point to consider in connection with the plea of limitation is the exact date on which *Musammat* Mohini died. There can be no doubt that the burden lies on the plaintiffs to prove conclusively that her death took place within twelve years of the suit.

In support of their case the plaintiffs rely on a number of documents as well as oral evidence. The defendants rely mainly on oral evidence. So far as the oral evidence of the parties is concerned it is clear that it cannot be of much value when the dispute is confined to a difference of a few days only. No witness can be expected to remember the date of her death exactly. The only witness who has attempted to give an exact date is Jhaman Lal, a witness for the defendants, but his cross-examination shows clearly that he has not a good memory and we find it impossible to rely implicitly on his statement. We shall also show later on that the date given by Jhaman Lal now is not quite consistent with the written statement which he had filed in 1908.

Soon after the death of *Musammat* Mohini Ram Prasad instituted a suit on the 23rd of September 1908 against Jhaman Lal, *Musammat* Mohini's own brother, claiming certain jewelleries, ornaments and other articles. In para. 3 of his plaint he stated that about eleven months ago Jhaman Lal had taken away the plaintiff's mother *Musammat* Mohini during her illness to his own village and she died there on *Aghan Sudi*, 14 *Sambat* 1964, corresponding to the 18th of December 1907. Then in para. 7 he gave this date as the date of his cause of action. In the written statement filed by Jhaman Lal he nowhere specifically denied that the date of the death of *Musammat* Mohini was not the correct date. The learned Subordinate Judge in his judgment also assumed that the date of her death was the 18th of December 1907. At that time both Ram Prasad and Jhaman Lal were nearly connected with *Musammat* Mohini and were in the best position to know or to find out the exact date of her death. At that time there was no motive

(1) 18 A. 396; A. W. N. (1896) 102; 8 Ind. Dec. (N. S.) 971.

(2) 22 A. 55; A. W. N. (1899) 172; 9 Ind Dec. (N. S.) 1068.

(3) 17 C. 580; 5 Sar. P. C. J. 498; 8 Ind. Dec. (N. S.) 926 (P. C.).

for either of them to conceal the exact date of her death. It is clear, therefore, that a statement of the exact date of her death, both according to the calender year and the *Sambat* year, made only a few months after her death, is of a very great evidentiary value and cannot be lightly passed over. The only ground on which the learned Subordinate Judge has ignored this statement is that on a subsequent date, namely, on the 5th of December 1919, Ram Prasad filed another suit in which he stated that *Musammat* Mohini died on the 9th of December 1907. The statement in the last mentioned plaint is, however, not of much value, as we know that it was in that very month that preparations were being made for the filing of this suit, and it might well be assumed that the parties were well aware that litigation was going to be launched. The second plaint, therefore, cannot very much derogate from the value of the former plaint.

The plaintiffs also relied on two death registers of which certified copies were produced and the originals also were summoned from the Office of Superintendent of Police. One of these registers is a bigger register and contains entries of deaths of villagers arranged according to the various villages. The other is a smaller register which contains reports of deaths in chronological order and not by division of villages. For the sake of reference we shall call the first register as the village death register and the second the daily death register.

The entry of the date of the death of *Musammat* Mohini as contained in the village death register is admittedly suspicious. It has certainly been tampered with at one stage or another. On the 3rd of September 1919 one of the plaintiffs applied for a certified copy of this entry and a certified copy was granted to him on the 17th of September 1919. This copy stated the date of her death to be the 15th of December 1907, but a note was added that the original was not clear. As admittedly the claim would have been well within time in September 1919 there was no occasion for the plaintiffs to get the date tampered within that month. Armed with the certified copy the plaintiffs waited till December and ultimately filed the plaint on the re-opening day, *i. e.*, on the 17th of December 1907. We find it difficult to believe that before the 17th of December the plaintiffs must have got the date tampered with. They could very well have not allowed any time to be wasted and might have taken steps to get the plaint filed rather than tamper with the death register on which they were going to rely. On the 8th of January 1920, an application was made on behalf of one of the defendants and a certified copy of this entry was granted to him on the 9th of January. The heading of this certified copy has been carefully corrected and in this copy the date "10th of December 1907" is mentioned at no less than three places. A perusal of this copy suggests that pains were taken to show that the date of the death of *Musammat* Mohini was the 10th of December 1907. There is also no note whatsoever in this copy which would indicate that the original was either not clear or suspicious. After this one of the plaintiffs again applied for a certified copy on the 12th of January 1920, but did not mention the date of *Musammat* Mohini's death in the application. He was asked to supply this date but failed to do so. The application was accordingly struck off. He then filed a second application on the 5th of February 1920 on which a fresh copy was granted to him, but it has not been produced in Court. The defendants also applied for a fresh copy on the 9th of February 1920, and a copy was granted on the 20th of February 1920 which gave the date of her death as the 10th of December. There is note on this certified copy that this copy was made exactly as the original (could be read). As matters stand the original is now suspicious. We find it now unnecessary to speculate as to which party must be held to be responsible for the tampering. We have come to the conclusion that this Death Register should be excluded from consideration altogether.

The other register namely daily death register on the face of it is not suspicious. It is a bound book the stitches of which do not appear to have been broken. The entry regarding the death of *Musammat* Mohini in this register has not at all been tampered with. The original has come from proper custody and a certified copy of the entry has also been produced. Both the original and the copy say that the death of *Musammat* Mohini as reported by the village *chaukidar* on the 19th of December 1907, had taken place on the 18th of December 1907. It is to be noted that this date fits in with the date

given in Ram Prasad's plaint filed in the year 1908. These two pieces of evidence, therefore, corroborate each other. It is true that this date does not tally with the date given in the plaint, but for this the plaintiffs have an obvious explanation, namely, that they got this date from the certified copy which had been granted to them shortly before the suit was instituted. As the plaintiffs cannot have a personal knowledge of the exact date of her death it seems impossible to pin them down to the date mentioned in the plaint.

The learned Subordinate Judge, however, has held that this register is not admissible in evidence at all and the learned Advocate for the respondents has strongly supported that finding. The *chaukidar* who made the report of *Musammat* Mohini's death has not been traced and has not been produced. He is probably dead. No attempt has been made by the plaintiffs to produce any other evidence in order to prove the handwriting in this book. The learned Advocate for the respondents has, therefore, argued that this register is not at all admissible and that even if it is admissible and relevant, it requires some proof.

He has relied on a number of cases decided by the Oudh Court in support of his contention. In all these reported cases, however, the book in question was the *chaukidar's* pocket-book and not the Death Register kept at the Police station. The cases reported as *Sampat* v. *Gauri Shankar* (4), *Habib-ullah* v. *Emperor* (5), *Bisheshar Dayal* v. *Hira Lal* (6) and *Mohammad Jafar* v. *Emperor* (7) are thus distinguishable. On the other hand it has been laid down in the case of *Tamiz-ud-din Sarkar* v. *Taju* (8) and in the case of *Zaibunnissa* v. *Hasratunnissa* (9) that the death register kept at the Police station is an official book, and the entries in it are legally admissible. A somewhat similar view has been expressed in the case of *Devarapalli Ramalinga Reddi* v. *Srigiriraju Kotayya* (10).

Under the Police Act (V of 1861), s. 12, the Inspector-General of Police is authorised to frame orders and rules relative to, amongst others, the collecting and communicating by them of intelligence and information, etc. Under the Police Regulations, Ch. XXIV, para. 274, sub-cl. (4) the head *muharrir* of every Police station officer has to keep registers of births and deaths and make entries therein as reported by the village *chaukidars*. There are prescribed forms Nos. 1 and 5 which have to be used for that matter. The register in question contains printed pages of the form No. 5 and it was manifestly kept at the Police station and later on forwarded to head-quarters. The mere fact that the entries in it are made in chronological order would not show that this document is not an official book. We are clearly of opinion that this register was an official book, register or record made by a public servant in the discharge of his official duty within the meaning of s. 35 of the Indian Evidence Act. An entry made therein would, therefore, be itself a relevant fact.

Mr. Dhar, who argued the case on behalf of another set of respondents, has strongly contended that even if the register is an official book within the meaning of s. 35 and even if an entry in it is a relevant fact, the register must either be proved by some evidence or be shown to come within the scope of s. 81 of the Indian Evidence Act. It cannot be denied that there is no oral evidence on the record that this was the identical register which was kept at the Police station Etmadpur in which circle village Brijnathu where *Musammat* Mohini died is situated. All that is known is that this was brought in Court from the Record Room at head-quarters by a clerk named Abdul Ghani. Mr. Dhar has, therefore, contended that the Court can presume its genuineness under s. 81 of the Evidence Act only when it is shown that this is a document directed by any law to be kept by any person and if such document is kept substantially in the form required by law and is produced from proper custody. His argument is that the Police Regulation para. 274, sub-cl. (5) enjoins the keeping of a register with separate pages assigned for each village and that, therefore, this register is not

(4) 10 Ind. Cas. 713; 14 O. C. 68.
(5) 18 Ind. Cas. 653; 15 O. C. 351 at p. 356; 14 Cr. L. J. 93.
(6) 36 Ind. Cas. 941; 19 O. C. 221; 4 O. L. J. 49.
(7) 54 Ind. Cas. 166; 22 O. C. 250; 6 O. L. J. 577; 21 Cr. L. J. 22.
(8) 46 Ind. Cas. 237; 46 C. 152; 22 C. W. N. 822.
(9) 52 Ind. Cas. 162; 22 O. C. 124; 1 U. P. L. R. (O.) 1.
(10) 41 Ind. Cas. 286; 41 M. 26; 22 M. L. T. 17; 33 M. L. J. 60; (1917) M. W. N. 558; 6 L. W. 246.

kept substantially in the form required by law, assuming that the law requires it to be kept. He has argued that it was, therefore, incumbent on the plaintiffs to lead evidence to prove the identity of this register and to show that it is this very register which has come from the Record Room and which was the register kept at the Police station. The answer to this objection is that in addition to the original register the plaintiffs have produced a certified copy of its entry, and a certificate is endorsed on it purporting to have been given by an authorized officer. The correctness of the copy must, therefore, be presumed under s. 79 of the Evidence Act. This copy removes all doubt as to any possible mistake in the identity. We have already said that the entry in the daily death register is corroborated by the statement contained in the plaint of 1908. These two pieces of evidence, even excluding the other register, are very strong evidence of the exact date of the death of *Musammat* Mohini. As against this we have no rebutting evidence whatsoever except the solitary statement of Jhamman Lal, the brother of *Musammat* Mohini. We have already said that Jhamman Lal when sued in 1908 by Ram Prasad did not specifically deny the correctness of the date. In the witness-box he did not appear to be a man possessing a retentive memory.

There is, of course, always a possibility that the date given by Ram Prasad in his plaint might not have been the exact date or that the date as reported by the *chaukidar* was not the correct date. But in the absence of any other reliable evidence there is no reasonable ground for doubting that the statements contained in these two independent documents, which corroborate each other, were inaccurate.

We accordingly hold that the plaintiffs have established that *Musammat* Mohini died on the 18th of December 1907, and that, therefore, the present claim was in no way barred by time.

The next point which we propose to consider is the question of Ram Prasad's adoption.

The plea of *res judicata* is raised in connection with this issue and is based on the following circumstances. Kallu Misra had admittedly brought up Ram Prasad in his house from his childhood. It is the defendants' case that he even performed Ram Prasad's *janeo* ceremony and marriage ceremony, but the evidence as to this consists of the solitary statement of Jhamman Lal and is, therefore, not necessarily strong. There can be no doubt, however, that Ram Prasad had been living in Kallu Misra's house when he died and continued to live for some time longer. On the 20th of August 1897, he executed a bond in which he asserted that he was the adopted son of the deceased Kallu Misra. *Musammat* Mohini promptly instituted a suit on the 26th of November 1897, for a declaration that Ram Prasad was not the adopted son of Kallu Misra and that the bond referred to above was altogether invalid and ineffectual. Ram Prasad filed a written statement on the 18th of December 1897 in which he put forward his claim of a valid adoption. The parties, however, entered into an agreement to refer all their disputes to arbitration and the Court referred the matter to the arbitration of three arbitrators. Two of these three arbitrators are proved in this case to have been residents of the same *mohalla* Kachahri Ghat where Kallu Misra used to live and one of these two, namely, Ganga Prasad used to live in a house which was in front of Kallu Misra's house, the two houses being separated only by a road. Ganga Prasad's son Mahabir Prasad proves this. On the 24th of February 1898, the arbitrators delivered their award in which they stated that they were empowered under the agreement to decide the dispute between the parties, without having regard for the issues and without taking any evidence. They expressed the opinion "Ram Prasad is the son and the proper heir of Kallu Misra deceased." Then they proceeded to direct that out of the entire estate left by him one house was to remain in the possession of *Musammat* Mohini for life and to go to Ram Prasad after her death and that two houses were to vest absolutely in her with full power of alienation. Ram Prasad filed objections to this award on the 14th of March 1898. The Court, however, disallowed these objections on the 25th of March 1898, and ordered that a decree be prepared in accordance with the award. A decree was accordingly prepared which bears the date 25th of March 1898.

The learned Subordinate Judge has held this decree not to be binding on the plaintiffs on the ground that, in his opinion, it was not passed after a fair trial, but

merely embodied a private settlement of the dispute, the arbitrators having been given power to decide the case without taking any evidence and without having regard to the issues framed. There is not much evidence on the record to indicate any peculiar circumstances under which the proceedings had been conducted. All that we know is that there was one sitting of the arbitrators. At least two of the arbitrators were residents of the same *mohalla* and there is nothing strange if they had been given power to decide the case on their own personal knowledge without taking any further evidence. The suit was a contested one and the award was made after the case had been referred to the arbitrators under an order of the Court. Objections were also filed to the award and they were disallowed. We are, therefore, entitled to presume in the absence of any satisfactory evidence to the contrary that the Court at that time was satisfied that it was a *bona fide* litigation and not a collusive or fraudulent one. We find it impossible to fix upon any particular circumstance which would justify us in holding that there was not a fair trial at all. Decrees of Courts are not to be lightly treated on a mere suspicion and on a mere supposition based on no substantial evidence, that they are collusive. We are, therefore, unable to agree with the view which the learned Subordinate Judge has taken of the arbitration proceedings.

Musammat Mohini represented the whole estate for the time being. The reversioners had then no rights *in præsenti*. Her claim was to avoid the adoption set up by Ram Prasad. The suit was, therefore, brought not only in her own interest but in the interests of the whole body of reversioners who would be entitled to the property after her death. If the adoption were to be upheld the line of the reversioners would be altogether cut off. The suit brought by *Musammat* Mohini must, therefore, be treated as a representative suit and all persons having a common interest must be deemed to have been represented through her under s. 11, Explanation 6 of the C. P. C. The defendants Nos. 7 and 8 are claiming through Ram Prasad, whereas the plaintiff No. 1 must be deemed to have been then represented by *Musammat* Mohini. The award and the decree, therefore, operate as *res judicata* between them.

Defendants Nos. 2 and 3 and defendant No. 9, as will be shown later, claim title under *Musammat* Mohini and, therefore, the plea of *res judicata* cannot be successfully urged on their behalf.

We now proceed to consider the question of adoption itself. The defendants rely on an agreement dated the 21st of April 1878 which purports to have been executed by Bansi the father of Ram Prasad in favour of Kallu Misra. The stamp of this document was sold to Bansi himself. The document purports to be more than 30 years old and there is nothing suspicious about it. It must, therefore, be presumed that it is a genuine document. It shows that Bansi was giving one of his sons named Ram Bakhsh to Kallu Misra in order that the latter might "make him his son." The learned Subordinate Judge has thought that this document negatives the theory of adoption. We think that if this document refers to the defendant No. 1 then it corroborates that theory. The name given in the document, however, is Ram Bakhsh. After adoption the original name of the boy is always changed. It is, therefore, not at all unlikely that Ram Prasad's original name was Ram Bakhsh. At the same time it cannot be denied that Bansi had more than one sons and there is a possibility that this agreement might have referred to an elder brother of his. We would, therefore, not say much more about it.

The next important evidence is the arbitration award to which we have already referred. Apart from all questions of its binding nature it is certainly a very strong piece of evidence inasmuch as it was pronounced by arbitrators two of whom were residents of the same *mohalla* as Kallu Misra and was pronounced when apparently a dispute arose for the first time. We consider it to have great weight.

We may next refer to a number of documents which have not been referred to by the learned Subordinate Judge in his judgment and which show that Ram Prasad ever since then has been consistently asserting himself as the adopted son of Kallu Misra. These assertions were made in documents of the following dates. The 12th of June 1898, the 6th of June 1899, the 10th of September 1899, the 31st of March 1900, the 14th of June 1900, the 19th of October 1907, the 17th of April 1908, the 16th of April 1912, the 12th of

February 1917, the 5th of February 1918, and also in the plaint dated the 5th of December 1919, and in the written statement in this case. It was not till Ram Prasad went into the witness-box that he denied a formal adoption. It is true that all these statements are mere admissions of Ram Prasad in his own favour, but they are admissible in order to show that adoption had been asserted all along. But a strong circumstance in support of the theory of adoption is to be found in the position taken up by Jhamman Lal when Ram Prasad brought a suit in 1908 against him. That suit was contested by Jhamman Lal and it was dismissed, and the decree was appealed against by Ram Prasad. It can not, therefore, be suggested for a moment that that litigation was a collusive one. In the plaint which Ram Prasad had filed he had described himself as the son of Kallu Misra. Jhamman Lal admitted the correctness of this statement. It is apparent that if Jhamman Lal did not know or did not believe that Ram Prasad was the adopted son of Kallu Misra, one of the pleas which he would have naturally taken, would have been that Ram Prasad had no *locus standi* to sue as he was not the adopted son of Kallu Misra at all. The admission by Jhamman Lal so soon after the death of *Musammat* Mohini, in our opinion, is of great significance. It is only on this former admission of Jhamman Lal that we are prepared to attach some importance to his deposition in this case, where he says that the adoption had in fact taken place. The other evidence produced on behalf of the defendants has not been believed by the Court below and we are not prepared to say that the learned Subordinate Judge was wrong in rejecting that testimony. As against all this evidence the plaintiffs have produced practically no evidence. Hakim Gayan Singh one of the plaintiffs merely stated that Ram Prasad was not the adopted son of Kallu Misra but when cross-examined had to admit that he had made no enquiries about it as he did not think that there was any need for it. As to Ram Prasad, it must be remembered that he had put forward the plea of adoption in his written statement, but when examined as a witness he stated that the ceremony of adoption had not been formally performed. He in fact gave up his plea of adoption by admitting that he was not a formally adopted son. The other contesting defendants, however, claim title under documents executed by *Musammat* Mohini or by Ram Prasad himself prior to the suit and are in no way bound by a subsequent adverse admission by Ram Prasad. His statement is merely a piece of evidence in the case which has to be considered for what it is worth. We may say at once that we are not prepared to place any reliance whatsoever on what Ram Prasad has stated in this case one way or the other. He is a totally unreliable witness who is capable of changing his statement to suit the occasion. He gave one date of *Musammat* Mohini's death in the plaint which he verified in 1908. He gave another date in the plaint which he verified in 1919, according to his personal knowledge and then ultimately stated in the witness-box that he had no personal knowledge of it.

The evidence on this issue, in our opinion, is all one sided and the learned Subordinate Judge was not right in holding that merely because the oral evidence produced by the defendants to prove the giving and the taking was not of a satisfactory nature the issue should be decided against them. It is to be noted that Ram Prasad has been asserting himself as an adopted son for a very long number of years. Although the reversioners of Kallu Misra were not bound to bring a declaratory suit in the lifetime of *Musammat* Mohini nevertheless they could have brought one if they wanted. They chose to wait for a long period till *Musammat* Mohini's death and then waited again till nearly 12 years after her death. The plaintiffs now at this long distance of time call upon the defendants who are mere transferees and not connected with the family of Kallu Misra or of Bansi, to prove that all the formalities required for a valid adoption were gone through in the seventies. After such a long lapse of time the defendants are entitled to fall back on the documentary evidence and the conduct of the parties. It is impossible now to expect that they would be able to produce eye-witnesses to this adoption. We are satisfied that the balance of evidence is entirely on the side of the defendants and that its weight has not been properly appreciated. They have fully discharged the burden of proving that the adoption had in fact taken place.

In the Court below there was an objection as to the validity of the adoption on the ground that Kallu Misra was a Kankubjya *Brahmin* and Bansi was a Sanadh *Brahmin* and it was suggested that an adoption of a Sanadh boy by a Kankubjya *Brahmin* was not valid. Two witnesses, namely, Shib Deo, plaintiff, and Suraj Prasad stated that such an adoption could not take place. We are unable to accept this contention. A registered sale-deed dated the 25th of January 1906 shows that Jhamman Lal is of the caste of Sanadh *Brahmin*. *Musammat* Mohini, therefore, must have been of the same caste. She was duly married to Kallu Misra who was a Kankubjya *Brahmin*. There was obviously, therefore, no bar to a marriage between them. Nor can the adoption of a boy belonging to the same sub-caste be held to be invalid. In the case of *Narain Singh* v. *Shiam Kali Kunwar* (11), the Oudh Bench of which one of us was a member held that for the purposes of inheritance each primary caste must adopt from within its own limits and that the adoption would not be invalid so long as the adoptive father and the adopted son belonged to sub-caste of the same primary caste. We, therefore, think that there is no force in this objection.

We have already indicated that so far as the pleadings went Shib Deo Misra and his transferees would in no case be entitled to the entire property left by Kallu Misra, as it is admitted that at the time of the death of *Musammat* Mohini when succession opened to the reversioners, there were more than one person entitled to it. In cases of such collateral succession the property inherited is the separate property of all the reversioners and does not go to the head of the family only. In order to get over this difficulty, the appellants relied on a Will which was produced by Ram Prasad at a very late stage in the case. In the plaint there was no suggestion that Kallu Misra had left any Will. Even in the written statement which Ram Prasad filed there was no suggestion that Kallu Misra had not died intestate. The story told by Ram Prasad is that soon after the death of *Musammat* Mohini he obtained possession of a large number of papers left by her and kept them since. He, however, did not discover that that bundle of papers contained this document. It was only a few months ago when certain other persons were examining the papers that this Will was discovered. We find it difficult to believe that Ram Prasad could have had possession of all these papers for a period of nearly ten years without getting them examined by some person. We agree with the learned Subordinate Judge that this document is a rank forgery and was manufactured for the purposes of this case. In this document Ram Prasad gets the temple and rights appertaining thereto, which alone now remain after the various transfers. On the other hand Shib Deo, to the exclusion of the other reversioners, gets the entire estate on the death of *Musammat* Mohini. It is clear that this document was prepared in order to benefit Ram Prasad and to benefit Shib Deo Misra and his transferees. Ram Prasad himself produced it in Court and is responsible for its production. Though we have a suspicion that it was produced in Court at the instance of at least some of the plaintiffs it is difficult to come to a conclusion as to which of them got it produced.

The learned Subordinate Judge has held this document to be a forgery on two internal circumstances afforded by the deed itself. At places where there were creases the ink used in the writing has spread out. This clearly indicates that some old paper was got hold of and written upon subsequently. It can also be shown that the boundaries of the house entered therein at No. 7 could not have been the boundaries which existed in 1887 which date the document purports to bear. The eastern boundary of Kallu Misra's house No. 7 is shown as Deoki's house and the western boundary as Hira Lal's house. These boundaries are the same which appear in a subsequent document of 1897, namely, the plaint filed by *Musammat* Mohini against Ram Prasad. It is suggested on behalf of the defendants that in forging the Will the boundaries of this house as given in the plaint of 1897, were copied out. Between 1887 and 1897, comes a sale-deed dated the 22nd of June 1890 executed by Ram Chandra in favour of Deoki Nandan. This document clearly recites that the house which was being sold by Ram Chandra was bounded on the east by the house of Deoki Nandan and on the west by the house of Kallu Misra. There is also a recital that this house of Ram Chandra had been in his family from the

(11) 25 Ind. Cas. 45; 17 O. C. 186.

time of his grandfather and had been acquired in 1874. It is clear, therefore, that in the year 1887, Ram Chandra's house intervened between Kallu Misra's house and Deoki Nandan's house. When, however, Deoki Nandan purchased Ram Chandra's house the latter house also became Deoki Nandan's, and this very well explains the eastern boundary as given in the plaint of 1897, for in that year Deoki Nandan's new house was situated to the east of Kallu's house. On the other hand in 1887 Deoki Nandan's house was not the eastern boundary of Kallu's house but it was Ram Chandra's house which was the eastern boundary. This internal evidence also shows that this document was not in existence before 1890.

There is another still more important circumstance which has not been detected by the Court below and which we may point out as conclusively establishing that the document Ex. 1 is a forgery. This document purports to have been executed on the 4th of October 1887, corresponding to *Aghan Badi* 3, *Sambat* 1944. A reference to the calendar at once makes it clear that the *Hindi* date corresponding to the 4th of October 1887, was *Katik Badi* 2 *Sambat* 1914, and the English date corresponding to *Aghan Badi* 3 *Sambat* 1944, was the 3rd of November 1887. It is manifest that a hopeless blunder was committed in putting down the two dates on this document. We have, therefore, no hesitation in rejecting this altogether.

Some attempt was made in the Court below to lead oral evidence to prove the signatures on this document. Hakim Gayan Singh plaintiff tries to prove the signature of Kallu Misra and so does Ram Prasad. While a third witness Ganeshi Lal tries to prove the signature of one of the attesting witnesses. We have examined their evidence and have come to the conclusion that no reliance can be placed on it. Gayan Singh is an interested witness and Ram Prasad is totally unreliable. Nor is the evidence of Ganeshi Lal in any way convincing.

We come now to the question of estoppel. Defendants Nos. 2 and 3 claim under a title derived from *Musammat* Mohini. On the 3rd of August 1898, *Musammat* Mohini made a gift of the house in her possession to Jagdhar her own brother. On the 25th of January 1906, Jagdhar sold it to Santan Lal and Lakhshmi Narain. On the 3rd of February 1910 Santan Lal and Lakhshmi Narain mortgaged it to Hardayal and Raj Narain. The mortgagees obtained a decree for sale on the basis of the mortgage-deed and purchased the property at auction on the 9th of March 1918. The previous deeds recited the award and the fact of Ram Prasad's adoption. The reversioners allowed the transferees Santan Lal and Lakhshmi Narain who were the ostensible owners to remain in possession even after the death of *Musammat* Mohini. We are satisfied that Har Dayal and Raj Narain were *bona fide* transferees for value after due enquiries. The claim as against them is barred by s. 41 of the Transfer of Property Act.

Defendants Nos. 7 and 8 derive title from Ram Prasad. After the death of *Musammat* Mohini, Ram Prasad remained in possession of the house which is now in their possession. He mortgaged it on the 18th of May 1910 to Behari Lal and then on the 3rd of October 1911 contracted to sell the equity of redemption to Badri Prasad. On the 16th of April 1912 he sold the equity of redemption to Badri Prasad the mortgagee. Defendants Nos. 7 and 8 are the sons of Badri Prasad. We are satisfied that Badri Prasad was a *bona fide* transferee for value and he had made due enquiries and acted in good faith on the strength of the award of the arbitrators which was recited in the previous title deed. The reversioners allowed Ram Prasad to remain in possession as ostensible owner and the transferees are protected.

Defendants Nos. 4, 5, 6 and 10 are also transferees but they have compromised their disputes and we are not now concerned with their rights in this appeal.

The case of defendant No. 9 Khubi stands on a slightly different footing. He took a mortgage from *Musammat* Mohini herself on the 17th of July 1898, and then took a sale-deed of the equity of redemption from her on the 11th of March 1899. He, therefore, derived title from *Musammat* Mohini herself and the deeds in his favour were executed in her lifetime. We are of opinion that a transferee from a Hindu widow who takes the property from her before the reversioner's right has accrued cannot successfully plead the bar of s. 41 of the Transfer of Property Act. Assuming that he was a *bona fide* transferee for value who has taken the property after due enquiry and believing in the validity of the award, it cannot be held that he has

taken it from an ostensible owner who was in possession with the consent, express or implied, of the reversioners. A Hindu widow enters into possession of her husband's estate by right and not with any express or implied consent of the reversioners. While she is alive the reversioners have no voice in the matter and have no right to intervene. She can continue in possession in spite of their protest. A transferee from such a person who is in possession by her own right and as to whose possession no consent of the reversioner can be implied by law, cannot claim the protection of s. 41 of the Transfer of Property Act.

The only point that remains now is the question of costs. The suit is failing substantially on a ground common to all the defendants, namely, the *factum* of the adoption of Ram Prasad. We think, therefore, that it is a case in which one set of costs only should be allowed to the defendants against the plaintiffs. The learned Subordinate Judge has not allowed separate costs though the decree that has been prepared gives the defendants separate costs on account of Pleaders' fees.

We accordingly dismiss this appeal with this modification that the plaintiffs' suit shall stand dismissed as against all the defendants. The plaintiffs will bear their own costs and pay the costs of all the defendants other than Ram Prasad in both Courts. The defendant Ram Prasad shall bear his own costs throughout. The total legal fee allowed will be the maximum taxable fee both in this Court and in the Court below. Fees in this Court will include fees on the higher scale.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 203 OF 1922.

December 10, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

AHMED SULEMAN JIVA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RANDER TOWN MUNICIPALITY—DEFENDANT—RESPONDENT.

Bombay District Municipal Act (III of 1901), ss. 96, 174—Reference to Collector—Advice by Collector, whether order—Order passed on application of person not owner, whether binding on owner—Application for permission to build—Municipality, power of, to refuse application.

Where before deciding a matter a Municipality refers it to the Collector for his advice and the Collector advises that a previous order passed by him should be adhered to, the advice given by the Collector cannot be treated as an order under s. 174 of the Bombay District Municipal Act, which only gives the Collector power to suspend an order which a Municipality has actually made. [p. 949, col. 2.]

Where a person who is not the owner of a piece of land makes an application to the Municipality for permission to build upon the land an order passed on such application is not binding on the real owner, and it is not necessary for the latter to have the order set aside. [p. 950, col. 1.]

A Municipality has no power on an application to build to pass an order which practically amounts to a refusal. It is entitled to direct, that the proposed building should be set back to a certain distance from the street but it is not entitled to order that on each side of the proposed building open spaces should be left with the object of preventing the applicant from building at all. Such an order is *ultra vires* of the Municipality and cannot be brought within its powers under s. 96 of the Bombay District Municipa Act. [p. 949, col. 2; p. 950, col. 1.]

First appeal from the decision of the District Judge, Surat, in Civil Suit No. 4 of 1924.

Mr. *G. N. Thakor* (with him Mr. *M. B. Dave*), for the Appellants.

Mr. *S. S. Patkar*, Government Pleader, for Respondent No. 2.

JUDGMENT.—The plaintiffs are owners of a house site at Rander which is 13 feet by 120 feet. On December 11, 1918, they gave notice to the Municipality of their intention to build a house on this site through their Attorney Ismail Hussen Jiva. On December 23, at a meeting of Managing Committee of the Municipality at which the application was considered it was resolved that the Committee were unable to interfere with the resolution previously passed by the General Board in the matter. On March 11, 1919, the matter came before a Special General Meeting of the Municipality, when it was decided (Ex. 68) that the Board was of opinion that permission could be granted on the applicants undertaking to leave off building on both sides of the land, namely, the east and west, that is to say, on their leaving a set-back on the east and west to the streets on which the land rebutted. Accordingly it was resolved that a letter should be written to the Collector and permission should be given on receiving a reply. The Collector replied on July 22, stating that he had seen the land and agreed with Mr. Anderson's order that the

land should not be allowed to be built upon except on the conditions made by him. According to those conditions 5 feet from the northern side and 5 feet from the southern side had to be left vacant, so that the owner would only be able to build on a strip 3 feet wide. That was really a refusal to permit the owner to build on his land.

So the General Board resolved on July 24, 1919, that Ismail Hussen should be informed that they could not make any alteration in the permission note granted by the General Board on July 19, 1915. That order was communicated to the plaintiffs on August 8, 1919, and it is really that order against which the plaintiffs have applied to the Court for relief. The history of the previous application for building on this land is as follows: One Fatma had given notice to build on the land in 1913 and the Municipality gave her permission but the order passed on that application by the Municipality was cancelled by the Collector acting under the powers given him under s. 174 of the Bombay District Municipal Act (Ex. 53). The Collector said "the Municipality should effect this (the prevention of excessive congestion) by requiring the landholder to leave a margin of five feet not built upon on each side of his proposed building (which is impossible). Since he cannot do that he cannot build at all." As a matter of fact Fatma who made the application was not the owner of the land. Then in 1915, one Mahomed Suleman Jiva, purporting to be a co-sharer in the land, had given notice to the Municipality of his intention to build, and on July 19, 1915, a resolution was passed that permission could be given on the condition that the building should be within the alignment in front, and 5 feet of space should be left open on each side. Before that order was passed Suleman died, and it is to that order to which the Municipality referrred in their letter of August 8, 1919, addressed to the plaintiffs' Attorney. The learned Judge in the Court below held that the suit was barred by limitation because it was not brought within six months from the orders of the Municipality in 1913 and 1915, and the resolutions of the Managing Committee dated December 23, 1918, and of the General Board dated July 24, 1919. On the other issues it was held that the Collector had power under s. 174 of the Bombay District Municipal Act to suspend the permission granted by the Municipality, and that the resolution of the Municipality, dated July 24, 1919, adhering to its order of 1915, was not illegal and *ultra vires*.

It seems to us that the real point which lies within a very small compass has not been perceived by the District Judge. The order on the resolution of July 24, 1919, was only communicated to the plaintiffs on August 8, 1919, and from that date the plaintiffs had six months' time within which to appeal to the Court for relief, and, therefore, the suit was within time. It is not a suit to set aside an order of the Collector. The only order of the Collector which we have before us was made in September 1913 on the application of Fatma, who was not the owner, to build on the land. It is true that the Municipality in 1919 before passing their order referred the matter to the Collector for his advice. The Collector advised that the previous order passed by Mr. Anderson should be adhered to, and this was incorporated in the terms of the order made on the plaintiffs' application. This advice given by the Collector in 1919, could not be an order under s. 174 of the Act, which only gives the Collector power to suspend an order which a Municipality has actually made.

Therefore, the only question is whether the order of the Municipality of August 8 was within their powers under s. 96 of the District Municipal Act.

We agree with the appellants' contention that the Municipality have no power on an application to build to pass an order which practically amounts to a refusal. They would be entitled to direct that the proposed building should be set back to a certain distance from the street, but they would not be entitled to order that on each side of the building open space should be left with the object of preventing the applicant from building at all.

On referring to the plaint we note that the land between the two streets on the east and west has been divided up into narrow strips, and it may be that the Collector thinks that in the interest of the inhabitants of the town an open space should be created in the block of buildings between the two streets. The question whether the Collector can, under the powers given to him by s. 174 of the Act, virtually deprive an owner of the use of his land without giving him compensation does not

arise in this case. In any event such improvements cannot be brought about by orders passed by the Municipality under s. 96 of the Act. The Municipality must acquire the land in the proper way if they wish to create open spaces. We think, therefore, that the order of August 8 was *ultra vires* of the Municipality to this extent that they had no power to direct the plaintiff to set back his building on the north and south so as to prevent him building on his own land.

The appeal will be allowed to that extent with costs in both the Courts.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 37 OF 1924.

December 23, 1924.

Present:—Mr. Dalal, J. C.

RAGHURAJ SINGH—DEFENDANT—APPELLANT

versus

Musammat MAJID-UN-NISSA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. VI, r. 17, O. XLI, r. 23—Remand, when can be made—Amendment of pleadings—Power of Court.

A remand should be made when a preliminary point only is decided or where the Trial Court has not understood the case and a new trial is desired. [p. 950, col. 2.]

The discretion of the Court under O. VI of r. 17 of the C. P. C. to allow amendment of pleadings is very wide. [p. 951, col. 1.]

Appeal against an order of the Additional Subordinate Judge, Sitapur, dated the 28th April 1924

Mr. *H. D. Chandra*, for the Appellant.

Mr. *Muhammad Ayub*, for the Respondents.

JUDGMENT.—Two grounds of appeal were argued in this Court:

(1) that the lower Appellate Court ought not to have permitted amendment of the plaint as it did, and

(2) that there was no necessity for the remand of the suit under O. XLI, r. 23, C. P. C.

The active plaintiffs are purchasers of ¾ths of the land in suit from two persons of the name of Dabhu Sah and Dooni Sah. Dabhu Sah is dead and Dooni Sah was the other plaintiff. The plaintiffs stated that they had received a grant from Shahi times of the plots in suit and were proprietors thereof. They called the contesting defendant *zemindar* of the village but stated in para. 3 of the plaint that he had nothing to do with the land in suit. In para. 9 it was urged that the plaintiffs were entitled to possession of the land as proprietors or by right of possession. What the scribe, who prepared the plaint, meant by "right of possession" he alone can tell.

In the Court of Trial all these contentions were brushed aside and the contest appears to have been on the ground that the plaintiffs were under-proprietors of the land in suit. On that footing the case was tried. This is the impression I have received from a very careful judgment of the Trial Court. If in the Trial Court any allegation had been pressed that the plaintiffs were proprietors or had some strange right by virtue of possession the officer presiding in the Court, who appears to have fully understood the facts of the case, would have noticed this contention. It often happens that things are adjusted by word of mouth in the Trial Court and strange fantastic assertions are made by the learned Counsel in the Appellate Court on the basis of written pleadings.

The Munsif of the Trial Court held that the plaintiffs were under-proprietors and passed a decree for possession of the ¾ths share purchased by the active plaintiffs, and granted a money decree for mesne profits.

From this decree an appeal was lodged and was heard by the Additional Subordinate Judge of Sitapur. He has written a rambling judgment and practically ordered the Trial Court to take upon itself a new trial on points already decided.

There was no reason whatsoever for a remand. A remand is made when a preliminary point only is decided, or where the Trial Court has not understood the case and a new trial is desired. In the present case nothing of the sort has happened. I am fully satisfied that what was agitated in the Trial Court was under-proprietary title and nothing else. The plaintiffs did not appeal on the ground that proprietary possession was not decreed to them. Even in the cross-objection there is nothing said as to decree of the ¾ths share. The cross-objections related only to the ¼th share of the property about which the suit was dismissed. Under the

circumstances the plaintiffs must be taken to have abandoned their claim to proprietary title, if they ever set it up, and the remand was quite wrong for an enquiry as to whether the plaintiffs were proprietors or not.

The Judge of the Trial Court definitely held that Dooni Sah had not been in possession during the period of limitation. This was a definite finding which the Appellate Court could have confirmed or set aside. It did not require any re-trial.

The question of jurisdiction is one of law and the lower Appellate Court could have decided it without remitting any issue.

As to whether the plaintiffs are this, or that, or the other, the Trial Court has definitely decided that they are not black or white or grey but are under-proprietors. This means that they are nothing else. These findings of fact could either have been accepted by the Appellate Court or set aside. There was no cause for a remand.

It is obvious to me, therefore, that the appeal ought to have been decided by the lower Appellate Court and not remanded.

As regards amendment the discretion of a Court under O. VI, r. 17 is very wide. The pleadings may be altered or amended in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. There is nothing unjust in putting down definitely the real issue between the parties that the plaintiffs were under-proprietors of the land in suit. The Trial Court has really gripped the contest between the parties and is quite correct in its statement that the real issue is whether the plaintiffs are under-proprietors or not. When this is definitely stated in the plaint no harm is done and such a definite statement was necessary for the purposes of determining the real question in controversy between the parties. The amendment shall, therefore, stand.

In the result I set aside the order of remand and direct the lower Appellate Court to decide the appeals finally without making any remand. The Trial Court has either affirmed or negatived all the contentions of the plaintiffs. The question of jurisdiction was not specifically referred to by the Trial Court, possibly because in his Court no Counsel troubled himself about it. That question, however, is one of law and does not require remand for decision.

Costs here shall abide the result and about other costs the lower Appellate shall give directions at the time it passes final orders in the appeal pending before it.

Z. K. *Order set aside.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 133 OF 1923.

December 11, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

KALLAPPA RAMAPPA DEYANNAWAR —DEFENDANTS—APPELLANTS

versus

BALWANT DASO BETTIGERI— PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 41—Charge created on property by decree—Judgment-debtor, whether ostensible owner—Transferee, whether gets good title.

A charge created by a decree on property in the possession of a judgment-debtor reduces his full ownership to a limited ownership and the judgment-debtor is in no better position than a mortgagor who retains for himself the equity of redemption, so that it is only the equity of redemption that he can dispose of. A transferee from such a judgment-debtor cannot claim the benefit of the provisions of s. 41 of the Transfer of Property Act. The judgment-debtor in such a case is not an "ostensible owner" within the meaning of the section so as to be able to give a good title to a transferee for value without notice. [p. 952, col. 1.]

Maina v. *Bachchi*, 28 A. 655; A. W. N. (1906) 165; 3 A. L. J. 551, referred to.

Second appeal from the decision of the Assistant Judge, Belgaum, in Appeal No. 181 of 1921, confirming the decree passed by the Subordinate Judge at Gokak, in Civil Suit No. 111 of 1916.

Mr. *H. C. Coyajee* (with him Mr. *Nilkanth Atmaram*), for the Appellants.

Mr. *Bahadurji* (with him Mr. *A. G. Desai*), for Respondents Nos. 1 and 2.

Mr. *Y. N. Nadkarni*, for Mr. *K. H. Kelkar*, for Respondent No. 3.

JUDGMENT.—This suit was originally dismissed on the ground that it was not competent according to the provisions of s. 47 of the C. P. C. In second appeal to this Court* we held that that decision was wrong, and setting aside the proceedings of both the lower Courts remand-

*Since reported as *Balwant* v. *Umabai*, 61 Ind. Cas. 287; 23 Bom. L. R. 254; 45 B. 812.—[*Ed.*]

ed the case to the Trial Court for decision on certain issues which this Court considered were the proper questions to be determined between the parties. It is now suggested that there was another issue which ought to have been sent down for trial, namely, whether the plaintiffs' objection to the sale advertised by the *mamlatdar* should have been considered, and whether the fact that the objections were not considered was sufficient to invalidate the sale. More than four years ago this Court passed that order, and now for the first time it has been suggested that that issue ought to have been remanded for trial. It is impossible now at this stage of the proceedings to consider that question. All the issues sent down by the High Court were found in favour of the plaintiffs, and consequently a decree was passed in their favour.

The important issue was the third issue: "whether the judgment-debtor was the ostensible owner of the suit lands with the consent, express or implied of the decree-holder within the meaning of s. 41 of the Transfer of Property Act." That would depend upon whether the charge created by the decree on the property in the possession of the judgment-debtor reduced his full ownership to a limited ownership. If his ownership was so reduced, then he could not be the ostensible owner so as to give a title to the transferee for value without notice. In *Maina* v. *Bachchi* (1), it was held "that, it being clear upon the construction of the decree that it was the intention of the parties to create a charge on the property for the payment of maintenance within the meaning of s. 100 of the Transfer of Property Act, the charge could be enforced against the *bona fide* transferees for value without notice." The following passage appears in the judgment at page 659*:—

"The Transfer of Property Act recognizes in the clearest manner that immovcable property can be made security for the payment of money by way of charge, just as it recognizes the various kinds of mortgages. It equally recognizes the right to enforce the mortgage or charge. It would appear that the provisions as to registration contained in the Registration and Transfer of Property Acts apply to charges (when created by acts of parties) just as much as to mortgages, and if they do so apply I can see very little reason for drawing a distinction between mortgages on the one hand and charges (within the meaning of s. 100) on the other, more particularly as registration amounts to notice."

It follows that there can be no difference between a decree directing that certain property should be a charge for the plaintiff's maintenance as decreed in the suit, and a decree directing, as in this case, that certain property should be a charge for payment of the decretal amount.

Consequently the judgment-debtor in this case was in no better position than a mortgagor who retains for himself the equity of redemption, so that it would only be the equity of redemption that he could dispose of. The result must be that the plaintiff only got at the sale what was left to the judgment-debtor, as he took the property subject to the charge created by the decree. The appeal must be allowed and the suit dismissed with costs throughout subject to any previous order thereon.

The plaintiff to pay costs of the present appellants throughout.

Z. K. *Appeal allowed.*

(1) 28 A. 655; A. W. N. (1906) 165; 3 A. L. J. 551.

*Page of 28 A.—[*Ed.*]

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS CASE No. 665 OF 1924.
April 3, 1925.

Present:—Mr. Justice Zafar Ali.

RAMJI LAL—DEFENDANT—PETITIONER

versus

THE FIRM LAKSHMI CHAND-HINGAN LAL—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Application filed beyond time—Extension of time—Ignorance of law, whether sufficient cause.

An application for leave to appeal as a pauper was filed beyond the period of limitation and the applicant alleged that he did not know what the prescribed period of limitation for the application was:

Held, that ignorance of law could not be accepted as sufficient cause for not filing the application within time.

Petition, under O. XLIV, r. 1, C. P. C., for leave to appeal to this Court in *forma pauperis* against the judgment and decree of the Subordinate Judge, First Class, Ambala, dated the 3rd March 1924.

Mr. *B. A. Cooper*, for the Petitioner.

Mr. *Shamair Chand* and Kanwar *Dalip*

Singh, Government Advocate, for the Respondent.

ORDER.—This is an application for leave to appeal as a pauper. The application is barred by time. Counsel for the applicant states that the latter did not know that it was to be filed within 30 days from the date of the decree, but ignorance of law cannot be accepted as a sufficient cause for not filing it within time. I dismiss it with costs on the ground that it is barred by time.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 68 OF 1923.

December 12, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

AMOLAKCHAND LADURAM—PLAINTIFFS—APPELLANT

versus

MOTILAL AGIARIRAM—DEFENDANT—RESPONDENT No. 1.

Civil Procedure Code (Act V of 1908), O. XXI, r. 66—Bombay High Court Civil Circular No. 69 (6), (7)—Hindu Law—Joint family—Decree against father as manager of family—Execution of decree—Sale of family property—Interest of sons, whether passes to purchaser.

A decree was passed against a Hindu father carrying on business in the name of the family as manager, and certain family property was sold in execution of the decree. In a suit by the sons of the judgment-debtor for a declaration that their interest in the property had not passed to the auction-purchaser:

Held, that the decree having been passed against the father as manager of the family the whole of the family property was liable for the family debt and that the whole interest of the family had passed to the purchaser. [p. 954, col. 2.]

First appeal from the decision of the First Class Subordinate Judge, at Dhulia, in Special Civil Suit No. 448 of 1921.

Mr. *G. N. Thakor* (with him Mr. *M. V. Bhat*), for the Appellants.

Mr. *V. S. Bhandarkar* (with him Mr. *Y. V. Bhandarkar*), for Respondent No. 1.

JUDGMENT.—The plaintiffs prayed for a declaration that their interest in the suit lands was neither put up to sale in *Darkhast* No. 199 of 1919 nor purchased by defendant No. 1 Motilal, and for partition. The plaintiffs are minors who with their father defendant No. 2 constituted a joint Hindu family. In 1915 Motilal filed a suit against the second defendant in the Bombay High Court in respect of certain trade transactions which defendant No. 2 had made with him as his Adatya in Bombay. Laduram was therein described 'as manager of the joint family consisting of himself and his minor sons and carrying on as such manager a joint family business at Mandal as a merchant.' Defendant No. 2 contended that he was an agriculturist, that the High Court had no jurisdiction, that the transactions sued on were all wagering transactions and made without any lawful consideration, and further set up a counter-claim against defendant No. 1. The High Court disallowing all these contentions passed a decree against the second defendant in favour of Motilal for Rs. 13,235-14-1 on December 16, 1918. In execution of that decree under *Darkhast* No. 119 of 1919 Motilal got attached certain lands of defendant No. 2. Out of them eight lands, the subject-matter of this suit, were purchased by Motilal himself with the Court's permission. In taking possession Motilal was obstructed by Bhuribai, the wife of the second defendant, purporting to act as the guardian of the minor sons on the ground that their interests in the lands had not been sold. This led to an application by Motilal for removal of the obstruction and delivery of possession of the entire lands to him. The Court granted that application and ordered possession to be given to him. The plaintiffs then filed this suit.

We do not quite follow the arguments which appear to have prevailed in the Trial Court on a preliminary point. The Judge said the suit should fail because the plaint had not been amended. It is a perfectly proper suit. In the circumstances of the case the sale had already been made to the purchaser, and, therefore, the plaintiffs had to sue for a declaration that their interest had not passed at the sale.

On the merits the plaintiff's claim was dismissed with costs on the ground that defendant No. 2 described himself as manager of the joint Hindu family, that the decree was against the family property, and that the sale by the Court was of the interest of all the members of the family, which thereupon passed to the purchaser.

The appellants rely upon the High Court Circular No. 69 (7), which purports to

give directions with regard to the preparation of the proclamation for sale in execution proceedings. In Circular No. 69 (6) it is said that the object of the enquiry under s. 287 of the C. P. C. of 1882, now O. XXI, r. 66 of the Code of 1908, is merely to collect particulars to be inserted in the proclamation for the information of intending purchasers. The conclusions arrived at in this enquiry are not subject to appeal, for they are not determinative between the parties. In sub-cl. (7) it is stated that the enquiry shall be completed as soon as possible. When it is finished, the proclamation of sale shall be prepared in the form prescribed (No. 29, Appendix E, Sch. I of the Code). If in the case of a Hindu judgment-debtor it is desired to sell the interest of any other member of the family (*e. g.*, that of a minor son or brother) the name of such member and the fact that his interest is being sold must be stated in the proclamation, as otherwise his interest will not pass to the purchaser. That would really mean that in all proclamations of sale, when the property of a Hindu judgment-debtor is put up for sale, and nothing is said about the interest of other members of his family, a condition should be implied that only his interest passes to the purchaser, even though he is described as the manager of the joint Hindu family, and it had not been suggested that the debt or claim for which the property was being sold was not a proper debt or claim against the family. Now the law with regard to such proclamations of sale is laid down in *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (1), where the facts are exactly similar to the facts in this case. The property which belonged to a joint Mitakshara family, consisting of a father and two sons, was sold in execution of decrees against the father, the order and notices providing for the sale of the right, title and interest of the judgment-debtor. It appeared from the circumstances in which the above words had been inserted, from the conduct of the sons, and the price paid by the execution creditor, that it was a sale of property over which the father had a disposing power. It was held that the substance and not the technicalities of the transaction should be regarded, and that the entire property passed to the purchaser. The observations in *Mahabir Pershad* v. *Moheswar Nath Sahai* (2) were affirmed. That case was followed by this Court in. *Dada Jinappa Vagiani* v. *Yesu* (3), where again there was a mortgage decree executed by the father the first defendant in the suit. The mortgagee purchased the property at the Court sale, and the plaintiff sued the first defendant and his sons to recover possession. The sons contended they were not parties to the prior suit and that their interests were not affected by the sale. No reference appears to have been made to the High Court Circular, and it was held that the interest of all the members of the family passed under the execution proceedings to the purchaser.

We have been referred to *Timmappa Devarabhatta* v. *Narsinha Timmayya* (4) and *Hanmandas Ramdayal* v. *Valabhdas Shankar Das* (5). In *Timmappa Devarabhatta* v. *Narsinha Timmayya* (4), the High Court Circular was actually incorporated in the proclamation and, therefore, the purchaser knew exactly what he was purchasing. If it had been expressly mentioned in the proclamation in this case that the interest of the father only passed, then undoubtedly the plaintiffs would be able to succeed.

But the Circular has not been incorporated in the proclamation of sale, and, therefore, we have to apply the ordinary law as laid down in the decided cases, in order to ascertain what passed to the purchaser, for the Circular cannot be considered as laying down the law by which we are bound, so that we must hold that the interests of the sons were not purchased, because they were not mentioned in the proclamation. Consequently as a decree was passed against the father carrying on business in the name of the family as manager, the whole of the family property was liable for the family debt, and when the property of the debtor was put up for sale, the whole interest of the family passed to the purchaser.

Therefore, we agree with the judgment of the Court below and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 39 Ind. Cas. 252; 44 I. A. 1; 19 Bom. L. R. 290; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 44 C. 524 (P. C.).

(2) 17 I. A. 11; 17 C. 584; 5 Sar. P. C. J. 489; 8 Ind. Dec. (N. s.) 929 (P. C.).

(3) 73 Ind. Cas. 402; 25 Bom. L. R. 491; (1923) A. I. R. (B.) 450.

(4) 21 Ind Cas. 123; 37 B. 631; 15 Bom. L. R. 794.

(5) 46 Ind. Cas. 133; 43 B. 17; 20 Bom. L. R. 472.

SIND JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATION No. 58 OF 1922.

January 30, 1924.

Present:—Mr. Raymond, A. J. C., and Mr. Kennedy, A. J. C.

FIRM OF AYASING-UTTAMSING—PLAINTIFFS—APPLICANTS

versus

FIRM OF CHETANDAS-TANOOMAL—DEFENDANTS—RESPONDENTS.

Procedure—Set-off, whether can be forced on defendant—Jurisdiction.

It is not for the plaintiff to force the defendant to claim a set-off.

A person claiming to recover a certain amount of money cannot claim the sum due from him to the defendant on an altogether different transaction and thus bring his claim within the jurisdiction of a Small Cause Court.

Application to revise an order of the Judge of the Small Cause Court, Karachi, in Suit No. 4316 of 1921.

Mr. *Lunindaram T. Bolakani*, for the Applicants.

Mr. *Srikishindas H. Lulla*, for the Opponents.

JUDGMENT.—This suit by the applicant seems to have been an extremely vicious suit. His allegation was that in October and December 1918 transactions took place between him and the defendant which led to the defendant owing him a sum of Rs. 3,275 odd. He wished naturally to recover this from the defendants and as the defendants were unwilling to pay, he was desirous of bringing an action. But as he was reluctant to pay the Court-fees and as he wished to get the benefit of the summary procedure of the Small Cause Court, he proceeded to allege that on the 23rd of August 1918, another and totally unconnected transaction had taken place between himself and the defendant—the result being that he became liable in the sum of Rs. 2,304 odd to the defendants. He, therefore, in his plaint filed in the Small Cause Court proceeded to deduct Rs. 2,304 odd from Rs. 3,275 odd and put in a prayer for decree in respect of the sum of Rs. 970 odd —thus bringing the claim within the jurisdiction of the Small Cause Court.

The Small Cause Court rightly, in our opinion, held that it had no jurisdiction to try the suit and returned the plaint for being presented to the proper Court.

We say that the Small Cause Court was right in this because it is clear that the plaintiff had no right to bring a suit in that manner. There was no question as to there being any account between the plaintiff and the defendant so that plaintiff was entitled to sue for the balance due at the foot of the account. There had been no settlement or agreement between the parties set up that one claim was to be deducted from the other. It is not for the plaintiff to force the defendant to claim a set-off. The correct procedure for the plaintiff was to file a suit in this Court for the sum of Rs. 3,275 odd leaving it for the defendant, if so advised, to put in a counter-claim or claim a set-off for Rs. 3,204 odd. Otherwise it is possible they might have been induced to settle up the accounts on both the transactions and could have brought an action on the amount due at the foot of the account.

It appears that the procedure adopted by the plaintiff is wholly illegal and is highly inconvenient. It is quite obvious that this system of forcing a set-off on to the defendants might easily be the means of unduly extending the jurisdiction of the Court of Small Cause so that cases which refer to larger sums and are of high complexity might by this artifice be brought between the jurisdiction of the Small Cause Courts.

We, therefore, think that the Small Cause Court was perfectly right in refusing to entertain this suit in its present form.

What the plaintiff now wishes to do after gathering our opinion is to allow him an opportunity to amend his plaint. It is very difficult to see how he can amend. His claim for Rs. 3,275 odd is apparently barred. If he agrees to reduce his claim to Rs. 970 odd without any reference to the counter-claim by the defendant, it is by no means certain that the counter-claim of the defendants will be barred. In any case, he ran the risk and cannot complain of when the chance proves unfavourable to him if he has to pay the penalty. In this case the plaintiff ran the risk of getting his claim rejected or suffering other inconveniences in consideration of the hope that he might get a cheap and speedy relief in respect of the balance of his claim and if in this attempt he has failed, he cannot legitimately complain if he has to pay the penalty.

It seems to us, therefore, all that we can do in this case is to dismiss this application with costs.

K. S. D. *Application dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 115 OF 1924.

January 21, 1925.

Present:—Mr. Dalal, A. J. C.

KANHAYA BAKHSH SINGH AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

SHEO NATH AND ANOTHER—DEFENDANTS —RESPONDENTS.

Oudh Laws Act (XVIII of 1876), s. 9—Pre-emption—Member of village community, who is—Admission of fact and admission of law—Admission of fact made by Pleader, whether binding on party.

An admission made by a Pleader on a point of law is not binding on the party whom he represents. [p. 956, col. 2.]

Whether an admission is one of law or of fact, must depend upon the circumstances of each case. [*ibid.*]

In the matter of pre-emption ownership of land is the one condition of the membership of the village community for the purpose of s. 9 of the Oudh Laws Act. It is immaterial whether the land consists of one plot only on which no revenue is assessed. The owner of a plot of land in the village on which there stands a grove for which no Government revenue is paid is a co-sharer for the purpose of pre-emption within the meaning of the Oudh Laws Act. [p. 957, col. 1.]

An admission of a Pleader that a certain person owns land in the village so as to be a member of the village community within the meaning of s. 9 of the Oudh Laws Act is an admission of fact and not one of law and is binding on the party whom the Pleader represents. [*ibid.*]

Appeal against a decree of the District Judge, Fyzabad, dated the 16th January 1924, reversing that of the Subordinate Judge, Sultanpur, dated the 25th October 1923.

Mr. *St. G. Jackson*, for the Appellants.

Mr. *G. N. Misra*, for the Respondents.

JUDGMENT.—The plaintiffs sued Sheonath and Sant Bakhsh for pre-emption under s. 9 of the Oudh Laws Act. The plaintiffs are co-sharers in Mahal Zemin Bahadur Singh, the defendant Sheonath is a co-sharer in Mahal Gaura Baraman and the property in suit is situated in Mahal Badri Singh. Obviously, therefore, the plaintiffs and Sheonath fall within the 3rd class mentioned in s. 9 and they are all members of the village community with respect to the property sold. The sale-deed specifies the shares of the vendees and Sheonath is purchaser of one-half.

The defence of Sant Bakhsh was that he also belonged to the village community because he was owner of groves together with the land on which those groves stand and of stray trees, wells, etc., in the village. He also claimed that he had equal right of purchase with the plaintiffs. Evidence was led on behalf of both the parties and after evidence was closed on both sides on 25th October 1923, certain proceedings were recorded by the Trial Court. It was admitted there by the Pleaders of parties that the plaintiffs and both the defendants were members of a village community, and, therefore, equally entitled to pre-empt. The Court, thereupon, made a note that in such a case lots must be drawn.

The Court then proceeded to judgment on the question whether the plaintiffs had notice of the sale and refused to purchase and as regards the sale price entered in the deed. On these points the findings being against the defendants as to notice and against the plaintiffs as to the sale price, lots were drawn and the defendants were determined to be the persons entitled to purchase by success in drawing the lot.

The suit was dismissed in consequence. On appeal to the lower Appellate Court it was pleaded that the admission of the plaintiffs' Pleader as regards Sant Bakhsh was an admission on a point of law and not binding on the plaintiffs. This argument was not accepted by that Court and the appeal was dismissed.

In second appeal the same argument is advanced. As regards Sheonath there is no cause for appeal because admittedly the plaintiffs and Sheonath are members of the village community as regards vended property and they all come within cl. (3) of s. 9 of the Oudh Laws Act. The plaintiffs have no preferential aight of purchase as regards him.

The point of law urged by the learned Counsel for the appellants is correct but in the present case the admission is not one of law. If the Pleader had made a mistake in thinking that on certain conditions Sant Bakhsh was a member of the village community the admission would be considered one of law and the plaintiffs would not be held bound thereby. In the present case the issue was one of fact because Sant Bakhsh alleged that he was owner of land as well as of a grove standing thereon. If he was the owner of the land as well as of the grove, no mistake in law was made by the Pleader in making the admission which he did. Whether the admission is one of law or fact will depend upon the circumstances of

every case. It has been settled law here that in the matter of pre-emption ownership of land is the one condition of membership of the village community for the purpose of s. 9 of the Oudh Laws Act—see *Narendra Bahadur Singh* v. *Balkaran Singh* (1). It does not matter if the land consists of one plot only on which no revenue is assessed. As pointed out by a Bench of this Court in *Aulad Husain* v. *Zainab-un-nissa* (2), the payment of revenue cannot be a criterion, for proof of share in the village or of ownership of land because if it were, *muafi*-holders would not be considered co-sharers. In that case the Bench re-affirmed a decision of a Single Judge reported in the same volume at page 86 [*Ram Kishun* v. *Nadir Hussain* (3)] that the owner of a plot of land in the village on which there stands a grove for which no Government revenue is paid is a co-sharer for the purposes of pre-emption within the meaning of the Oudh Laws Act. The case where a grove-holder was not held to be a member of the village community was one where the owner of the grove did not own the land underneath —*Gangoll* v. *Kamar Ali Khan* (4). In that case also the learned Judges quoted with approval the case of *Narendra Bahadur Singh* v. *Balkaran Singh* (1) already quoted in this judgment.

The learned Counsel for the appellants here argued that what Sant Bakhsh owns is only the trees and not the land on which the trees stand. In view of the admission of the Pleader in the Trial Court I shall not inquire into this matter here. I take the admission of the Pleader to amount to an admission of fact that Sant Bakhsh did own the land of the grove purchased by him in 1896 (Ex. A-2). The admission would have been one of law if the learned Counsel for the appellants here had satisfied me that even where a grove-holder holds the land on which the grove stands he would not be a member of the village community. In such a case it may be argued that the Pleader had made a mistake as to the law applicable in cases of pre-emption. If it is admitted that Sant Bakhsh is owner of the land of his grove, he would under the prevailing law of pre-emption in Oudh be a member of the village community; so when such an admission is made by a Pleader it cannot be said that the admission was defective in law. For these reasons I am of opinion that the plaintiffs cannot go behind their Pleader's admission in this appeal.

I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 7 O. C. 275.
(2) 10 O. C. 225.
(3) 10 C. C. 86.
(4) 7 Ind. Cas. 613; 13 O. C. 202.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 427 OF 1923.
January 9, 1925.
Present:—Mr. Hallifax, A. J. C.
SHIOGOPAL—PLAINTIFF—APPELLANT
versus
SUKHRU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (V. of 1920), s. 28—Hindu Law—Joint family—Insolvency of father—Share of sons, whether vests in Receiver—Transfer after adjudication, validity of.

When a member of a joint Hindu family is adjudicated as an insolvent, the undivided share of his sons but not that of other members of the family, vests in the Receiver, though the sons' share would not be liable for any debts which they could prove to be illegal or immoral. [p. 958, col. 2.]

Fakirchand Motichand v. *Motichand Hurruckchand*, 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294, *Rangayya Chetti* v. *Thanikachalla Mudali*, 19 M. 74; 6 Ind Dec. (N. S.) 757, *Bawan Das* v. *O. M. Ghiene*, 64 Ind Cas. 976; 20 A. L. J. 155; (1922) A. I. R. (A.) 79; 44 A. 316 and *Sita Ram* v. *Beni Prasad*, 84 Ind. Cas. 790; 22 A. L. J. 1097; L. R. 6 A. 109 Civ., followed.

Section 28 of the Provincial Insolvency Act protects the secured creditor in respect of his security, but it does not protect the insolvent in respect of a voluntary transfer of his property. [*ibid.*]

Appeal against the decision of the District Judge, Raipur, dated the 6th July, 1923, in Civil Miscellaneous Appeal No. 3 of 1923.

Dr. *H. S. Gour*, for the Appellant.
Sir *B. K. Bose*, for Respondent No. 1.

JUDGMENT.—On the 17th of September 1918 Bhuni Sonar, the Manager of a joint Hindu family consisting of himself and his two sons, executed in favour of the appellant Shiogopal a mortgage by conditional sale of a village share belonging to the family. In June 1919 the amount due on the mortgage was Rs. 700. On the 15th of March 1919, Bhuni Sonar applied to be adjudged an insolvent, and was so adjudged on the 26th of April 1919.

The appellant Shiogopal was aware of Bhuni's insolvency, though it seems quite probable that he was not aware of

the legal effects and bearings of the adjudication, and acted quite honestly according to his own dim lights. Anyhow on the 17th of June of the same year he bought the whole of the share mortgaged to him for Rs. 2,000. Of this sum Rs. 700 went to pay off his own mortgage and the insolvent, paid off unsecured debts of Rs. 210, Rs. 155, Rs. 647 and Rs. 350 to four other persons, making Rs. 2,062 in all.

One of these creditors had applied to the Insolvency Court before his debt was paid off to have the sale declared void as in contravention of s. 28 of the Provincial Insolvency Act, 1920, or rather of s. 16 of the Act then in force, which was Act III of 1907. He, of course, withdrew the application as soon as his debt was paid but equally, of course, another creditor who had not been paid off appeared in his place, and the sale was set aside.

The main reliance of the appellant, who seeks to support the sale to himself, is on sub-ss. (5) and (6) of the Provincial Insolvency Act, 1907, which are re-produced without change in sub-s. (6) of s. 28 of Act V of 1920. In this connection the learned District Judge has distinguished the case of *Shiam Sarup* v. *Nand Ram* (1) by finding that in that case the mortgagee who was paid off by means of another mortgage was apparently "the principal if not the only creditor" of the insolvent. If that were so, how could there be any adjudication of insolvency, and who attacked the transfer? I cannot, however, see that the view of the meaning of s. 28 of the Insolvency Act as applied to that case differs at all from that taken by the learned Judge himself, which seems the only possible view of the meaning of the plain words of the section.

The appellant came into Court not as a mortgagee at all but as a full owner by purchase. He first bought the property, that is to say, the equity of redemption which had already vested in the Receiver. It was after that purchase that he proceeded to realise his security by receiving payment of the mortgage-debt from the insolvent. The latter did in fact pay the mortgage-debt out of the money paid to him for the equity of redemption but that makes no difference either way. Section 28 protects the secured creditor in respect of his security, but it does not protect the insolvent in respect of a voluntary transfer of his property.

A further contention, put forward apparently for the first time in this Court, is that as the insolvent has two sons it was only one-third of the village share that vested in the Receiver, and the sale is good for the two-thirds share belonging to the sons. The argument has an appearance of ingenuity but is unsound. Any unsecured creditor can bring the whole of the family property to sale for a debt due by the insolvent, unless his sons can prove the debt to be "illegal or immoral", the burden of proving this being on them. The insolvent could sell his sons' share in the property for the same purpose and subject only to the same restriction. This right is transferred to the Receiver when the father is adjudicated an insolvent. It appears to me beyond question that when a member of a joint Hindu family is so adjudicated the undivided shares of his sons, though not those of other members of the family, vest in the Receiver, though the sons' shares would not be liable for any debts which they could prove to be "illegal or immoral." This view has been accepted as sound in Bombay in *Fakirchand Motichand* v. *Motichand Hurruckchand* (2) in Madras in *Rangayya Chetti* v. *Thanikachalla Mudali* (3) and in Allahabad in *Bawan Das* v. *O. M. Chiene* (4) and the very recent case of *Sita Ram* v. *Beni Prasad* (5).

It is pointed out by the learned Counsel for the appellant that considerable hardship has been caused to him by the avoidance of his sale; as has been said, he probably acted in good faith according to his lights, and though he still has his mortgage, which he can enforce, he loses the Rs. 1,300 paid to the other creditors. But he can go on the schedule for that sum, which is due to him by the insolvent under s. 65 of the Contract Act, and the Court will be bound under s. 54 of the Insolvency Act, apparently of its own motion and without any application, to annul the payments made by the insolvent

(1) 63 Ind. Cas. 366; 43 A. 555; 19 A. L. J. 511.

(2) 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294.

(3) 19 M. 74; 6 Ind. Dec. (N. S.) 757.

(4) 64 Ind. Cas. 976; 20 A. L. J. 155; (1922) A. I. R. (A.) 79; 44 A. 316.

(5) 84 Ind. Cas. 790; 22 A. L. J. 1097; L. R. 6 A. 109 Civ.

to the other creditors, and then take steps for the recovery of the amounts so paid. The appellant will then be entitled to his proportionate share of his Rs. 1,300 along with the other creditors. It ought not to be difficult to induce the other creditors to forego the fraudulent preference each of them has obtained by refunding the amount paid to him and sharing in the general rateable distribution. It might be pointed out to each of them that a refusal to refund means a civil suit against him of which the inevitable result is a decree for the whole amount with costs and possibly interest, and may even mean that he does not share in the eventual rateable distribution. The appeal will be dismissed and the appellant must pay all the costs.

G. R. D.
Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 92 OF 1924.
January 15, 1925.

Present:—Mr. Dalal, J. C.

Lala HARI KISHEN DASS—DEFENDANT—APPELLANT

versus

MAIKU LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Under-proprietary title—Mortgage of tenancy rights—Acceptance of rent—Estoppel—Appeal, second—Finding of fact—Evidence, absence of, effect of.

Where there is an entire absence of evidence the High Court is entitled to interfere with a finding of fact in second appeal. [p. 959, col. 2.]

A landlord may accept rent from a mortgagee of tenancy land though the mortgage may be invalid under the law. The mere acceptance of rent in such a case does not indicate that the tenant was the owner of an under-proprietary holding, nor is the landlord estopped from contending that the tenant has no such title. [p. 960, col. 1.]

Second appeal, under s. 100, C. P. C., against a decree of the Subordinate Judge, Hardoi, dated the 28th February 1923, reversing that of the Munsif, Sandila, dated the 22nd April 1922.

Mr. *M. H. D. Chandra*, for the Appellant.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—The question at issue is whether the plaintiff Maiku Lal, who is a mortgagee of certain plots, is entitled to obtain possession of those plots after ejectment by the Revenue Court. His plea, which was repelled by the Trial Court was that the plots over which he had possession as a mortgagee consisted of land in which his mortgagor had under-proprietary interest. On appeal by the plaintiff the lower Appellate Court in a confused judgment held that the tenure was under-proprietary. The judgment consists mostly of a catalogue of documents without discrimination or discussion. I have gone through the record and do not find an atom of evidence to support the claim of the plaintiff to under-proprietary tenure for his mortgagor. When there is an entire absence of evidence this Court is entitled to interfere with a finding of fact.

The only record in which the holding is shown as an under-proprietary tenure is the *khasra* of the last Settlement. This entry was copied in the yearly *khasra* upto 1308*F*. for seven years. In that year the entries were checked by some officer and after that year the record was of ordinary tenancy and not of an under-proprietary tenure.

The *wajib-ul-arz* of the first Settlement (copy Ex. 2) most abundantly proves that the mortgagor had only the rights of a grove-holder to own the trees standing on this plot. In para. 2 the *taluqdars* and owners to whom plots of land had been decreed are declared to have the right of transfer. Then the following clause appears, *bajuz* (that is with this exception) the groves entered in a list subjoined were planted with the permission of the *zemindar* and the grove-holders of those groves had no right of transfer. The lower Appellate Court has made no attempt to translate this Urdu entry, so this Court is not able to state how that Court interpreted the entry. Possibly it read the word *bajuz* along with the following clause which would make that clause meaningless. Obviously the word *bajuz* means that with the exception of what has gone before. This plot was not mentioned in the *khatauni* prepared at the time of Settlement (copy Ex. A-12) which gave a list of under-proprietary holdings. The entry in the list of groves that the grove was *maurusi* (ancestral) and under mortgage does not indicate under-proprietary rights of the mortgagor. A note is made that no trees stood on the land at the time. The grove may have been ancestral but when the trees are removed the holder thereof becomes an ordinary tenant

of the land. He was so treated by the Revenue Court and his mortgagee was rightly ejected.

Reference was made by the respondent's learned Counsel to receipts granted by the defendant-appellant's agent to the plaintiff calling the plaintiff a mortgagee. There is no mention in these receipts of under-proprietary tenures. It was argued that when the plaintiff was called a mortgagee it must be understood that the *zemindar* held the land to be such as could be validly mortgaged. No such deduction can be drawn. The *zemindar* may accept rent from a mortgagee of tenancy land though the mortgage would be invalid under the law. No question of estoppel arises because these receipts were given long after the mortgage was effected.

There is no evidence whatsoever, however, wrongly it may be interpreted, on which a finding in favour of an under-proprietary tenure can be based. I, therefore, set aside the finding of the lower Appellate Court and uphold the finding of the Trial Courts.

I allow this appeal and dismiss the plaintiff's suit with costs of all the Courts.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 4419 OF 1925.

January 7, 1925.

Present:—Mr. Justice Srinivasa Iyengar.

MERUVA PARASURAMADU—PLAINTIFF—PETITIONER

versus

MANDAVILLI RAMANNA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLIV, r. 1, proviso—Leave to appeal in forma pauperis*—Principles applicable—Respondent,* locus standi *of, to be heard.*

On an application for leave to appeal in *forma pauperis* under r. 1 of O. XLIV of the C. P. C., all that is required under the proviso to the rule is that the Court before admitting the appeal should be satisfied that it is not merely a frivolous appeal, and that there are reasonable grounds for doubting the correctness or justness of the decision of the lower Court.

It is not necessary that the Court must go through the whole case and admit the appeal only if it is satisfied that it would reverse the decision of the lower Court there and then if no appearance were entered for the respondent.

Where such an application comes on for admission, the respondent has no *locus standi* to be heard.

Petition, under O. XLIV, r. 1 of the Act V of 1908, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant leave to the petitioner to appeal in *forma pauperis* against a decree of the Court of the Additional Subordinate Judge, Cocanada, in Original Suit No. 19 of 1924, (O. S. No. 84 of 1922 on the file of the Court of the Subordinate Judge, Cocanada).

Mr. *G. Lakshmanna*, for the Petitioner.

Mr. *P. Somasundaram*, for the Respondent.

ORDER.—I think this is a case in which leave to appeal should be granted under the provisions of O. XLIV, of the Procedure Code. Mr. P. Somasundram appeared without any notice on behalf of the respondent in the appeal and wished to be heard on the question whether having regard to the terms of the proviso to r. (1) of that Order there is such a case made out for the appellant as would justify me in saying that the judgment and the decree of the lower Court are erroneous or unjust. I am not satisfied that he has got any *locus standi* to appear at this stage and require to be heard, but I have nevertheless heard him, and even after hearing him I am not at all satisfied that the requirements of the proviso are not satisfied in this particular case. I cannot possibly read the terms of the proviso as indicating that I must go through the whole case and admit the appeal only if I am satisfied that I would reverse it there and then if no appearance was entered for the respondent. I take the terms in the proviso merely to indicate that the Court before admitting such a pauper appeal should be satisfied that it is not merely a frivolous appeal and that there are reasonable grounds for doubting the correctness or justness of the decision of the lower Court. In that view I consider that there is a great deal to be said with regard to the correctness of the decision of the lower Court and I, therefore, order that the appeal should be admitted.

V. N. V.
Z. K. *Appeal ordered to be admitted.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 37, 40, 45 AND 46 OF 1924.

April 14, 1924.

Present:—Mr. Kennedy, A. J. C.

ALLAHDITO AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 112, 117—Accused, admission by—Enquiry, whether necessary—Qualifications of sureties, whether can be altered.

Even where a person against whom an order under s. 112, Cr. P. C., has been made, on its being read over to him, admits the allegations in the said order, it is incumbent on the Court to proceed to make an inquiry as provided by s. 117 of the Cr. P. C.

A Magistrate has no right to introduce new qualifications while deciding on the suitability of sureties offered by the accused.

Quære.—Whether an order committing a person to prison on default of security being furnished, for a period to be specified later on is legal.

Appeals from Jail against an order of the Sub-Divisional Magistrate, Shah Bunder, dated the 17th December 1923.

Mr. *Naderbeg Mirza*, Third Assistant Public Prosecutor, for the Crown.

JUDGMENT.—In this case four persons were sent up before the Sub-Divisional Magistrate on the ground that they should furnish security under s. 110, C. P. C., because they are habitual thieves and bad characters. The Magistrate duly framed an order under s. 112 and the accused being in Court read it (the order) over to them. The accused admitted the allegations against them and the Magistrate thereupon proceeded to require them to produce two sureties of the sum of Rs. 500 and inasmuch as they failed to do so they were committed to Jail for a period which the Magistrate ultimately fixed at 12 months or until such sureties were produced.

Now the procedure adopted by the learned Magistrate was not in some respects strictly in accordance with the law as laid down in the Cr. P. C. Section 117, cls. 1 and 2 require that when an order under s. 112 has been read or explained under s. 113, to a person present in Court, when that person appears or is brought before the Magistrate in compliance with or in execution of a summons or warrant issued under s. 114, the Magistrate shall proceed to enquire into the truth of the information upon which action has been taken and take such further evidence as may appear necessary. By virtue of sub-s. 2 the enquiry is to proceed on the lines of an enquiry into a warrant case except that no charge need be framed. The order, therefore, on which the proceedings start is in no way a charge, but something more like a complaint and just as it would be unlawful or inexpedient to convict an accused person of a serious offence without ascertaining whether on the facts admitted a legal offence was committed, so it does not seem intended by the Code, that even where the accused persons do admit they fall under the categories given in s. 112, no enquiry should be made. It is obvious that the people exposed to the operation of Ch. VIII are often illiterate and ignorant people and a mere admission is not conclusive proof that they are persons who should be bound over. The whole Chapter is a chapter which vests extraordinary powers in the Police and the Magistracy and, if it is not to form an instrument of intolerable oppression it must be worked with the utmost discretion. The proper procedure, therefore, in the cases of these three appellants not having been followed the order of the learned Magistrate is set aside and the case remanded for disposal according to law.

In addition to the above remarks it is perhaps desirable to say that it is by no means clear to this Court, that the order of the Magistrate, dated the 17th December 1923, directing that the accused be detained in prison for a period to be specified hereafter is a legal order and it would also be a matter for discussion whether the amount of security demanded is not excessive and it is further to be noted that in the proceedings taken after the order of securities was made and the accused persons brought certain sureties, Magistrate irregularly introduced certain new qualifications while deciding on the suitability of these sureties. There is no word in the order about *khatedars* or tax-payers and the Magistrate had no right to reject the persons if they were otherwise suitable according to the terms of the order on the ground that they were not *khatedars*. The case will go back to the Magistrate. I set aside the proceedings subsequent to the drawing up of the order and I direct the learned Magistrate to dispose of the matter according to law.

K. S. D. *Order set aside.*

P. B. A.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 770 OF 1924.

January 19, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

BISHAMBHAR NATH BAJPAI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal trial—Charge, proof of—Liability for act of agent—Benefit of doubt—Penal Code (Act XLV of 1860), s. 409—Criminal breach of trust—Intention—Proof.

An important principle of Criminal Law is that the guilt of an accused person must not only be proved beyond any reasonable doubt but that it must be proved strictly in accordance with the law. An accused person is on his trial in respect of a particular charge and to import matters into the trials not relevant to the charge is equivalent to trying him as to matters on which he has no opportunity to defend himself. [p. 962, col. 2.]

Manna Lal v. *Emperor*, 75 Ind. Cas. 753; 27 O. C. 40; 9 O. & A. L. R. 947; 25 Cr. L. J. 49; (1925) A. I. R. (O.) 1, followed.

The criminal intention necessary to be proved in order to sustain a conviction under s. 409 of the Penal Code is a matter of inference from the facts proved. [p. 963, col 1.]

There can be no criminal liability for the act of an agent. [p. 964, col. 1.]

Where the conduct of the accused is as much consistent with his guilt as with his knowledge of the guilt of another and the anxiety to protect him, the benefit of the doubt must be given to the accused. [*ibid.*]

Appeal against an order of the Sessions Judge, Lucknow, dated the 22nd December 1924.

Dr. *J. N. Misra*, Messrs. *K. P. Misra* and *Harkaran Nath Misra*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—The appellant, Bishambhar Nath Bajpai, has been convicted and sentenced to three years' rigorous imprisonment under s. 409 of the Indian Penal Code by the learned Sessions Judge of Lucknow. The charge on which he has been tried stands as follows:—"That you between 8th May 1923 and 17th July 1923 at Unao being the managing Director of the Unao Town Bank and in such capacity entrusted with dominion over Rs. 17,000 committed criminal breach of trust in respect of the said amount of Rs. 17,000, and thereby committed an offence punishable under s. 409 of the Indian Penal Code." As a result of the trial the appellant can only be convicted on proof of the particular charge and on no other ground.

In my judgment the decision of the learned Judge has been influenced by several matters which are wholly extraneous to the charge under consideration. An important principle of Criminal Law is that the guilt should not only be proved beyond any reasonable doubt but that it should be proved strictly in accordance with law. The reason underlying the principle is obvious. The accused is on his trial in respect of a particular charge and to import matters into the trial not relevant to that charge is equivalent to trying him as to matters on which he has no opportunity to defend himself. I had had occasion to refer to this principle in a recent case of *Manna Lal* v. *Emperor* (1). It is, therefore, necessary to eliminate all extraneous matters from the consideration of this case.

In his judgment under appeal the learned Judge observed as follows:—"I must here refer to some incidents that took place before those on which the present charge is based. . . . . " Then he proceeds to relate those incidents and draw the inference that the conduct of the appellant was dishonest in respect of those incidents. The learned Judge thinks that those incidents are evidence under ss. 11 and 15 of the Indian Evidence Act. In my opinion they are not. There are other pieces of evidence which on the face of them are hear-say and consequently inadmissible. It is not necessary to recapitulate them here.

The case for the prosecution underlying the charge set forth above is as follows:—(1) That on the 8th May 1923 the appellant withdrew Rs. 2,000 (2) that on the 17th May 1923 he similarly withdrew Rs. 7,000 and, (3) that on the 11th June 1923 he again withdrew Rs. 5,000 and (4) finally on the 17th July 1923 he withdrew Rs. 3,000 from the Unao Town Bank with the ostensible object of placing them in deposit with the Oudh Commercial Bank but that he did not do so. This then is the substance of the charge. The learned Judge states the case for the prosecution in the following sentence:—"The case for the prosecution is that the accused never intended the money to reach the Oudh Commercial Bank and that in taking it himself or ordering it to be handed over to his brother-in-law he dishonestly mis-

(1) 75 Ind. Cas. 753; 27 O. C. 40; 9 O. & A. L. R. 947; 25 Cr. L. J. 49; (1925) A. I. R. (O.) 1.

appropriated it. It will be seen that there is no substantial difference between the version which the learned Judge has given and the one which I have given of the case for the prosecution except in so far that in stating the facts on proof of which the prosecution depends he has included, and rightly, the criminal intention of the accused as well. This intention is obviously a matter of inference from the facts proved. What then are the facts proved? It is proved beyond any reasonable doubt that the entire amount of Rs. 17,000 was paid on the dates mentioned above by the Unao Town Bank to one Gauri Shankar, who is the brother-in-law of the appellant, and not to the appellant. The finding of the learned Judge is not definite on that question of fact. At one place in his judgment he says:—"The direct evidence and the vouchers themselves point very strongly to the conclusion that the accused intended to put the money in the hands of Gauri Shanker even if he did not take it himself." At another place we find the following observation:—"What was necessary was for Gauri Shanker, *who had had the use of the money for some months*, to re-pay the principal....." (The italics are mine). Finally the learned Judge remarks:—"If the accused intended to misappropriate the money, it would really be rather surprising to find that he had done so in such a direct way as to receive the money into his own hands and seeing what his position is he would be far more likely to pay the money to some one else; and there is no doubt whatever that the money was paid, if not to him, to his brother-in-law." The learned Judge is of opinion that the fact that the money was not paid into the hands of the appellant is a matter of little or no importance. I am unable to agree with him in this opinion. According to my judgment that element is of first importance in the whole case. My conclusion, therefore, on the consideration of the entire evidence is that every farthing of the sum of Rs. 17,000 was delivered by the Unao Town Bank into the hands of Gauri Shankar. This Gauri Shankar was the Head Clerk of the Oudh Commercial Bank with which the money was intended to be invested. The further fact proved is that Gauri Shankar instead of making the desired investment appropriated it himself.

Now an important conclusion reached by the learned Judge is as follows:—"I do not imagine and it has not been suggested for the prosecution that there was any intention on the part of the accused to misappropriate this capital sum of Rs.17,000 permanently. It was the use of it and the interest, that would be obtained on it, that was needed . . . ." This conclusion of the learned Judge reduces the case for the prosecution into a very narrow margin. I do not think for a moment that the prosecution would succeed if it were shown, that the money withdrawn from the Unao Town Bank was not deposited in the Oudh Commercial Bank as originally intended but was deposited, say, in the Imperial Bank. Whichever may be the place where the money finally went to, the use of the money during the continuance of the deposit will lawfully be made by the depositee and consequently such a use will not be wrongful gain nor could it amount to a wrongful loss to the Unao Bank because the Bank had admittedly agreed to part with the money for its being deposited with another. The Unao Town Bank in the ordinary course of business would merely be entitled to interest as a part of the transaction, on the deposit and to the repayment of the capital on demand or at a period agreed upon. The capital has all been re-paid by Gauri Shanker and there is documentary evidence on the record (Ex. 51) that interest has also been paid to and accepted by the Unao Town Bank. There is no evidence that there was any stipulation as to the time of re-payment or that it was broken. Further, as to the actual use we have the finding of the learned Judge already quoted that Gauri Shanker had had the use of the money, ..." The bulk of the judgment of the learned Judge is devoted to the consideration of the conduct of the appellant in relation to certain matters; for instance his attitude as to the absence of a pass-book of a receipt from the Oudh Commercial Bank indicating a deposit with the Bank; his silence at the meeting of the Directors and his acquiescence in the passing of the balance-sheet falsely showing a deposit with the Oudh Commercial Bank. To my mind the conduct of the appellant in relation to those matters reasonably leads to the inference that he had knowledge of Gauri Shanker's default in making the required deposit

and that he had the desire to shield Gauri Shanker whom he expected to re-pay in proper time the entire capital together with interest to the Unao Town Bank. It may be and it is highly probable, that in certain matters Guari Shanker was really the agent of the appellant. This would particularly be true as to the affairs of the shop at Cawnpore in which the appellant had also an interest and for the benefit of which, it is said by the prosecution, the money was taken, though there is no direct evidence that the money was so utilized. But there can be no criminal liability for the act of an agent.

Finally, the only other possible conclusion, that can be drawn from the entire evidence and the circumstances in the case, is that the conduct of the appellant is as much consistent with his guilt as with his knowledge of the guilt of Gauri Shanker and the anxiety to protect him. The learned Sessions Judge has taken the former and I have taken the latter view. The benefit of the doubt must accrue in favour of the appellant. On these grounds I am of opinion that the charge fails.

I allow this appeal, set aside the conviction and sentence and acquit the appellant of the offence charged. The appellant was released on bail by this Court. The bail is cancelled.

Z. K. *Appeal allowed; Conviction set aside.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATIONS NOS. 69 AND 70 OF 1920.

August 16, 1920.

Present:—Mr. Kennedy, J. C., and Mr. Aston, A. J. C.

SHAFI MAHOMED AND ANOTHER—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476, applicability of—Statement made to Magistrate in his executive capacity—Magistrate, whether can take action—Intended bigamous marriage—Magistrate, whether can stop.

Section 476 of the Cr. P. C. applies only when a false statement is made in the course of judicial proceedings. [p. 965, col. 1.]

A Magistrate has no jurisdiction to stop an impending bigamous marriage. [p. 964, col. 2.]

Criminal revision against an order of the Additional City Magistrate, Karachi, dated the 16th August 1920.

Mr. *Motiram Idanmal*, for the Applicants.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.

Kennedy, J. C.—The facts of this case are that one Shafi Mahomed presented an application to the Additional City Magistrate stating that one Sharoo being the wedded wife of Shafi Mahomed was about to commit a bigamous marriage with some other person. This application was supported by affidavit and also by statement on solemn affirmation by Allahdino who was examined by the Magistrate.

The Magistrate thereon sent the application to the Police in consequence of which the Police went to the house where marriage was about to be celebrated and directed all the people to stop the marriage until further orders.

Subsequently inquiries were held and it was discovered that the allegation namely, that Sharoo was the wedded wife of Shafi Mahomed was entirely fictitious.

The Magistrate thereupon issued orders allowing the marriage of Sharoo with her intended husband to proceed and issued notices to Shafi Mahomed and Allahdino to show cause why they should not be dealt with under s. 476 of the Cr. P. C. After holding the enquiry the Magistrate came to the conclusion that they have made wilfully false statements and acting under s. 476, Cr. P. C., sent the case for trial to the nearest Magistrate of the First Class. It is against this order that the present applications have been filed both by Shafi Mahomed and by Allahdino.

The point taken by the applicants which seems fatal to the proceedings is that there was no judicial proceeding pending before the Magistrate. It is only in cases where there is judicial proceeding pending that s. 476 has any applicability. And reading the application of Shafi Mahomed and the Magisterial order whereon and the subsequent proceeding upto the time when the marriage was allowed to proceed, it seems to us that the application was made to the Magistrate rather in the executive capacity or in respect of a possible breach of peace, not to him in his Magisterial capacity. There is no provision so far as I know of law that enables the Magistrate to stop an impending bigamous marriage. Bigamous marriage is not a cognizable

offence and is not entered in Ch. XIII and as a wife is not an immoveable property the Magistrate has no preventive power to interfere. It does not appear that any breach of peace was contemplated or that the Magistrate purported to act under Ch. VIII of the Cr. P. C., This seems to exhaust the power of the Magistrate to deal with the prevention of an offence. Moreover had the Magistrate contemplated action as a Magistrate he would have acted, under s. 203 which he did not do but gave information to the Police under s. 155 which is not an appropriate section when the informant is acting in a judicial capacity. Therefore, there being no judicial proceeding pending the Magistrate could not act under s. 476, Cr. P. C. This is sufficient to dispose of the present application. Moreover there being no judicial proceeding a prosecution under s. 193 could not lie. Whether it under s. 182 which *prima facie* seems more appropriate would be good need not now be considered.

Meanwhile we set aside the present order of the Magistrate and quash the proceedings.

Aston, A. J. C.—I agree with the decision of the learned Judicial Commissioner, but would add the following remarks:—I think the Magistrate contemplated action, as a Magistrate, when he addressed the order to the City Inspector, for the order purported to be under s. 155 (2), Cr. P. C. It is clear, however, that the order was not passed in a judicial proceeding. No case was pending before the Magistrate he was not sitting to determine jural relations between parties nor exercising special powers for the prevention of crime, under which he could have legally taken evidence on oath. He had not received a complaint, that an offence had been committed. His intention, rather, was to authorize the Police to take steps to prevent the commission of an offence, if certain circumstance existed.

K. S. D. *Order set aside.*
P. B. A.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 175-B OF 1924.
December 23, 1924.
Present :—Mr. Baker, J. C.

ISMAIL AND ANOTHER—ACCUSED—APPLICANTS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 337—Pardon—Offences exclusively triable by Sessions Court—Pardon relating to other offences, validity of—Commitment, whether can be quashed on ground of want of evidence.

A pardon can be granted under s. 337, Cr. P. C., by a Magistrate enquiring into a case exclusively triable by a Court of Session along with one not so triable, and the fact that there may be other offences which are not so triable will not invalidate the pardon granted in respect of the offence exclusively triable by the Sessions Court. But once the pardon is granted the approver is an approver with regard to the whole case and not with regard to some of the accused only. [p. 967, col. 1.]

A commitment can be quashed on a point of law only, and not on the ground that there is no evidence on the Committing Magistrate's record to sustain the charge. [p. 967, col. 2.]

Emperor v. Suleman Ibrahim, 10 Ind. Cas. 802; 13 Bom. L. R. 201; 12 Cr. L. J. 256, followed.

Reference for an order quashing the commitments in all charges except first part of the charge under ss. 467/109, Indian Penal Code, against the applicants.

Messrs. *M. Gupta*, *M. R. Bobde*, *K. R. Cama*, K. B., and *M. B. Niyogi*, for the Appellant.

Mr. *G. P. Dick*, Government Advocate; for the Government.

ORDER.—This is a Reference by the Sessions Judge, East Berar, asking for the quashing of the charges against the accused Ismail and others, except the first charge under ss. 467/109, Indian Penal Code, against Ismail and the charge under s. 467 against Yeshwant. The District Magistrate has been heard as also the accused, who contend that the charges should be quashed altogether.

The facts as stated by the Sessions Judge in his order of Reference are that in a suit for redemption of a possessory mortgage against one Ismail Panju he produced some false *kabuliyats* with the object of showing that the rent of the land was lower than was actually paid and thus reducing the profits. The alleged forged *kabuliyats* were written by one Yeshwant and the thumb impressions of Mohan, the tenant of the land, were taken. The *kabuliyats* were subsequently attested by Baba, Shaikh Jalal and Shaikh Sajjan,

The Munsif of Pusad who tried the case being of opinion that the *kabuliyats* were forged took proceedings under s. 476, Cr. P. C., and made a complaint against all of them for an offence under s. 463, Indian Penal Code, and against Ismail for an offence under s. 471, Indian Penal Code, also. The Magistrate who tried the case tried all the accused jointly and framed charges as follows:—

(1) Against Ismail under ss. 467-109 for abetment of forgery of the *kabuliyats* which are valuble securities. Under s. 471 for fraudulently using as genuine the forged *kabuliyats*. Under s. 193 for making a false statement in respect of the execution of the *kabuliyats*.

(2) Against Yeshwant under s. 467, Indian Penal Code, for forgery of the *kabuliyats*.

(3) Against Baba Vithoba and Shaikh Sajjan, two of the attesting witnesses, under s. 467 for forging the said *kabuliyats* and under s. 193 for making a false statement in regard to the execution of the *kabuliyats*.

(4) Against Shaikh Jalal, the remaining attesting witness, for forging the *kabuliyats* under s. 467, Indian Penal Code.

During the proceedings a pardon was offered to Mohan, the alleged executant of the *kabuliyats*, and he was examined as an approver. He deposed as to the forgery of the *kabuliyats* by Yeshwant at the instigation of Ismail, but did not know anything about the attestation which were not made in his presence.

The Magistrate then in accordance with s. 337, cl. (2 A), Cr. P. C. committed all the accused to the Court of Sessions.

The Sessions Judge is of opinion that this is illegal for the following reasons :—

(1) The order of the Subordinate Judge constituting the complaint made no reference to s. 193, Indian Penal Code, and the Magistrate could not take cognizance without a complaint of an offence under that section.

(2) The ruling in *Gunwant* v, *Emperor* (1) prohibits the joint trial of the scribe and attesting witnesses of an alleged forged document for giving false evidence in support of that document.

(3) The pardon cannot have reference to the giving of false evidence but to the forgery only as regards Ismail and Yeshwant. Section 193 is not one of the offences covered by s. 337, Cr. P. C. Section 337 will apply only to the charge under s. 467 and cannot warrant the commitment for an offence under s. 193. It has no reference to the attestation by the attesting witnesses.

Hence they have been wrongly committed and the case in respect of them should be remanded to the Magistrate for a fresh trial. So also the pardon has no reference to the charge under s. 471 against Ismail and the commitment under that head is also illegal as the case under that charge should be tried by the Magistrate.

The Sessions Judge desires to take up only the first head of charge (s. 467) against Ismail and Yeshwant. He is of opinion that the remaining parts of the trial should be taken up by the Magistrate as separate trials.

He, therefore, asks for orders under s. 215, Cr. P. C., quashing the commitment under all charges except the first part of the charge against Ismail and the charge against Yeshwant for forgery. He adds that his view is that the attestations were made some time after the executions and Mohan was not cognizant of the attestations and if they constitute forgery, they were not the same offence for which he was given pardon.

He adds that the Public Prosecutor does not agree with him. The District Magistrate has submitted a statement from him in which he states that in his opinion a pardon granted under s. 337 to Mohan extends to all charges against all the accused connected with the forgery of the *kabuliyats*.

A number of points have been raised by the learned Counsel on behalf of the accused, in which they have taken exception to the pardon granted to Mohan, a point I will deal with later.

To take first the question of the charge under s. 193, Indian Penal Code. Under s. 195 (1) (*b*) of the Code of Criminal Procedure no Court shall take cognizance of an offence punishable, under s. 193, Indian Penal Code, committed in relation to any proceeding in any Court except on the complaint in writing of such Court.

Admittedly the complaint made by the Munsif did not include s. 193, Indian Penal Code.

Therefore the Magistrate trying the case had no jurisdiction to take cognizance of it, and no power to try or commit the accused under it.

(1) 38 Ind. Cas. 723; 13 N. L. R 35; 18 Cr. L. J. 339.

It follows that the charge under s. 193 against Ismail, Baba Vithoba and Shaikh Sajjan must be quashed as being found without jurisdiction and not by a competent Magistrate and under s. 215 of the Cr. P. C. I quash it accordingly.

The ruling in *Gunwant* v. *Emperor* (1) will, therefore, not apply as there will be no question of a joint trial for giving false evidence. In the absence of any complaint by the Court in which the offence was committed, there can be no trial under s. 193, Indian Penal Code, at all.

Next as to the charge under s. 471, Indian Penal Code, against Ismail, the learned Sessions Judge is of opinion that the pardon can have reference only to the actual forgery.

This is not so. It has been held in *Harumal Parmanand* v. *Emperor* (2) that all that ss. 337 and 338, Cr. P. C., require is that there should be an offence that is triable exclusively by the Sessions Court under inquiry or trial, and the fact that there may be other offences alleged or charged which are not so triable is immaterial and will not invalidate a pardon granted in respect of the offence exclusively triable by the Sessions Court.

So also in *Balmokand* v. *Emperor* (3) it was held that when a Magistrate is enquiring into a case exclusively triable by a Court of Session along with one not so triable, pardon can be granted under s. 337.

These rulings show that the approver is an approver as regards the whole case and not as regards some of the accused only. Under the amended s. 337 of the new Code certain modifications have been introduced and it has been contended on behalf of the accused that this is not a case in which a pardon could have been granted at all, as the offence complained of was under s. 463, Indian Penal Code. Section 463 is merely a defining section and the offences must be regarded as one under s. 465, Indian Penal Code, which is not one of the offences covered by s. 337, Cr. P. C., and, therefore, no pardon could have been granted.

I do not think it would be proper at this stage of the case to express any opinion on this point, which raises a difficult question of law. I have nothing to do with the pardon granted to the approver.

(2) 30 Ind. Cas. 456; 16 Cr. L. J. 632; 9 S. L. R. 43.
(3) 28 Ind. Cas. 738; 16 Cr. L. J. 354; 11 P. W. R. 1915 Cr.; 17 P. R. 1915 Cr.; 246 P. L. R. 1915.

In any case there is the approver's evidence on record. Section 467, Indian Penal Code, under which the accused have been committed is one of the offences for which a pardon can be granted under s. 337, Cr. P. C. and I am not disposed, at this stage, to go into the question of whether a Magistrate to whom a complaint has been made by a Court under s. 463 or 465 could commit the case under s. 467. That is a matter which can be decided at the trial.

I do not see any reason for quashing the charge against Ismail under s. 471 and in view of the rulings above quoted the evidence of the approver, supposing it to be admissible, will be evidence as to all the charges.

As the Sessions Judge has split the trial of Ismail and Yeshwant, I do not think it necessary to do more than quash the charges under s. 193, Indian Penal Code. It is open to the Sessions Judge if he likes to try the attesting witnesses together or separately, but I agree with the view of the Public Prosecutor that the pardon granted to Mohan under s. 337 of the Code extends to all charges against all the accused connected with the forgery of the *kabuliyats* (except under s. 193, Indian Penal Code). I express no opinion as to the validity of the pardon and I certainly am not going to decide whether the *kabuliyats* are or are not a valuable security.

It has been contended on behalf of the attesting witnesses that as the approver does not implicate them, there is no evidence against them. A commitment can be quashed on a point of law only. It cannot be quashed on the ground that there is no evidence on the Committing Magistrate's record to sustain the charges *cf. Emperor* v. *Suleman Ibrahim* (4) followed in *In re Sessions Judge of Coimbatore* (5).

The papers are returned to the Sessions Judge.

G. R. D. *Papers returned.*

Z. K.

(4) 10 Ind. Cas. 802; 13 Bom. L. R. 201; 12 Cr. L. J. 256.
(5) 25 Ind. Cas. 993; 27 M. L. J. 593; 15 Cr. L. J. 666.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 55 OF 1924.

June 20, 1924.

Present:—Mr. Kennedy, J. C.

YARU—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 523, 524—Magistrate when can act on his own authority—Limitation, whether applies to possessor of property.

The period of six months prescribed by s. 523 of the Cr. P. C. applies only to a person other than the original possessor.

Under s. 523 the Magistrate to whom a report is made is competent to act on his own authority and it is only when action is contemplated under s. 524 that orders of a Magistrate of the class mentioned therein are to be obtained.

Appeal, under s. 524 (2) of the Cr. P. C., against an order of the Resident Magistrate and First Class Magistrate, Sujawal, dated the 25th March 1924.

Mr. *Tarachand Khimandas*, for the Appellant.

Mr. *Nadirbeg Mirza*, Third Assistant Public Prosecutor, for the Crown.

JUDGMENT.—In this case, the house of the accused was searched in respect of an alleged theft of buffaloes. In the course of that search ornaments of the value of Rs. 800 were attached. The accused was prosecuted and convicted for the theft of buffaloes and sentenced to a term of imprisonment, but ornaments so attached, were not sent up to the Court as being part of the stolen property or its value. And it remained in the custody of the Police. Eventually the Police wrote to the Resident Magistrate of Sujawal asking for an order as to the disposal of property, and the learned Magistrate forwarded the application to the Sub-Divisional Magistrate, Shah Bander. Various proceedings took place and finally on the 25th of March 1924, the Resident Magistrate, Sujawal, finding that no one had made any claim as regards the property directed that the property be placed at the disposal of Government under s. 524 of the Cr. P. C. The applicant who appears to be the legitimate owner of the property appeals against that order. The procedure seems to be faulty and the result is that the present order cannot be sustained. It is the business of the Magistrate to whom the report is made, namely, the Resident Magistrate himself to dispose of the matter in the first instance and it is only when s. 524 applies, the orders of the Sub-Divisional Magistrate or specially empowered First Class Magistrate intervene. The error in which the Magistrate has fallen appears to be this. The suspicious property is found in the possession of a certain person and is proclaimed under s. 523, then it is the duty of any person other than the possessor who may have a claim to that property to appear within six months and establish his claim. If no such person appears within the period fixed or when a person appears has failed to establish his claim, then the further question arises and, that is whether the person in whose possession that property was found is able to show that it was legally acquired by him. And it is not the case that the possessor is subject to six months' period of limitation. That period of limitation applies only to the person other than the original possessor. Now it appears that no third person appeared within the six months. Therefore, it is now for decision whether the original owner, that is, Yaru, is entitled to retain it, and that enquiry should now be held. No doubt a certain amount of duty lies upon the owner to establish his claim properly. On the other hand, Yaru, the present possessor who was in Jail, must have found it somewhat difficult to ascertain precisely what his legal position was as regards these ornaments.

I set aside the order of the Resident Magistrate placing the property at the disposal of Government and directing its sale. I direct the Magistrate now to dispose of the matter according to law, that is, to pass a proper order after ascertaining whether Yaru is able to show that it was legally acquired by him. And in disposing of that matter, it would be proper to remember that there is always a presumption that a person actually in possession of the property is unless it is contrary shown the owner thereof.

P. B. A. *Order set aside.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 605 OF 1924.
(CRIMINAL REVISION PETITION No. 506 OF 1924.)
January 8, 1925.

Present:—Mr. Justice Srinivasa Iyengar.

B. R. RAMANUJACHARIAR—ACCUSED—PETITIONER

versus

T. V. KAILASAM IYER—COMPLAINANT—RESPONDENT.

Madras Local Boards Act (XIV of 1920), ss. 159, 207, 223--Failure to remove alleged encroachment after notice--Offence--Acquittal--Fresh notice--Second prosecution, legality of--Period of three months under s. 223, extension of, by fresh notice, whether permissible.

In a prosecution against an accused for an offence under s. 207 (c) read with s. 159 of the Madras Local Boards Act XIV of 1920, for failure to remove an alleged encroachment after due notice by the local authority, the real offence is the wrongful encroachment that is committed by the person. The notice referred to in s. 159 is in a sense merely in the nature of a condition precedent to the prosecution. [p. 970, col. 1.]

An offence within the meaning of the sections comes to be committed, at any rate, on the expiry of the notice by which the person is called upon to remove the encroachment and fails to do so within the time limited in the notice. Where a person commits an offence by disobeying the terms of the notice, he should not be deemed to commit a fresh offence every time the local authority chooses to give a fresh notice calling upon him to remove the obstruction. [p. 970, col. 2.]

The real principle underlying s. 223 of the Madras Local Boards Act is that it should not be within the power or province of a local authority to molest and annoy persons by prosecutions which are not promptly undertaken by the local authority. The local authority has no power by giving fresh notices to constitute the disobedience to each of such fresh notices as amounting to a fresh offence under s. 207 of the Act. [p. 969, col. 2.]

Where an accused person who was charged under s. 207 of the Local Boards Act for failure to remove an alleged encroachment after due notice under s. 159 is acquitted, a second prosecution for the same offence after a fresh notice is illegal, especially where it is instituted more than three months after the issue of the first notice. [p. 970, col. 1.]

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order of the Court of the Stationary Second Class Magistrate, Mannargudi, dated the 11th August 1924, and made in C. C. No. 166 of 1924, and to quash all proceedings in the said C. C. No. 166 of 1924.

Messrs. *V. L. Ethiraj* and *T. R. Srinivasa Iyengar*, for the Petitioner.

Mr. *C. Kunhriraman*, for the Respondent.

The Public Prosecutor, for the Crown.

ORDER.—The petitioner in this case was charged before the Stationary Second Class Magistrate of Mannargudi with an offence under s. 159 read with s. 207 of the Local Boards Act, Madras Act XIV of 1920. He raised a plea in bar of the prosecution on the ground that for the same offence, he was previously charged in C. C. No. 215 of 1923, on the file of the same Court, that the complaint was then withdrawn by the local authority and that the order of acquittal then passed by the Magistrate under s. 248 of the Cr. P. C. was a bar to the present prosecution. The learned Counsel for the District Board of Tanjore has contended before me that according to the scheme of the Act the offence consisted not in the encroachment alleged to have been made by the accused but in his failing to comply with any direction lawfully given to him within the terms of cl. (c) of s. 207 of that Act and that, therefore, the local authority was entitled again and again to give notice under s. 159 and every time the conditions in the notice were not complied with, there would be an offence committed by the person to whom such notice is given. There is a very fatal objection to the maintainability of such a contention. Under s. 223 of the same Act it is provided that "no person shall be tried for any offence against the provisions of this Act, or of any rule, or bye-law made under it unless complaint is made by the Police, or the President of a Local Board, or by a person expressly authorised in this behalf by the Local Board or its President within three months of the commission of the offence." The contention of the learned Counsel for the District Board of Tanjore comes to this that it is within the powers of the Local Board to extend the period of limitation prescribed by s. 223 by giving fresh notice and constituting the disobedience to each of such fresh notices as amounting to an offence under s. 207. To construe it in that manner would obviously be to defeat the provisions of the principle underlying s. 223. I take it that the real principle underlying that section is that it should not be within the power or province of a local authority to molest and annoy persons by prosecutions which are not promptly undertaken by the local authority. If this view is correct it follows that the original offence was at any rate committed on the expiry of the first notice given by the local authority to the accused. The prosecution, therefore,

was liable to be launched within three months of that date, and as the present prosecution is undertaken long after the expiry of three months from that date the present complaint is not sustainable.

Even apart from this, there is another objection to the maintainability of the present prosecution. There has been an acquittal by a competent Court in respect of the offence charged against the accused in the year 1923. If it was an offence not to comply with and carry out the directions of the notice issued by the local authority in the year 1923 and if of that offence the accused was acquitted he cannot possibly be tried again for the same offence, and I cannot read the sections of the Act as contemplating different offences being committed in respect of the same subject-matter every time the local authority choose to give a fresh notice and launch a prosecution. My attention has been drawn to the second clause of s. 207 which provides for enhanced sentence in the case of persistent or old offenders. That has, however, nothing to do with the question what is the offence that is contemplated by the Act for which a penalty is provided. It is no doubt true that s. 159 of the Act is not very happily worded. Taking a common sense view of the provisions of s. 159, it seems to be clear that the real offence in such cases is the wrongful encroachment that is committed by the person. The notice referred to in the section is in a sense merely in the nature of a condition precedent to the prosecution and all that the Act says is that no one should be prosecuted straight away simply because he has committed or is deemed to have committed an act of encroachment, but the Act required that some notice should be given to him and that he should be prosecuted only if, even after such notice, he fails to remove the encroachment. No doubt the contention that it is merely a failure to comply with the direction contained in the notice can be advanced having regard to the terms of s. 207 of the Act, and having regard to those terms, it is impossible to say that the offence is complete even before any notice is given because the Legislature clearly treats as an offence only a failure to comply with the terms of the notice. But taking the real nature of the acts said to constitute the offence and the terms of all the sections, it is clear that an offence within the meaning of the Act comes to be committed at any rate on the expiry of the notice by which the person is called upon to remove the encroachment and fails to do so within the time limited in the notice. It will be against all principle to hold that even though a person commits an offence by thus disobeying the terms of the notice, he should be deemed to commit a fresh offence every time the local authority chooses to give a fresh notice calling upon him to remove the obstruction. In any view, therefore, the present prosecution cannot possibly be sustained and I must, therefore, hold that the Sub-Magistrate was wrong in the view taken by him that the plea in bar was not valid. In my judgment the plea is not only valid but sound and in that view the complaint should be dismissed and I direct accordingly.

V. N. V. *Petition dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION NOS. 857 AND 858 OF 1924.

December 2, 1924.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Mukerji.

RASH BEHARY KARURY—PETITIONER

versus

THE CORPORATION OF CALCUTTA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 247—Complainant, absence of—Acquittal, right of, when accrues—Revival of criminal case—Adjournments, frequent, undesirability of.

An application or order for revival of a criminal case can only be made on the supposition that the case is over and not pending. A case which is pending cannot be revived. [p. 971, col. 2; p. 972, col. 1.]

Under s. 247 of the Cr. P. C. the right to an order of acquittal accrues to the accused upon two conditions, and is dependent, firstly, on the absence of the plaintiff and, secondly on the Court not adjourning the case. If a case is not taken up at all, it cannot be said that the second condition is fulfilled, for there is no knowing in what way the Court's discretion would have been exercised if the case had been taken up. [p. 972, col. 1.]

Frequent adjournments of a case at the request of the prosecution disapproved.

Babu *Bankim Chandra Mukerjee*, for the Petitioner.

Babu *Kusi Prosonno Chatterjee*, for the Opposite Party.

JUDGMENT.

REVISION No. 858 OF 1924.

Mukerji, J.—This Rule has been issued to show cause why the proceedings mentioned in the petition should not be quashed.

The proceedings against the petitioner are under s. 495A of Act III (B. C.) of 1892, as amended by the Calcutta Municipal Amendment Act of 1917. A study of the proceedings as they were had in the Court of the Municipal Magistrate of Calcutta is surprisingly interesting.

The proceedings were started on the complaint of Dr. S. N. Ghose, Special Food Inspector, filed on the 2nd December 1923. The records do not indicate what happened till the 1st February 1924, which is the date which the first summons issued against the petitioner bears. The summons was signed by the Magistrate on the 13th February 1924 and evidently was served on the petitioner, on whose behalf, it appears, appearance was entered on the 23rd February 1924. The order passed on that date runs as follows:—"Pleader appears and would contest. To 8th March 1924 for evidence." On 8th March 1924 the order passed by the Magistrate was this: "Kunja Bihari Das for accused present. Prosecution not ready. To 15th March 1924 for evidence." On the last mentioned date the complainant was examined and partly cross-examined and then the case was adjourned with the following order:—"For further cross-examination of the Food Inspector (meaning the complainant) when certain documents called for by the defence are produced by the prosecution. To March 29th 1924." It appears that on the application of the defence a summons was issued to the Chairman, Corporation of Calcutta, for producing certain reports and correspondence. On March 29th 1924 the order recorded was in these words: "Papers wanted from Chairman not forthcoming. To 12th April 1924."

On the 12th April 1924 what happened is stated by the petitioner to be this, that the complainant was unwilling to proceed with the case on certain legal grounds. This is what the petitioner stated in a petition which he subsequently filed in the Court of the Magistrate and this again is what he has repeated in his petition to this Court. The learned Magistrate, however, in the explanation which he has submitted in answer to the Rule says that "the prosecutor was unwilling to proceed with the case for the time being, as powers had not upto that time been delegated under the new Act. It did not mean that he wanted to abandon the case." I fully accept the statement of the learned Magistrate as to what transpired in his Court and I hold that nothing happened on that day which may be construed as evincing a desire on the part of the prosecution to drop or discontinue the proceedings. On this the learned Magistsate recorded an order in these words:—"Accused's agent Kunja Bihari Das present, but the prosecution is unwilling to proceed with the case on legal grounds as no power under the new Act has been delegated yet to the officers. Proceedings stayed for two months." There is a controversy as to whether the complainant was present in Court on that day, it being alleged on behalf of the petitioner that he was not, and on behalf of the prosecution that he was. The matter is of no consequence, for the learned Magistrate thought fit to adjourn the case as he was perfectly entitled to do even in the absence of the complainant.

The order of the 12th April 1924 then was a good and proper order adjourning the case for 2 months. The next order that is to be found on the record is an order dated 21st June 1924 a date more than 2 months after the 12th April 1924 which runs in these words: "Proceedings revived. Summon accused for 5th July 1924." This order appears to have been passed on an application on a printed form which was worded thus: "The prosecution prays that Case No. 6895-B in which proceedings were stayed in this Court on the 12th April 1924 may be revived." The 12th of June was a holiday. This application was not filed on the 13th June 1924, the period of 2 months having expired on the 11th, but was filed on the 14th June 1924 and dealt with by the Magistrate on the 21st June 1924. On the 14th June 1924 the application being presented before the Magistrate he ordered the record to be put upon the 21st and on that date passed the order aforesaid.

The procedure that obtains in the trial of these cases, I take it, is regulated by the Cr. P. C. An application or order for revival can only be made on the supposition that the case was over and not pending, and it is difficult to imagine how a

case which is pending may be revived. The period for which the adjournment was granted having expired it was the duty of the Court to take the case up and pass some orders on it. On the 13th June 1924 the complainant was admittedly absent. The course left open to the Court was to proceed under s. 247, Cr. P. C., unless it chose to act under s. 344, Cr. P. C. If it acted under s. 344, Cr. P. C., it could for a reasonable cause adjourn the trial if it thought fit to do so, by making an order in writing and stating the reasons for the order. Admittedly it did not do so. The only other section under which the Court could act is s. 247, Cr. P. C. That section lays down that if the summons has been issued on complaint (as it was in the present case) and upon a day to which the hearing may be adjourned (which in the present case was the 12th June 1924 and the Court being closed on that day it was the 13th June 1924) the complainant does not appear (as he did not in the present case) the Magistrate shall acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day (which he did not in the present case). The proviso to the section need not be considered as admittedly the learned Magistrate did not proceed with the case. If the Court had taken the case up and did not think fit to adjourn the case it would have been bound to acquit the accused under the law. The question is what is the legal consequence of the case not having been taken up on that day at all.

At one time I was inclined to take the view that as the law secures to the accused an indefeasible right to an order of acquittal the provisions of s. 247, Cr. P. C., being mandatory unless an order of adjournment is made, that right could not be defeated by the omission on the part of the Court to take the case up and pass an order. On a mature consideration, however, I have come to the conclusion that that view is not correct. The right to an order of acquittal accrues to the accused upon two conditions, and is dependent, *firstly* on the absence of the complainant and *secondly* on the Court not adjourning the case. If a case is not taken up at all, it cannot be said that the second condition is fulfilled, for there is no knowing in what way the Court's discretion would have been exercised if it had been taken up. To adopt the other view would result in unnecessary harshness to the complainant and undue leniency to the accused, which would be apparent if we take an extreme case like this, namely, where the Court is not sitting owing to illness or other engagements of the presiding officer and the complainant absents himself, believing that no useful purpose would be served by his appearance. I am, therefore, of opinion that on the failure of the complainant to appear on the 13th June 1924, and on the omission of the Magistrate to take the case up, the petitioner was not entitled to an order of acquittal. This view has been taken by my learned brother Suhrawardy, J., in the case of *Sher Mull* v. *The Corporation of Calcutta* (1).

In that case this Court while finding no illegality which would justify its interference expressed its strong disapproval of the procedure followed by the Magistrate, and pointedly drew his attention to the provisions of s. 344, Cr. P. C. The printed form of application for revival such as has been used in the present case was also used in that case, and in spite of the condemnation it received, the procedure seems to have been more established than before. No notice appears to have been taken of the observations contained in the judgment in that case, and on the other hand it has been cited in the explanation submitted in the present case, as an authority warranting the procedure. This disregard, in my opinion, is nothing less than contumacious.

In the case of *Sher Mull* v. *The Corporation of Calcutta* (1) the statament of the Magistrate under s. 441, Cr. P. C., showed that the Corporation had instituted a large number of prosecutions for adulteration of *ghee*, and as the cases are usually strongly contested, and as the evidence in the majority of cases is more or less similar it is inconvenient for the Corporation and the accused as also for the Court for the cases to go on at one and the same time, and consequently some of the cases, including the said case, had been stayed consistently with a procedure prevailing in the Court for the last 20 years. This Court pointed out that the procedure adopted could not be justified even by 20 years' prevalence, but it was of opinion

(1) 77 Ind. Cas. 892; (1923) A. I. R. (C.) 725; 25 Cr. L. J. 492.

that the convenience of parties would have been sufficient for adjourning the case and the circumstances of the case would have rendered remands for lengthy periods reasonable.

So far as the present case is concerned no question of convenience of the accused or of the Court appears to have arisen. The prosecutor did not appear on the 13th June 1924. Even after the revival the prosecution again took time twice, once on the 2nd and again on the 23rd August 1924 the grounds for which do not appear on the order-sheet or any where on the record. To my mind it is clear that the prosecution has, in the present case, been cherishing an idea that it is at the sweet will of the prosecution to go on with a case or get it adjourned, and the orders of the Court have tended to foster that idea. It must be remembered that the case had been partly gone into and then stood adjourned, for further examination of the complainant and for production of certain papers and also to enable the officers to have the necessary delegation of powers under the new Act. It may be presumed that the last mentioned defect was remedied before the application for revival was made. The offence for which the trial is to take place is now more than a year old, and the difficulty of an accused person to meet a charge in respect of an offence committed long ago is obvious.

If there is an impression any where that proceedings of this nature can be tolerated it is time that such impression should be removed. I am, therefore, of opinion that these proceedings should be quashed.

I would accordingly make the Rule absolute and quash the proceedings.

REVISION No. 857 OF 1924.

The facts of this case are similar to those of Revision Case No. 858 of 1924. The noticeable points of difference are these: on 8th December 1923 the case was adjourned to 15th December 1923 for defence. On 15th December 1923 the case was adjourned with the following order: "Corporation is looking afresh into the matter. Proceedings stayed for one month." The next order on the order sheet is dated 8th March 1924 on which date the case was revived, and then it was adjourned to the 29th March 1924 on which date it was ordered to be tried with the other case and since then it shared in the vicissitudes of the latter.

The same order is passed in this case as in Rule No. 858 of 1924.

Newbould, J.—I agree.

Z. K. *Rule made absolute.*

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 328 OF 1924.

October 30, 1924.

Present:—Mr. Justice Wallace.

THE PUBLIC PROSECUTOR—APPELLANT

versus

CHERU KUTTI—ACCUSED.

Madras Local Boards Act (XIV of 1920), s. 170—Market, what is—Market in existence before Act, whether "new market".

A market is a place set apart for the meeting of the general public, of buyers and sellers, freely open to any such, to assemble together, where any seller may expose his goods for sale and any buyer may purchase. [p. 974, col. 1.]

Where arecanuts were brought to certain premises weighed and there purchased or sold to or by people and a fee was levied by the owner thereof:

Held, that the place constituted a "market" within the meaning of the Madras Local Boards Act. [p. 974, col. 2.]

The expression "new market" in s. 170 of the Madras Local Boards Act is used in its ordinary signification as "for the first time opened or kept open". [p. 975, col. 1.]

Appeal, under s. 417 of the Cr. P. C., 1898, against the acquittal of the aforesaid accused by the Court of the Sub-Divisional Magistrate, Palghat, in Criminal Appeal No. 12 of 1924, on his file (C. C. No. 305 of 1923, Ponnani Sub-Magistrate's Court.)

The Public Prosecutor, for the Crown.

Mr. *D. A. Krishna Vanai*, for the Accused.

JUDGMENT.—This is an appeal against an acquittal of the accused in C. C. No. 305 of 1923 on the file of the Second Class Magistrate, Ponnani. The accused was charged for an offence under s. 170 of the Local Boards Act (XIV) of 1920 with keeping open a new private market. The Trying Court convicted him. The lower Appellate Court reversed the conviction and acquitted the accused, and Government have appealed against the acquittal.

The Taluk Board, Ponnani, has lately opened a public day market for the sale of arecanuts in Challisseri Town. It is contended that accused keeps a private day market for the same purpose which is not licensed by the Taluk Board. This market

was being held admittedly before the Taluk Board opened its market, and, when that was opened, the President issued a notice to the accused to show cause against prosecution for keeping an unlicensed market to which the accused replied that he has not been keeping any market at all.

The Local Boards Act does not define the term "market", but in this case I do not think that presents any difficulty. A market is a place set apart for the meeting of the general public of buyers and sellers freely open to any such, to assemble together, where any seller may expose his goods for sale and any buyer may purchase. The notification of the Taluk Board is Ex. E. It states that an arecanut day maket is established "for the sale of arecanuts" and directs that in future, all arecaunts brought for sale shall be taken to the said market only and sold there. The first point that the prosecution has to prove, therefore, is that in the accused's so called private market, arecanuts are being brought for sale and sold, so as to constitute an act of interference with, or in the English legal phrase, a "disturbance," of the public market.

I shall for convenience' sake at present call the premises by the name of the accused's *kada* without considering if he is the owner thereof or not, a point on which the accused has put forward a case that he is not the owner. P. W. No. 1, a member of the Taluk Board, states that 200 people gather in the accused's *kada* for sale and purchase and that he has seen "the accused and his men collecting fees" presumably on the sales. He was deputed by the President of the Taluk Board to make a report about this unauthorised market. He admits that at the time of his visit the accused was not present and that he cannot say who "the accused's men" are, and that as to the sort of fees collected his information is pure hearsay. His report, Ex. C., implies that the accused was present when he made his enquiry but does not say that he saw any selling of arecanut going on. P. W. No. 2 is another member of the Board. He also enquired and made a report. He says that many go to the accused's *kada* for selling and buying and that fees are being levied. The accused was not there also when he went. He cannot name anyone who bought. His report, Ex. G, shows that what he saw in the accused's *kada* was the weighing of arecanuts; for which a fee was being charged. The weighment was no doubt for purposes of sale. But neither member seems to have seen sales going on in the accused's *kada*. Struck with the fact that arecanut brought to the accused's *kada* and similar *kadas* was more than the amount brought to the Taluk Board market, they inferred that these private *kadas* are used for exposing the arecanut also for sale. P. W. No. 3 says that these *kadas* are used for sales and that he himself has sold arecanut at the accused's *kada* once after the Taluk Board market was started. P. W. No. 4 states that he has sold in the accused's *kada* twice after the establishment of the public market. P. W. No. 5, not a disinterested witness, says that arecanut is taken for sale to the accused's *kada*. D. W. No. 1 professes to have leased the accused's *kada* in 1922 and does not say that sales did not take place there. D. W. No. 2 who professes to be a lessee from 1923, says that he used to buy arecanut there in large quantities. D. W. No. 3 admits that he sells arecanut in Cherukutty's, that is, accused's shop. D. W. No. 4 gives no evidence on this point. The defence witnesses, who were examined really to prove that the accused had sold the shop to his sister, really support the prosecution contention that buying and selling goes on freely in the accused's shop. Taking the evidence of P. W. Nos. 3 and 4 with the evidence of defence witnesses referred to above and the facts noted at their personal inspection by P. W. Nos. 1 and 2, I am satisfied that the greater part of the buying and selling of arecanut goes on, not in the Taluk Board market opened for the purpose, but, in the private markets, of which the accused's is one, and that the weighment there is merely a preliminary or a sequel to the real business, namely, the buying and selling, for which the shopman charges fees. That is the *kada* is a place ordinarily used by dealers in arecanuts to meet and expose their goods for the purpose of buying and selling; in fact it is a market used for exactly the same purpose for which the Taluk Board market is designed and established, and it constitutes, therefore, a disturbance of the public market.

The next point is, assuming that the accused is keeping open this market, is it a "new" market within the meaning of s. 170 of the Local Boards Act. It is not new in the sense that it has been established since that Act came into force for it was in

existence prior to the Act. Is it a case then to which s. 171 would more appropriately apply as "a private market already lawfully established at the commencement of the Act". The Public Prosecutor argues that this phrase can only apply to private markets authorised under the previous Local Boards Act. This depends on whether under the old Act there could be any private market lawfully established which was not authorised by that Act. It seems quite clear that that could be. The provisions regulating private markets were for the first time introduced into the old Local Boards Act V of 1884 by Act VI of 1900, and from s. 117 (E) (3) introduced by that Act it is clear that there were even before the passing of that Act private markets lawfully established; nor does it follow that a market for which no license was granted was necessarily not lawfully established since it may have been a case provided for by s. 117 E. (6) when a license had been duly applied for, but the Taluk Board neglected to pass orders on the application. Such matters have not been gone into in this case since the prosecution was not under s. 171; but it follows from the argument that "new" in s. 170 is not equivalent to "every market not already licensed under the Local Boards Act of 1884". It is the more necessary not to widen the meaning of the word "new" because although under Act V of 1884, s. 117 (*d*) and the succeeding sections, a new market might be opened under prescribed conditions, under Act XIV of 1920 no new market may be opened at all. On a consideration of the above noted I must hold that the word "new" is used in its ordinary signification as "for the first time opened or kept open", and, therefore that s. 170 does not apply to the accused's *kada* in this case. Sections 171, 175 or 179 are more appropriate sections.

In this view, it is unnecessary to go further into the question of whether the building in which the market is held belongs to the accused or has been transferred to his sister. I would remark that under the section it is not the owner of the premises but the person who keeps open the market, that is, presumably the person who collects or has collected for him the fees levied in the market for the exposure and sale of the goods, who is punishable.

I must, therefore, hold that the conviction of the accused under s. 170 was rightly reversed by the lower Appellate Court. I must, therefore, refuse to interfere with the order of acquittal and dismiss this appeal.

V. N. V. *Appeal dismissed.*

CALCUTTA HIGH COURT.

REFERENCE No. 172 OF 1924.

December 3, 1924.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Mukerji.

KUTISWAR MONDAL AND OTHERS—1ST PARTY—PETITIONERS

versus

JITENDRA NATH SEN AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 146, 438—Order under s. 146, operation of, extent of—Order when comes to end—Record of Rights, entry in, whether final adjudication by competent Court—Reference under s. 438, form of.

A reference under s. 438 of the Cr. P. C. should always be made in the form prescribed for such references by r. 139 of Chap. I of the General Rules and Circular Orders of the Calcutta High Court, Criminal Appellate Side. [p. 975, col. 2; p. 976, col. 1.]

Once an order under s. 146 of the Cr. P. C. has been passed by a Court it can come to an end only under one of two circumstances, the first being that there is no longer any likelihood of a breach of the peace in regard to the subject-matter of the dispute, in which case the Magistrate would be competent to withdraw the order of attachment, and he can do so at any time at which he is satisfied that there is no further any such likelihood, and, secondly, it is competent for a Magistrate to release the subject-matter of the dispute from attachment if a competent Court has determined the rights of the parties to the proceedings or the person entitled to possession of the subject-matter of the dispute. [p. 976, col. 1.]

An entry in the Record of Rights cannot be regarded as constituting a final adjudication by a competent Court within the meaning of s. 146 (1) of the Cr. P. C. [p. 976, col. 2.]

Reference made by the District Magistrate, Jessore.

Babus *Narendra Kumar Bose* and *Debendra Narain Bhattacharjee*, for the Petitioners.

Babu *Mukunda Behary Mullick*, for the Opposite Party.

JUDGMENT.—This is a Reference made by the District Magistrate of Jessore in connection with an order passed by the Sub-Divisional Magistrate of Narail, dated the 5th June 1924, whereby the learned Sub-Divisional Magistrate ordered certain lands which had been under attachment under an order passed under s. 146, Cr. P. C., to be released in favour of the 1st Party. At the outset we should like to point out to the learned District Magistrate that the Reference is not quite in order. It is not in the form prescribed for such Reference by the General Rules

and Circular Orders of this Court, Criminal Appellate Side, Ch. I, r. 139, and it does not appear from the order which the learned Magistrate passed as to what is the recommendation that he makes in connection with the order. Reference under s. 438, Cr. P. C., should always be made in that form. In as much, however, as the order is before us we propose to deal with it and pass necessary orders.

It appears that an order under s. 146, Cr. P. C., was passed in respect of these lands by the Sub-Divisional Magistrate on the 27th September 1915. Thereafter there were series of litigations between the parties which have been set out in very great detail in the order passed by the learned Sub-Divisional Magistrate as well as in the order passed by the learned District Magistrate, and after these litigations and being moved by the two parties to the proceeding under s. 145 which led up to the order under s. 146, Cr. P. C., the learned Sub-Divisional Magistrate on the 5th June 1924 passed an order that the lands which have since then been under attachment be released in favour of the 1st party.

Once an order under s. 146, Cr. P. C., has been passed by a Court it can come to an end only under one of two circumstances, the first being that there is no longer any likelihood of a breach of the peace in regard to the subject-matter of the dispute, in which case the Magistrate would be competent to withdraw the order of attachment and he can do so at any time at which there is no such likelihood, and secondly, it is competent for a Magistrate to release the subject-matter of the dispute from attachment if a competent Court has determined the rights of the parties to the proceedings or the person entitled to possession of the subject-matter of the dispute. In the present case the learned Sub-Divisional Magistrate does not find that, as a matter of fact, there is no longer any likelihood of a breach of the peace and he does not base his order on that ground. He has referred to a series of litigations which there was between the parties since the order of attachment and he does not rely even upon the results of those litigations and in point of fact having regard to the orders that were passed in those cases it cannot be said that in any of them, there was any determination by a competent Court of the rights of the parties or as to the person who is entitled to possession of these lands. What has been relied upon by the learned Magistrate is an entry in the finally published Record of Rights to the effect that the lands appertain to the *jama* of the 1st party and that they are held by them under the 2nd party. This entry in the Record of Rights can at best be treated as presumptive evidence of the relation of landlord and tenant existing between the 1st party and the 2nd party to the proceedings, and cannot be regarded as constituting the final adjudication of a competent Court within the meaning of s. 146 (1), Cr. P. C. There is, therefore, no valid basis for the order which the learned Magistrate has passed in this case.

We accordingly think that that order should be set aside and the lands re-attached under the provisions of s. 146, Cr. P. C., and we order accordingly.

Z. K. *Order set aside.*

LAHORE HIGH COURT.

CRIMINAL PETITION No. 36 OF 1925.

April 3, 1925.

Present:—Mr. Justice Zafar Ali.

MANGAT—ACCUSED—PETITIONER

versus

EMPEROR THROUGH LAHIRI—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Hindu-Muhammadan case—European Magistrate, desirability of.

Where a Hindu-Muhammadan question is involved in a criminal case it is desirable that the case should be heard by a European Magistrate.

Kadir Bakhsh v. *Sundar Lal*, 27 Ind. Cas. 837; 127 P. L. R. 1915; 1 P. W. R. 1915 Cr.; 16 Cr. L. J. 213, referred to.

Petition, under s. 526, Cr. P. C., for transfer of the case.

Messrs. *Manohar Lal* and *Shamair Chand*, for the Petitioner.

ORDER.—Nobody appears to oppose this application under s. 526, Cr. P. C.

There is a Hindu-Muhammadan question involved in the case and it appears desirable that the District Magistrate himself should enquire into it and determine it. The same order was made in the case reported as *Kadir Bakhsh* v. *Sundar Lal* (1). I order accordingly.

Z. K. *Order accordingly.*

(1) 27 Ind. Cas. 837; 127 P. L. R. 1915; 1 P. W. R. 1915 Cr.; 16 Cr. L. J. 213.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 487 OF 1923.

January 30, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

IMAMBHAI KAMRUDIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAHIMBHAI USMANBHAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-owners—Party wall—Nature of wall built on party wall—Windows, whether can be opened in party wall—Trespass—Injunction, suit for—Limitation Act (IX of 1908), Sch. I, Art. 120.

Where one of two neighbouring owners raises a party wall with the consent or acquiescence of the other, the raised portion must assume the same character, as the old party wall on which it stands, and neither party can be allowed to commit a trespass on the party wall so increased in height. If either of the parties opens windows in the raised part of the party wall his action would amount to a trespass and would be liable to be restrained at the instance of the other party. A suit to restrain such action must, however, be brought within a period of six years under Art. 120 of Sch. I to the Limitation Act. Failing such a suit, however, the party aggrieved would be entitled to block the windows from his own side of the premises. [p. 978, col. 2.]

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 269 of 1922, confirming a decree of the Subordinate Judge, at Ahmedabad, in Civil Suit No. 659 of 1920.

Mr. *M. H. Mehta*, for the Appellants.

Mr. *H. V. Divatia*, for the Respondents.

JUDGMENT.—The plaintiffs sued for an injunction against the defendants directing them to close up the windows which they had opened in the plaint joint wall, and for permission to the plaintiffs to do so at the defendants' costs if they failed to close up the windows, and to restrain the defendants from making any new openings, etc., in the said common wall.

The defendants contended that the wall in which the windows in the suit were opened had not been of joint ownership; that the plaintiffs were not prejudiced in any way; and lastly that the plaintiffs filed the suit about twelve years after the windows had been opened.

The first issue in the Trial Court was whether the wall between the two houses had been proved to be of joint ownership. The Judge found on the facts that the wall up to the roof of the plaintiff's house was old, and was of joint ownership, but that the plaintiffs had to admit that some years ago the wall had been raised by the defendants' ancestors at their own expense. The owner of plaintiffs' house not only acquiesced in the raising of that wall but had a knowlegde of his doing so and did not protest. The suit having been filed after his death and that of Usmanbhai, nobody was in a position to say what arrangement there was between them, when Usmanbhai raised the wall above the roof at his own expense. The learned Judge continued:—

"The old wall is a common wall. Thus assuming that the new wall is also a party wall, it could not be said that there is an ouster by the opening of the windows. At the same time, *Watson* v. *Gray* (1), quoted with approval in *Kanakayya* v. *Narasimhulu* (2), would show that the raised portion could not be called a party wall of joint ownership. The ruling in *Motilal* v. *Maganlal* (3) is based on a specific agreement on defendants' part not to pay his share of expenditure which was not proved. There is nothing to show that there was consent of Ismailji or that this raising of the wall was necessary for the benefit of his house. From any point of view I find that plaintiffs should not be allowed any injunction."

The Judge, therefore, dismissed the suit.

In appeal the District Judge said:—

"The first question that arises is whether the raised portion of the wall becomes a common party wall. It was erected by the defendants at their own expense. There is no evidence whether there was any arrangement between the defendants' ancestor and the plaintiffs when the wall was raised or whether they consented to the defendants' ancestor raising the wall. At the outset it may be said that there was an acquiescene on the part of the plaintiffs in standing by. In these circumstances what is the character of the portion of the wall thus raised? No doubt under the rule enunciated in *Watson* v. *Gray* (1), the plaintiffs could have compelled the defendants' ancestor to demolish the raised portion of the wall. But they did not do so. The result is, as stated by Parker, J., in *Kanakayya* v. *Narasimhulu* (2), that the newly erected portion will not be a common or party wall, but will be the exclusive wall belonging to the defendants. The ruling in *Motilal* v. *Maganlal* (3) does not militate

(1) (1880) 14 Ch. D. 192; 49 L. J. Ch. 243; 42 L. T. 294; 28 W. R. 438; 44 J. P. 537.

(2) 19 M. 38; 6 Ind. Dec. (N. S.) 731.

(3) (1888) Un. P. J. 297.

against this view. All that it lays down is that the old party wall, even though re-built by a tenant-in-common at his own expense, does not cease to be a common party wall. That ruling says nothing about the portion of the wall newly raised by a tenant-in-common at his own expense. If then the raised portion of the wall did not become a common or party wall, the defendants have acquired an exclusive right to it by adverse possession for more than twelve years. There was, therefore, no trespass or ouster when the defendants opened the windows in the wall."

Accordingly the appeal was dismissed.

In *Kanakayya* v. *Narasimhulu* (2) the plaintiffs and defendants were tenants-in-common of a party wall. The defendants without the consent of the plaintiffs, intending to build a superstucture on their tenement, raised the height of the party wall. A suit was brought to compel the removal of the newly erected part of the wall. The District Munsif dismissed the suit, and his decree was confirmed by the Subordinate Judge. In appeal Parker, J., said :—

"The plaintiffs are entitled to the relief asked for. It is true that the refusal of plaintiffs to give the required permission may be ill-natured and that the raising of the wall will not really harm them ; but, at the same time, the altered wall is no longer the same wall and the newly-erected portion will not be a common or party wall. The erection of it might give rise to inconvenience and quarrels."

In *Watson* v. *Gray* (1) the owners in fee of two adjoining houses derived title to them from a common predecessor-in-title. The conveyances from that predecessor to the two owners respectively, contained a declaration that the wall which divided the yards at the back of the two houses should be and remain a party wall. It was held that the two owners were tenants-in-common of the wall. The plaintiff had complained that the defendant had committed trespass in that he had knocked down the new piece of wall which the plaintiff had built on the top of the party wall. The plaintiff claimed damages for the removal of the new piece of wall, and an injunction to restrain the defendant from interfering with the re-building of it, and it was held that the defendant's action did not amount to a trespass and the plaintiff was not entitled to any damages in the throwing down of the wall.

But the real question on the facts here is, what is the nature of the wall added by the defendants' ancestor with the acquiescence of the plaintiffs' predecessor-in-title, and it seems to us that if one of two neighbouring owners raises a party wall the other owner either giving his consent or acquiescing, then the raised portion must assume the same character as the old party wall on which it stands. Then it would follow that neither party can be allowed to commit a trespass on the party wall so increased in height, and the defendants' action in opening the windows in the raised part of the party wall would be a trespass. The plaintiff could have objected to the windows being opened in the party wall, but not having done so within the period of six years, the suit, coming within Art. 120 of the Indian Limitation Act, would be barred. With all due respect, therefore, we cannot agree with the District Judge who says that the newly erected portion is not a common or party wall, nor with Parker, J., who held in *Kanakayya* v. *Narasimhulu* (2) that where one neighbour had not consented to the new erection by the other, the new erection became the exclusive property of that other. Consequently we think that the plaintiffs would have been entitled to an injunction if they had sued within time. Nor do we think that the defendants in the circumstances of this case have acquired an exclusive right to the newly erected portion by adverse possession. They are only protected against an action by the plaintiffs for trespass owing to the opening of the windows. We think, therefore, though on different grounds, that the lower Appellate Court was right in dismissing the plaintiffs' suit, and this appeal must be dismissed with costs. With regard to the future it is desirable that these two neighbours should arrange their disputes and come to some amicable settlement with regard to the party wall. It is clear that the plaintiffs would be entitled to block the suit windows from their own side of the premises and if the occasion arose they would be entitled to an injunction restraining defendants from making any new openings in the common wall.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 179-B OF 1924.

January 5, 1925.

Present:—Mr. Baker, J. C.,
Mr. Prideaux, A. J. C., and
Mr. Kotwal, A. J. C.

NARAYAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

TULSIRAM—DEFENDANT—RESPONDENT.

Hindu Law—Lex loci *in Berar—Mitakshara and Mayukha, priority between.*

In Berar, following the Bombay Deccan, the Mitakshara is paramount and the 'Mayukha' is of secondary consideration, being only relied upon when the Mitakshara is silent or doubtful. [p. 981, col. 2.]

Case-law discussed.

Appeal against the decree of the First Additional District Judge, Akola, dated the 28th April 1924, in Civil Appeal No. 42 of 1924.

Messrs. *R. R. Jayavant* and *A. V. Khare*, for the Appellants.

Messrs. *G. G. Hatwalne* and *V. D. Sindekar*, for the Respondent.

OPINION OF THE FULL BENCH.

Prideaux, A. J. C.—(*December 16, 1924*).—The following genealogical tree explains the relationship of the parties:—

SHEORAM, (dead.)

(1) *Musammat* Parbati, (alive)	(2) *Musammat* Tulsi, (dead)	(3) *Musammat* Bayjai, (dead)
Narayan, (plaintiff No. 1).	Deoba, (died on 25-10-18) =*Musammat* Laxmi.	Jairam, (died on 25-10-18) =*Musammat* Punji, re-married on 30-8-21.
	Tulsiram, (defendant No. 1.)	
		Tukaram, (plaintiff No. 2.)

The plaint states that Sheoram died in 1913, and that in the following year, *i.e.*, February 1914 a partition of the ancestral property of the family was effected amongst Narayan, Deoba, Jairam and Tukaram, each getting a 1/4th share. At the time of the partition Narayan and Tukaram were minors and their guardian *Musammat* Parbati effected the partition on their behalf. After Narayan came of age he looked after the affairs of Tukaram. After the death of Deoba, Tulsiram became his heir, and on Jairam's death, his widow *Musammat* Punji, succeeded to his property. She was a minor at that time, living with her parents, and *Musammat* Laxmi the widow of Deoba took possession of the entire property of *Musammat* Punji as her guardian. Punji remarried on 30th August 1921 and thus the plaintiffs, it is contended, became heirs to Jairam's property; but *Musammat* Laxmi the guardian of *Musammat* Punji refused to deliver possession. Plaintiffs ask to be declared as owners of the moveable and immoveable property and claim mesne profits. This suit is thus for possession of Jairam's property in the hands of Deoba's widow defendant No. 2 and her son defendant No. 1.

Defendants Nos. 3 to 7 were joined being *bataidars* of the fields. The first two defendants pleaded that Tulsiram was the preferential heir, there having been a reunion shortly after the partition. It was further pleaded that the partition took place during the minority of all the brothers except Deoba and is not just and equitable, and that as the minors had not been properly represented that partition is void. Further pleadings were also raised with which we are not concerned.

The Trial Court held *inter alia* that the partition of 1914 was not invalid, or at least the defendant No. 1 cannot question it as his father Deoba, who was a party to the partition, was a major at that time; that at the time of the alleged re-union Jairam was a minor and there could not be a valid re-union. A decree was passed in plantiffs' favour, the Court finding that the parties were governed by the *lex loci* of Berar, *i. e.*, by the Mitakshara supplemented by the Mayukha and that in cases of conflict between the two laws the former prevails; and that the plaintiffs as half brothers are preferential heirs to the brother's son defendant No. 1.

On appeal the lower Appellate Court, following *Shriram* v. *Rajaram* (1), held that it is accepted law in Berar that where Mitakshara and Mayukha conflict the Mayukha predominates, and that in the present case the parties are governed by the Mayukha. It was further held that the defendant No. 1 appellant who is the full brother's son is the preferential heir to the plaintiffs who are the half brothers of the deceased Jairam. The appeal was allowed and the plaintiffs' suit was dismissed.

(1) 78 Ind. Cas. 367; 19 N. L. R. 193; (1924) A. I. R. (N.) 83.

It is here admitted that if the Mitakshara prevails, the plaintiffs are entitled to a decree, while if the case is governed by the Mayukha, the decision of the lower Appellate Court is correct. Dr. Sarvadhikari, in his valuable work Hindu Law of Inheritance, at page 313 (2nd edition) states that the Maharashtra School of Law is divided into two sub-divisions, the Mayukha Districts, *i. e.*, Gujerat, Island of Bombay and North Konkan where the Vyavahara Mayukha holds the first place and the rest of the Bombay Presidency where its authority is next to that of the Mitakshara.

Mulla, at page 12 of his Principles of Hindu Law (4th edition) writes :—

"As regards authorities in Western India, the Mitakshara ranks first and paramount in the Mahratta country, Northern Kanara and the Ratnagiri District. In Gujerat, the Island of Bombay and the North Konkan, the Mayukha is considered as the overruling authority where there is a difference of opinion between it and the Mitakshara. The principle, however, adopted by the High Court of Bombay, and sanctioned by the Privy Council, is to construe the two works so as to harmonize them with each other wherever and so far as that is reasonably possible. In Poona, Ahmednagar and Khandesh, the Mayukha is considered to be of equal authority with the Mitakshara, and not capable of overruling it as in Gujerat, Bombay and Northern Konkan."

Mayne, at page 29 of his Hindu Law and Usage (9th edition), says:—

"The works which supplement the Mitakshara in Western India are the Vyavahara Mayukha, and the Viramitrodaya. Of these the Mitakshara ranks first and paramount in the Maratha country and in Northern Kanara, and Ratnagiri, while in Gujerat, and apparently also in the Island of Bombay, the Mayukha is considered as the overruling authority when there is a difference of opinion. In Ahmednagar, Poona and Khandesh the Mayukha appears to be an authority equal to, though not capable of overruling the Mitakshara."

In *Jankibai* v. *Sundra* (2) it was held that the Ratnagiri district forms part of the Maratha country where the doctrines of the Mitakshara are paramount, and where the Mayukha notwithstanding the eminent position it has gained, is still a secondary authority. In *Bhagwan Vithoba* v. *Warubai* (3) their Lordships of the Bombay High Court held:—

"In cases governed by the Mitakshara, a sister comes in as heir to a deceased Hindu immediately after the grandmother; so that, where the competition is between her and a half brother's son, the latter, being higher in the line among heirs specifically mentioned in the Mitakshara, is entitled to preference over her as heir, though it would be otherwise in cases governed purely by the law of the Vyavahara Mayukha.....It is a well established rule of the Bombay High Court that where the Mitakshara is silent or obscure, the Court must, generally speeking, invoke the aid of the Vyavahara Mayukha to interpret it, and harmonise both the works, so far as that is reasonably possible."

In *Ramprasad* v. *Subu Bai* (4) a Judge of this Court held that "the Mitakshara, as interpreted in the Bombay Presidency, is the *lex loci* in Berar." And the late Mittra, A. J. C., in *Bhadia* v. *Musammat Bhagi* (5) found that under the Hindu Law, as interpreted in Berar, the sister is a preferential heir to the paternal uncle's son.

In *Narhar Damodar* v. *Bhau Moreshwar* (6) it was held that in the town of Mahad in the Kolaba District, Hindus are governed by the Mitakshara and not by the Vyavahara Mayukha.

There are a series of rulings of this Court on the question of the *lex loci* in Berar. In *Narayan Vithal* v. *Govind Narain* (7) the Judicial Commissioner of this Court held that among Mahratta Brahmans domiciled in the Central Provinces and governed by the Mitakshara, as interpreted in the light of the Mayukha, a daughter succeeding to her father's immoveable property does not take an absolute estate, but that the inheritance goes on her death to her father's heir. In *Govind* v. *Dawalat* (8) it was found that "under the Mitakshara, the *stridhan* of a woman dying without issue, and who had become a wife by any of the four approved modes of marriage belongs in the first instance to her husband. He excludes her sister." In

(2) 14 B. 612; 7 Ind. Dec. (*N. S.*) 875.

(3) 32 B. 300; 10 Bom. L. R. 389.
(4) 4 N. L. R. 31.
(5) 23 Ind. Cas. 229; 10 N. L. R. 24.
(6) 36 Ind. Cas. 539; 40 B. 621; 18 Bom. L. R. 744.
(7) 1 N. L. R. 154.
(8) 5 Ind. Cas. 426; 6 N. L. R. 3.

Balwant Rao v. *Baji Rao* (9) their Lordships of the Privy Council find that a man who has emigrated from the Bombay Presidency to the Central Provinces is *prima facie* subject to the law as expounded in Bombay; and that according to that law the daughter succeeds to the father in an absolute inheritance. In *Ram Prasad* v. *Musammat Subu Bai* (4), Stanyon, A. J. C. who had a large experience of judicial work in Berar, writes:—

"In my own experience of judicial work in Berar I never found it disputed, but on the contrary invariably taken for granted, that the Mitakshara, read with the Mayukha, was the predominating authority on Hindu Law in Berar cases. I therefore hold that the Mitakshara, as interpreted in the Bombay Presidency, is the *lex loci* in Berar."

In *Girjabai* v. *Vyankatesh* (10), Obbard, J. C. of Berar, held that the law compounded of Mitakshara, Mayukha and custom which obtains in the Bombay Presidency is applicable to Marathas in Berar. In *Sitaram* v. *Laxman* (11), Stanyon, A. J. C., held:—

"It is also beyond question that, subject to diversions created by caste customs, the personal law of the Berar Kunbi is the Mitakshara as interpreted by the Mayukha, otherwise called the Bombay School of Hindu Law."

In *Madho* v. *Janki* (12), it was held that the law applicable in Berar is the Mitakshara, as interpreted and followed in Western India. In *Govinda* v. *Musammat Doomi* (13) I held that in Berar the Mayukha is not paramount, the *lexi loci* being the Mitakshara interpreted by the Mayukha, and that the Mitakshara is paramount in that territory and the Mayukha secondary authority.

The Allahabad High Court in *Kanhaiya Lal* v. *Gaura* (14), held that where the Mitakshara is silent and doubtful other books of authority may be relied upon.

There seems no specific case from that part of the Bombay Presidency in which the Mitakshara is paramount, where in a case of conflict between that law and the Mayukha, the latter has prevailed, and it seems clear that the Mitakshara is, in the Bombay Deccan which adjoins Berar, supreme, the Mayukha only being relied upon where the Mitakshara is silent, or where it is indistinct or doubtful.

For the respondents in the present case *Bhadia* v. *Musammat Bhagi* (5), *Musammat Chandrabhaga* v. *Vishwanath* (15), and *Madho* v. *Janki* (12), are relied upon. But these cases do not seem to me to support the principle contended for. The trend of authority seems to me undoubtedly in favour of the proposition that in Berar, following the Bombay Deccan, the Mitakshara is paramount and the Mayukha is of secondary consideration, being only relied upon when the Mitakshara is silent or doubtful.

I would allow this appeal, set aside the decision of the lower Appellate Court and restore that of the first Court.

Baker, J. C.—(*December 18, 1924*).—Admittedly the law in Berar is the same as it is in Bombay. The law in Bombay is the Mitakshara, except in Gujerat, North Konkan and the Island of Bombay. It has been stated in certain rulings that the law in force in Bombay is Mitakshara as interpreted by the Mayukha, but there is no case in which when the Mitakshara and Mayukha differ the Mayukha has been held to prevail outside the districts, above mentioned, where the Mayukha authority is supreme. Berar is geographically a continuation of the Deccan, being adjacent to Khandesh, and not far from Ahmednagar, and it is separated by Khandesh and Nasik from the nearest point of Bombay Presidency where the Mayukha prevails.

I can see no reason why the law in Berar should follow the law prevailing in Gujerat rather than that prevailing in the adjacent Deccan Districts. The law in the adjacent Deccan Districts is the Mitakshara. It may be that it is interpreted by the Mayukha, but where the Mitakshara and the Mayukha differ, there is, so far as I am aware, no decision that Mayukha is to prevail in the Deccan Districts. There can, therefore, be no reason why the Mayukha should prevail over the Mitakshara in Berar.

I am, therefore, of opinion that in Berar the Mitakshara is to prevail over the

(9) 57 Ind. Cas. 545; 16 N. L. R. 187; 39 M. L. J. 166; (1920) M. W. N. 483; 22 Bom. L. R. 1070; 3 N. L. J. 251; 28 M. L. T. 157; 18 A. L. J. 1049; 12 L. W. 679; 47 I. A. 213; 25 C. W. N. 243; 48 C. 30 (P. C.).

(10) 2 Berar L. J. 135.

(11) 17 Ind. Cas. 133; 8 N. L. R. 128 at p. 129.

(12) 36 Ind. Cas. 514; 12 N. L. R. 148.

(13) 65 Ind. Cas. 671; 5 N. L. J. 187.

(14) 83 Ind. Cas. 147; 22 A. L. J. 890 at p. 892; (1925) A. I. R. (A.) 19; L. R. 6 A. 1 Civ.

(15) 20 Ind. Cas. 557; 9 N. L. R. 102 at pp. 108, 109.

Mayukha in cases where the two do not take the same view.

Kotwal, A. J. C.—(*January 2, 1925*).—In *Shriram* v. *Rajaram* (1), I only stated what I considered to be the law applicable to Berar according to my interpretation of the previous rulings of this Court.

The appellants' contention before the Bench is that the respective authorities of the Mitakshara and the Mayukha in Berar should be the same as in the Bombay Presidency excluding the Island of Bombay, Gujerat and North Konkan; in other words, that where the Mitakshara and the Mayukha differ the former should predominate and that the Mayukha is to be followed only when the Mitakshara is silent or doubtful. When the silence of the Mitakshara as to the existence of a particular right has the same effect as an express statement that that right does not exist, I fail to see how, where the Mayukha which states that that right exists is followed, it can be said that predominance is not given to it over the Mitakshara. Nor do I see how, when on a certain point a custom in accordance with the Mayukha is given preference over the Mitakshara, the Mayukha cannot be said to be given predominance, however much the predominance may be disguised by calling the point doubtful under the Mitakshara. I am not convinced that on the previous rulings relating to Berar cited in *Shriram* v. *Rajaram* (1), it cannot be said that the Mayukha does not predominate over the Mitakshara.

However, the point now in dispute did not directly arise in the previous cases and on the ground of territorial proximity relied on by my learned colleagues and I may add also of communal and sentimental affinity between the Mahrathas of Berar and those of the greater part of the Bombay Presidency, I am not prepared to disagree with my learned colleagues.

JUDGMENT.—(*January 5, 1925*).—The result is that the decree of the lower Appellate Court is set aside, and that of the original Court restored. The appellants will get their costs here and in the lower Appellate Court.

Z. K. *Decree set aside.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 310 OF 1923.

October 18, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice.

ROYAL BANK OF SCOTLAND—PLAINTIFFS

versus

RAHIM CASSUM & SON—DEFENDANTS.

Negotiable Instruments Act (XXVI of 1881), ss. 9, 118—Person holding bill for collection with lien on bill, whether holder in due course.

Under s. 118 of the Negotiable Instruments Act the holder of a bill is to be presumed to be a holder in due course until the contrary is proved. [p. 984, col. 2.]

A person holding a Bill of Exchange for collection with a lien on the bill is a holder of the bill for consideration within the meaning of s. 9 of the Negotiable Instruments Act. [p. 984, col. 1.]

Mr. *Kemp*, for the Plaintiffs.

Mr. *B. J. Wadia*, for the Defendants.

JUDGMENT.—This suit came on for hearing as a contested short cause on August 30, 1923, before Mr. Justice Coyajee when issues were raised. On that day the plaintiffs found it necessary to ask for an adjournment to have evidence relating to a certain letter of lien passed in their favour by Marshall & Co., Glasgow, taken on commission and the case was adjourned. It has now come on for hearing before me. After recording evidence and hearing arguments on October 15, I reserved judgment. I ordered the case to be set down for further arguments to-day. I have heard further arguments and have recorded further evidence of the defendants as to certain facts relating to the presentation of the bill for acceptance which were adverted to in the course of the arguments.

The material facts relating to this suit are really not in dispute and are sufficiently proved. The defendants are dealers in crockery and glassware in Bombay. They indented certain goods through Marshall & Co., Bombay Branch, from Marshall & Co., Glasgow. Marshall & Co. sent certain goods in pursuance of these indents, and on March 23, 1921, they drew a Bill of Exchange to the order of themselves for £167-9-0 payable at sixty days after sight "document against payment." The defendants were the drawees and Marshall & Co. (Bombay) were drawees in case of need. Messrs. Marshall & Co. (Glasgow) indorsed the bill in blank and sent it on

to their Bankers, the Royal Bank of Scotland (Glasgow), for collection. The Bank sent this bill to their London Office. The bill bears the endorsement "remitted for collection by Royal Bank of Scotland, London Office," to the Mercantile Bank of India, Bombay. The bill was presented by the Mercantile Bank of India, Bombay, to the defendants. But, according to the evidence on behalf of the defendants which I accept, the bill was not accepted by them but returned to the Bank. The Bank then referred the matter to the Bombay Branch of Marshall & Co., who were mentioned in the bill as drawees in case of need. Marshall & Co., Bombay Branch, then took this bill to the defendants' firm. At that time the term "documents against payment" was altered to "documents against acceptance" which is noted in pencil on the bill, and the bill was accepted by the defendants. The indorsement of acceptance is in these terms: "Accepted. Payable at the office of the Mercantile Bank of India, Limited, Bombay." The documents were then handed over to the defendants. The due date for payment was June 23, 1921. No payment was made on that day and the fact of the bill having been dishonoured for non-payment was duly noted on June 24. Though at one stage a point was made that the dishonouring for non-payment was not proved, it has been accepted before me as a fact and it is clear from the protest attached to the bill that it was dishonoured for non-payment on behalf of the drawees as well as on behalf of the drawees in case of need.

Subsequently, defendants had some correspondence with the local branch of Marshall & Co., with reference to the goods indented by them. In the result the defendants asked Marshall & Co., to secure certain payments from the Insurance Company; and as a fact Marshall & Co. (Glasgow) realised £18-4-2 from the Insurance Company in September 1921. The defendants made payments amounting in all to Rs. 1,500 in three items of Rs. 500 each to Marshall & Co., Bombay Branch. Before the further payment of Rs. 500 was made apparently Marshall & Co., failed in November 1921 and the last cheque of Rs. 500, which has been referred to in the evidence, was cancelled. After the adjudication order, the present plaintiffs, who are the Royal Bank of Scotland, received Rs. 500 from the trustee of the drawers' estate in part payment of this bill some time before August 1923. The Mercantile Bank made a demand for the sum in respect of this bill in April 1922 on the defendants.

Ultimately the present suit was filed by the Royal Bank of Scotland to recover the sum due from the defendants on the Bill of Exchange as holders in due course.

The defendants pleaded that the plaintiffs were merely agents for collection, that they throughout dealt with Marshall & Co., Bombay Branch, in respect of this bill, that they made substantial payments in respect of this bill to the Bombay Branch of Marshall & Co., that the plaintiffs were not holders in due course and that in any case the payments made by them to Marshall & Co., Bombay Branch, should be given credit for in this suit.

The difficulty has arisen in the case on account of the insolvency of Marshall & Co.

On these pleadings five issues have been raised: but the most important issue in the case is whether the plaintiffs are holders in due course. I shall deal with that question first.

On a consideration of the arguments and the provisions of the Negotiable Instruments Act, to which reference has been made, I have come to the conclusion that the plaintiffs were holders in due course. The expression "holder in due course" means any person who for consideration became the possessor of a promissory-note, Bill of Exchange or cheque payable to bearer. I need not refer to the second part of definition of this expression, as I do not think that it can apply to the facts of this case. The indorsement on the Bill of Exchange by Marshall & Co. is an indorsement in blank as defined by s. 16 of the Negotiable Instruments Act. The name of the Royal Bank of Scotland is not mentioned as indorsee and the indorsement in blank has not been converted into indorsement in full as contemplated by s. 49 of the Negotiable Instruments Act. It is a bill on which the only indorsement is an indorsement in blank. Having regard to Explanation (2) of s. 13 as amended, it is clear that this bill was at the date of the presentation payable to bearer though originally drawn as payable to the order of the drawers. The instrument was handed over to the Bank for collection with the indorsement in blank. Thus the plaintiffs

became holders thereof. They were holders for consideration. It is proved in the case that Marshall & Co., had current account with this Bank, and it is common ground that Marshall & Co. were indebted at the time and afterwards to a large extent far in excess of the amount of the bill. The letter of lien, which is proved by the evidence recorded on commission, shows that they were entitled to a lien on this bill in respect of the amount due to them. That letter distinctly gives a lien to the Bank over all bills which might be sent to them for collection and also expressly mentions that they would have the right to sue in respect of those bills. It is also clear on the evidence that when this bill was sent for collection to the plaintiffs by Marshall & Co. they wrote to the defendants here informing them of the fact that the bill was sent for collection to the plaintiffs. The bill, as I have already stated, was presented in the first instance by the Mercantile Bank of India on behalf of the plaintiffs to the defendants. According to the provisions of s. 27, sub-s. (3), of the Bills of Exchange Act, 1882, (45 & 46 Vic. c. 61) undoubtedly the plaintiffs would be holders for value, and it is not contested, and it cannot be contested, that having regard to the definition of "consideration" according to the Indian Contract Act, the Bank holding the bill for collection with a lien on the bill would be holder for consideration. It may be that Marshall & Co. sent the bill for collection to them, but, having regard to the state of their account with the Bank and their agreement with the Bank, the Bank would have a right in respect of the amount of this bill. It is not necessary to refer to the cases bearing on the question as to whether the Bank would be holder for value when such a bill is sent to them for collection prior to the Statute of 1882 as the law has been stated in sub-s. (3) of s. 27 of the Statute: and here we are governed by the definition of "consideration" according to the Indian Contract Act. I may mention, however, that even prior to that enactment the position of a holder, to whom the drawer was indebted, obtaining possession of a Bill of Exchange payable at a future date has been clearly stated in the case of *Currie* v. *Misa* (1). The law with regard to the Bill of Exchange payable at the future date has been stated in both the judgments. In the judgment of Lord Coleridge, C. J., it is pointed out that it is too late to dispute that a pre-existing debt due to the transferee of a bill entitles him to all the rights of a holder for value. I am, therefore, satisfied that the plaintiffs were holders for value, that is, for consideration. There is no specific provision in the Indian Negotiable Instruments Act corresponding to s. 27, sub-s. (3) but there can be no doubt that the law in India is not different on this point. There is also the presumption mentioned in s. 118 according to which a holder is to be presumed to be a holder in due course until the contrary is proved.

That being so, it is clear that they are entitled to sue the acceptor in respect of this bill: and unless their position as holders in due course was in any sense modified in law by the fact that Marshall & Co., Bombay Branch, intervened in the matter and got the bill accepted, it is clear that they must succeed in the suit.

As regards the point made by Mr. Wadia on behalf of the defendants that the bill was really presented to the defendants by Marshall & Co., Bombay Branch, and accepted at their instance and subsequent payments were made to Marshall & Co., by the defendants in respect of the goods on that understanding, I have come to the conclusion that the legal position of the plaintiffs as holders in due course is not altered thereby in any way and that the defendants cannot claim to set off those payments against the amount of the bill. It is undoubtedly a case of hardship in the sense that the defendants have paid certain sums to Marshall & Co., to whom the money was payable in respect of the goods. But the defendants were duly informed of the fact that the bill was sent for collection to the plaintiffs, and though the term "documents against payments" was altered at the time the indorsement for acceptance was made, the bill must be deemed in my opinion to have been presented on behalf of the plaintiffs by the Mercantile Bank. The alteration in the term "documents against payment" does not affect the plaintiffs' rights to recover on the bill so long as the plaintiffs do not object. I do not see how the defendants can complain of this alteration which was assented to by them and made at their instance. Whatever the rights as between the defendants and the original drawers of the bill may be in

(1) (1875) 10 Ex. 153.

consequence of the payments, which are proved to have been made by the defendants to Marshall & Co., I do not see how according to law the defendants can get credit for these payments in a suit by the holder in due course in respect of the bill accepted by them. Unfortunately the defendants made payments to Marshall & Co. after accepting the bill without a proper realisation of their legal liability in respect of the bill as acceptor to the holder in due course.

I shall now deal briefly with the issues as framed. On the first issue my finding is in the affirmative.

As regards the second issue my finding is in the negative. Though the bill was sent to them for collection by Marshall & Co., Glasgow, I cannot say that they were merely collecting agents in the sense that they had no other right or interest in respect of this bill. On this ground my finding is against the defendants.

My finding on third issue is in the affirmative. I cannot see how the maintainability of the suit by the plaintiffs can be affected by the bankruptcy of Marshall & Co. and in fact this point has not been pressed.

I have already stated my reasons in respect of the fourth issue and my finding is in the negative.

As regards the fifth issue my finding is in the negative. Though a copy of the letter, dated June 22, 1922, has been produced on behalf of the plaintiffs, no attempt has been made to prove that that letter was in fact delivered to the defendants; and in the course of the arguments Mr. Kemp did not press that point. I have not overlooked the fact that there was a demand by the Mercantile Bank of India in April 1922. At the same time I may add that it can make no difference in the result whether the demand was made or not.

Deducting the sum of Rs. 500, which has been admittedly received by the plaintiffs in respect of this bill, there will be a decree for Rs. 2,134-8-7 with interest at eight per cent. per annum from June 23, 1921, to this date, and costs and interest on judgment at six per cent. per annum.

As regards the costs of the commission, strictly perhaps the plaintiffs may be entitled to those costs. Having regard to the circumstances of the case, I think it is rather hard upon the defendants that they should have to pay the costs of the commission; and I am not quite satisfied that the plaintiffs might not have produced better materials here before taking out a commission, which might have afforded *prima facie* proof of the letter of lien and which might have dispensed with the necessity of the commission. Under the circumstances I direct that the costs of the commission should be borne by the plaintiffs.

Z. K. *Suit decreed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 272 OF 1923.

January 21, 1925.

Present :—Mr. Justice Ryves and Mr. Justice Mukerji.

Lala SANT LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

BANI PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Acknowledgment of liability, what amounts to—Letter admitting existence of running account—Precedents, value of.

In every case in which the plaintiff claims exemption from the bar of limitation on the basis of an acknowledgment of liability made by the defendant, the document relied on as constituting the acknowledgment must be interpreted by its own language and it is not very helpful to cite rulings as to the meaning to be attached to a document in another case unless the wording of the documents, in both cases, is the same. [p. 986, col. 1.]

In a suit for accounts the plaintiff relied upon a letter written by the defendant in which the latter admitted the existence of a running account between himself and the plaintiff and went on to say that his representatives would compare the accounts and pay what was found to be due:

Held, that the letter contained an acknowledgment of liability within the meaning of s. 19 of the Limitation Act and gave a fresh start of limitation. [*ibid.*]

Jogeshwar Roy v. *Raj Narain Mitter*, 31 C. 195; 8 C. W. N. 168, distinguished.

Second appeal from a decree of the Additional District Judge, Saharanpur, dated the 30th November 1922.

Mr. *Nehal Chand*, for the Appellants.

JUDGMENT.—In this appeal the short point is whether the letter sent by the defendants on the 20th of January 1917 is an admission of liability within the meaning of s. 19 of the Indian Limitation Act.

The suit was one for balance of account and admittedly was time-barred unless limitation was extended by this letter.

Both Courts have found that it was a clear admission of liability within the meaning of that section. The decisive words are that the writer admitted the existance of a running account between the parties and went on to say that his representatives would in *Phagun* or *Chait* compare accounts and pay what was found to be due.

The learned Counsel for the appellants has relied on the case of *Jogeshwar Roy* v. *Raj Narain Mitter* (1). In every case of this kind the document in question has to be interpreted by its own language and it is not very helpful to cite rulings as to the meaning to be attached to a document in another case unless the wording is the same.

The case of *Jogeshwar Roy* v. *Raj Narain Mitter* (1) is entirely distinguishable from this case. That was not a case of accounts between the parties and the wording of that letter is very different from the present one.

In our opinion the matter is really concluded by the Privy Council case—*Maniram Seth* v. *Seth Rupchand* (2).

We, therefore, dismiss the appeal but without costs as the respondents are not represented.

Z. K. *Appeal dismissed.*

(1) 31 C. 195; 8 C. W. N. 168.
(2) 33 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130; 33 I. A. 165 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1885 OF 1922.

January 15, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Mukerji.

JNANENDRA NATH SINGHA ROY —PLAINTIFF—APPELLANT

versus

Sm. RAKHYAKALI DEBI—DEFENDANT—RESPONDENT.

Landlord and tenant—Tenancy, transfer of—Recognition by landlord—Dakhilas *granted to transferee as* sarbarahakar, *effect of.*

In order to determine whether there has been recognition by the landlord of a transfer of tenancy, the Court should not look to the words used in the *dakhilas*, such as "*sarbarahakar*", etc., but has to consider whether in fact there has been a recognition, *Probhabati Dasi* v. *Taibaturinessa Chaudhurani*, 20 Ind. Cas. 664; 19 C. L. J. 62 at p. 65; 17 C. W. N. 1088, relied on.

Appeal against a decree of the District Judge, Nadia, dated the 8th of May 1922, affirming that of the Munsif, Ranaghat, dated the 2nd of September 1921.

Babu *Rupendra Kumar Mitra*, for the Appellant.

JUDGMENT.—This is an appeal by the plaintiff in a rent-suit against a decision of the District Judge of Nadia confirming a decision of the Munsif of Ranaghat. The landlord sued for rent for the years 1324 to 1326 and the defence was that the tenancy was a permanent one, and, secondly, that the tenancy had been transferred to one Lolit who had been subsequently recognised by the landlord as his tenant. The First Court accepted the contentions of the defence and held that the tenancy was a permanent one and that Lolit had been recognised and in the result dismissed the suit for rent. The lower Appellate Court held that the transfer had not been established inasmuch as the deed which purported to transfer the tenancy had not been proved and that it was not established that the tenancy was a permanent one and the learned Judge went on to find that by virtue of certain *dakhilas* it was established that the landlord had recognised Lolit as his tenant. In the circumstances, he agreed with the conclusion of the First Court and dismissed the suit.

It is urged before us, firstly, that the *dakhilas* do not establish the recognition of Lolit, and, secondly, that the defendant's case having been based on a deed of gift to Lolit he cannot rely on the rent-receipts as an answer to the landlord's claim. It appears that the *dakhilas* which were produced cover the period from 1318 to 1323. The rent-receipts for the years 1321 to 1322 while showing the tenancy as standing in the name of one Pran Hari Banerji show in addition Lolit as *sarbarahakar*. The other receipts, that is, those for the years 1318 to 1323, show Baranashi the husband of the defendant as a tenant and Lolit as being the person at present in possession. As has been pointed out in the case of *Probhabati Dasi* v. *Taibaturinessa Chaudhurani* (1) the Court cannot hereby look at words like "*sarbarahakar*" and similar words but has to consider whether in fact there has

(1) 20 Ind. Cas. 664; 19 C. L. J. 62 at p. 65; 17 C. W. N. 1088.

been a recognition. It seems to us that on the facts of the case and as shown by the *dakhilas* there was in the present case a recognition by the landlord of Lolit as his tenant. The first point, accordingly, fails.

So far as the second point is concerned we do not see why, even if the defendant's case based on the deed of gift failed, she should not rely, as she has done, on the *dakhilas*.

The result is that we think that the judgments of both the Courts below are correct and that this appeal must be dismissed.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND EXECUTION OF DECREE APPEAL No. 1 OF 1925.

February 2, 1925.

Present:—Mr. Daniels, J. C.

SURAJ BAKHSH SINGH AND OTHERS —DEFENDANTS—APPELLANTS

versus

BANS BAHADUR SINGH—PLAINTIFF —RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151—Pre-emption decree—Mistake in stating amount payable by decree-holder—Payment of correct amount—Amendment of decree after date fixed for payment—Inherent power of Court.

Under s. 151 of the C. P. C. the Courts have very wide powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

By a clerical mistake the decretal amount entered in a decree for pre-emption was in excess of the amount which the Court had declared to be payable. The decree-holder paid the correct amount of the decree within the time specified in the decree and obtained possession of the property. After the expiry of the period fixed in the decree for payment the judgment-debtor filed an objection to the effect that the decree had not been complied with and prayed that possession should be restored to him. Thereupon the decree-holder made an application for amendment of the decree and the Court amended the decree and corrected the mistake as to the amount payable by the decree-holder:

Held, that the Court had power to make the correction under s. 151 of the C. P. C. and that the power had been properly exercised.

Appeal against a decree of the District Judge, Fyzabad, dated the 1st September 1924, upholding that of the Subordinate Judge, Sultanpur, dated the 5th January 1924.

Mr. *Ghulam Hasan*, for the Appellants.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This is a second appeal in execution proceedings. The facts of the case are peculiar. The suit was one for pre-emption. The amount of money really payable by the pre-emptor to the original vendee was Rs. 2,500. The ostensible price had been Rs. 5,000 but the remaining Rs. 2,500 was payable by the original vendee to various creditors, and it admittedly was never paid by him. These facts were stated in the judgment of the learned District Judge, but by a clerical error in the conclusion of his judgment he entered the sum payable by the plaintiff as Rs. 5,000 instead of Rs. 2,500. He allowed six months time for payment. The pre-emptor, being possibly unaware of the mistake in the decree deposited within the six months the sum of Rs. 2,500 which was really due from him. This was on 25th January 1923. He was given an order for possession on the following day. On 8th February the judgment-debtor filed objections to the effect that the decree had not been complied with and, therefore, possession should be restored to him. On this, the decree-holder filed an application under s. 152 for correction of the mistake in the decree and judgment. The learned District Judge Mr. Cole, corrected the mistake without sending notice to the present appellant on the ground that there was no time to issue notice and the matter was so clear that notice was not necessary. Strictly speaking notice should have been issued, but the learned District Judge was about to go on leave preparatory to retirement and was probably anxious to dispose of the case himself before he left. The appellant now objects, as he objected in the Courts below, that it was not competent to the District Judge to correct his decree after the six months period allowed for payment of the money had expired. Under s. 151 of the Code the Courts are given very wide powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In my opinion these powers are wide enough to cover the correction which has been made in this case. It would be flagrantly unjust that the respondent should be deprived of the fruits of his decree by reason of a purely clerical mistake for which he was no way responsible. In my opinion the order of the Court below is correct and I accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 308 OF 1924.

December 13, 1924.

Present:—Mr. Kinkhede, A. J. C.

VITHOBA—PLAINTIFF—APPLICANT

versus

THE SECRETARY OF STATE FOR INDIA THROUGH D. C., NAGPUR—DEFENDANT No. 1, ABAJI BALAJI SADAN—DEFENDANT No. 2—NON-APPLICANTS NOS. 1 AND 2.

Civil Procedure Code (Act V of 1908), O. I, r. 3—Parties—Joinder of defendant against wishes of plaintiff, whether permissible—Power of Court—Practice.

Ordinarily the plaintiff who comes into Court is the *dominus litis* and it must always be left to him to choose his opponent against whom he has to claim relief in the suit, and it is not the look out of the Court or of any other third person, to see whether somebody else must be allowed to intrude into the case as a co-defendant, against the plaintiff's will, simply because he represents to the Court that he is a person who would be affected by the decision. [p. 988, col. 2.]

Nobody is bound or affected by a decision to which he is not properly made a party, and it is not the intention of the law to let third persons ventilate their own grievances in, and thus derive profit from, a suit commenced by another man at his own cost and for his own benefit. [*ibid.*]

Application for revision of an order of the Subordinate Judge, Second Class, Nagpur, dated the 16th August 1924, in Civil Suit No. 157 of 1924.

Mr. *R. N. Padhye*, for the Applicant.

Mr. *P. Lobo*, for Non-Applicant No. 1.

Mr. *G. R. Pradhan*, for Non-Applicant No. 2.

ORDER.—This is a revision under s. 115, C. P. C., against an order dated 16th August 1924 making Abaji non-applicant No. 2 co-defendant in the suit. The suit, as laid, was by plaintiff as a lessee against his lessor, the Secretary of State, as the sole defendant for a construction of deed of lease dated 1st February 1921, and for a declaration that the land in dispute is covered by it, and that the plaintiff is entitled to be maintained in possession thereof as such lessee. The suit was instituted on 3rd July 1924.

The case came on for hearing on 16th August 1924, and on that day Abaji claiming to be interested in the subject-matter in dispute applied to the Court for being joined as a co-defendant. The ground of his claim as set forth in his petition is that he was himself a grantee of the leasehold rights in respect of the land in dispute in the case, from the Government, under an indenture executed in his favour by the latter. He urged that he was the only person who would be affected by the decision of the present case and was, therefore, a necessary party, and that his presence before the Court was necessary in order that all the questions involved in the suit may be adjudicated upon effectually and completely. The Court of first instance without caring to ascertain further facts on which the applicant Abaji based his claim to be so joined, and without even asking either the plaintiff or the defendant No. 1 about the necessity of joining him as a co-defendant, passed an order that he be joined as defendant No. 2. The plaint was ordered to be amended then and there, and the plaintiff had to carry out the order of the Court, though under protest. This procedure is quite irregular.

Ordinarily the plaintiff who comes into Court is the *dominus litis* and it must always be left to him to choose his opponent against whom he has to claim the relief in the suit. No stranger has any business to intrude into the case and force himself upon a plaintiff who does not want him and who does not claim any relief against him. The plaintiff is the best Judge of his own interest. If he seeks relief against a particular individual and impleads that individual as a sole defendant, it is not the look out of the Court or of any other third person, to see whether somebody else must be allowed to intrude into the case as a co-defendant, against the plaintiff's will, simply because that third person represents to the Court that he is a person who would be affected by the decision. The first principle of law is that nobdoy would be bound or affected by the decision to which he is not properly made a party. So far as I can see it is not the intention of law to let third persons ventilate their own grievances in, and thus derive profit from a suit commenced by another at his own cost and for his own benefit. What Abaji seeks to bring about is to get an adjudication of his own rights under a subsequent lease alleged to have been granted to him by the Secretary of State. His claim, therefore, is by way of antagonism to the claim of the plaintiff. The frame of the suit as laid does not call for any adjudication upon the question of the competency of the Secretary of State to grant this subse-

quent lease to Abaji. All that the plaintiff claims is a declaration that upon a proper construction of the terms of his lease dated 1st February 1921 the land in suit was comprised therein. For the purpose of giving this relief to the plaintiff the presence of Abaji is not necessary, and he has been improperly joined as a party to the suit, by the Court below.

No doubt if the plaintiff had chosen, he could have framed his suit in such a manner as to drag into controversy the so-called title of Abaji under a lease of a subsequent date, and claim an adjudication which would bind not only the Secretary of State but also the latter's so-called subsequent grantee. But plaintiff has chosen to limit the scope of his suit and he cannot be forced to enlarge it only to give facility to Abaji to have his own claim to the land in suit entertained and decided. It is open to Abaji to get the necessary adjudication as regards his rights in a suit of his own.

For all these reasons, I am of opinion that the order dated 16th August 1924 was irregular and unwarranted by the circumstances of the case and outside the scope of the suit as laid. To allow this order to stand unreversed would be to force plaintiff to submit to unnecessary harassment and to take up a larger burden of fighting with two persons, where he has chosen, for reasons best known to himself, to fight his battle only with his lessor. I, therefore, think that this is a fit case for interference in revision. The order dated 16th August 1924 is, therefore, set aside and the name of Abaji as co-defendant No. 2 is expunged from the record. Costs of this petition for revision will be borne by Abaji. Pleader's fee Rs. 10.

G. R. D. *Order set aside.*
Z. K.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 96 OF 1924.

December 19, 1924.

Present:—Mr. Justice Devadoss and Mr. Justice Wallace.

BALAGURUSWAMI NAICKEN—
DEFENDANT—APPELLANT

versus

GURUSWAMI NAICKEN AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20, Sch. I, Art. 182 (5)—Execution of decree—Deposit of money to credit of suit—Application for payment by decree-holder, whether step-in-aid of execution—Mortgagee from judgment-debtor—Direction to pay decree-holder—Payment into Court long after—Limitation, fresh start of.

In order that an application for payment out of money in Court by a decree-holder may amount to an application to take a step-in-aid of execution under Art. 182 (5) of Sch. I to the Limitation Act, the money must have been realised in execution of the decree. [p. 990, col. 1.]

Where an amount of money is in Court to the credit of a suit and such amount has not been the proceeds of execution, an application for payment out cannot be said to be an execution application or an application in aid of execution. In such a case the plaintiff has only to apply to the Court for payment and the Court makes the payment without reference to the judgment-debtor in the suit. By asking for payment of the amount in Court, the plaintiff does not do anything to aid the execution of the decree. [p. 990, col. 2.]

Kuppuswami Chettiar v. *Rajagopala Iyer*, 70 Ind. Cas. 324; 45 M. 466; (1922) M. W. N. 113; 42 M. L. J. 303; 15 L. W. 348; (1922) A. I. R. (M.) 79; 32 M. L. T. 27 and *Narayanan Nair* v. *Raman Nair*, 82 Ind. Cas. 743; 20 L. W. 190; (1924) M. W. N. 674; (1925) A. I. R. (M.) 131, relied on.

An agent who can give the creditor the benefit of s. 20 of the Limitation Act has to act within the terms of his authority. If he exceeds his authority or does something which is not actually covered by his authority, he cannot bind the principal so as to give the creditor the benefit of s. 20. [p. 991, col. 2; p. 992, col. 1.]

Where a judgment-debtor executed a mortgage and directed the mortgagee to pay the mortgage amount immediately to the decree-holder and get a receipt but the mortgagee paid the money into Court more than a year thereafter and the decree-holder withdrew it:

Held, that the mortgagee was not a person duly authorized and that the payment by him did not fall under s. 20 of the Limitation Act so as to save the bar of limitation. [p. 992, col. 2.]

Linsell v. *Bonsor*, (1836) 2 Beng. (N. C.) 241; 2 Scott 399; 1 Hodges 305; 5 L. J. C. P. 40; 132 E. R. 95 and *Alagappa Chettiar* v. *Subramania Pandia Thevan*, 23 Ind. Cas. 810; 26 M. L. J. 509, relied on.

Appeal against an order of the Court of the Subordinate Judge, Coimbatore, dated the 20th December 1923, in E. P. No. 116 of 1923, in O. S. No. 64 of 1915.

Mr. *Watrap S. Subramania Iyer*, for the Appellant.

Mr. *J. M. Krishnaswamy Iyer*, for the Respondents.

JUDGMENT.—The question involved in this appeal is whether the execution of the mortgage decree in favour of the plaintiffs is barred by limitation. The Subordinate Judge held that the application for execution presented by the plaintiffs is not barred by limitation and the defendant has preferred this appeal.

The mortgage decree in favour of the plaintiffs was passed on 14th September

1916. An execution application was filed on 25th September 1917. It was dismissed on 17th October 1918. The present application is dated 9th March 1923. The contention of the plaintiffs is that a certain sum of money in Court was paid out to them by order dated 31st March 1920 and the cheque was actually issued on 1st April 1920 and that their application is, therefore, within three years from the date of the order for payment out. On the other hand Mr. Subramania Iyer for the appellant contends that the application for payment out of the sum of money in Court is not a step-in-aid of execution and, therefore, plaintiff's application for execution is barred. The defendant's guardian obtained leave of the Court for mortgaging the defendant's property for the purpose of raising money to pay off the plaintiff's debt. Sanction was given to the guardian to raise money in 1917 and on 14th October 1918 he hypothecated the defendant's properties to one Kasturi Naicker by Ex. I. The recital in Ex. I is "particulars of receipt of the said amount Rs. 17,690 is the amount received by way of direction given (to you) for setting and discharging the sum (payable) under the decree obtained against the said minor by Appanackenpettai K. Guruswami Naicken and others in O. S. No. 64 of 1915 on the file of the said Sub-Court and for obtaining receipt and retaining it as a title-deed herefor." The mortgagee seems to have paid the amount into Court on 19th March 1920 whereupon the plaintiffs applied for an order for payment out.

The question is whether in the circumstances an application for an order for payment out by the Court is a step-in-aid of execution. It is well settled that an application for payment out of money in Court by a decree-holder is a step-in-aid of execution if the money in Court was realised in execution of the decree. *Venkatarayalu* v. *Narasimha* (1), *Karala Varma Valiya Rajah* v. *Shangaram* (2), *Kooramayya* v. *Krishnamma Naidu* (3) and *Bapuchand Jethiram Gujar* v. *Mugutrao* (4). In this case the money in Court was not realised by the execution of the plaintiff's decree. The plaintiff's execution petition was dismissed so far back as 17th October 1918. The money was paid into Court to the credit of the suit and the plaintiffs applied for payment to them of the amount in Court. Where an amount of money is in Court to the credit of a suit and such amount has not been the proceeds of execution, an application for payment out cannot be said to be an execution application or an application in aid of execution. In such a case the plaintiff has only to apply to the Court for payment and the Court makes the payment without reference to the judgment-debtor in the suit. By asking for payment of the amount in Court, the plaintiff does not do anything to aid the execution of the decree. Where money is realised in execution of the decree, he has to ask the Court for an order to pay the money to him, and the Court, after considering whether there are other claimants in respect of the amount, passes an order in favour of the applicant. Such an order is a step-in-aid of execution. But, where the money is to the credit of the suit and all that is required of the plaintiff is to make an application for payment, it cannot be said that what he does is a step-in-aid of the execution of the decree.

In *Kuppuswami Chettiar* v. *Rajagopala Iyer* (5), Ayling and Venkatasubba Rao, JJ., held that an application to be a step-in-aid of execution should be one made in a pending execution application. Ayling, J. in delivering the leading judgment of the case differed from an observation of Ramesam, J., that "there is no warrant for the view that an application to take a step-in-aid of execution should be made "in execution, meaning, apparently, while an execution is pending." The application for the transfer of a decree from one Court to another for the purpose of execution is a step-in-aid of execution; and the application is in the form of an ordinary execution application with the prayer that the decree be transmitted to another Court for execution. Such an application is a step-in-aid of execution. In such a case it is necessary that the decree should be transferred to another Court for the purpose of execution; and, therefore, what is done in order to execute the decree is considered to be a step-in-aid of execution. But where the act of the plaintiff is not in furtherance of execution or in a pending

(1) 2 M. 174: 1 Ind. Dec. (N. S.) 392.
(2) 16 M. 452; 5 Ind. Dec. (N. S.) 1021.
(3) 17 M. 165; 3 M. L. J. 296; 6 Ind. Dec. (N. S.) 113.
(4) 22 B. 340; 11 Ind. Dec. (N. S.) 809.
(5) 70 Ind. Cas. 324; 45 M. 466; (1922) M. W. N. 113; 42 M. L. J. 303; 15 L. W. 348; (1922) A. I. R. (M.) 79; 32 M. L. T. 27.

execution, his act cannot be said to be one in aid of execution.

Mr. Krishnaswami Iyer, for the respondents relies upon *Thangi Shettithi* v. *Duja Shethi* (6), as supporting his contention that the order of the Court for payment out is a step-in-aid of execution. That case is distinguishable from the present case, as in that case an order of the Court was necessary for paying out to the plaintiff the amount of Rs. 500 paid into Court as security for costs. There the learned Judges observed as the money was deposited only as a security an order of the Court was necessary to make it available for payment towards the decree amount. An application for such a purpose and for payment out of the money is thus clearly necessary; and such an application is one in execution of the decree itself. In this case as we have already observed no such order was necessary in order to enable the plaintiffs to draw out the money standing to the credit of the suit.

If payment is made to the decree-holder by the judgment-debtor or by anybody on his behalf, or by the Receiver appointed by the Court to be in charge of the defendant's properties it would not amount to a step-in-aid of execution. In *Appasami Naickan* v. *Jotha Naickan* (7), it was held that payment by the Receiver appointed by a Court out of the rents and profits of the defendant's properties was not a step-in-aid of execution. The Receiver was not appointed for the purpose of execution; he was appointed during the pendency of the suit, and the Court paid to the plaintiff the amount that was collected by the Receiver and paid by him into Court. The learned Judges observed at p. 452 "We do not think that it can be properly said that such money was collected or paid in execution of the decree, though no doubt it was as a consequence of the decree that the appellants plaintiffs became entitled to it. The appellants in demanding the payment of these current profits of the estate did nothing towards the execution of the decree, for the decree did not deal with these profits." In the present case the mortgagee paid into Court a sum of money which he was directed to pay directly to the decree-holder; and the Court paid the money out to the plaintiffs on their applying for it. The Court, therefore, simply acted as the agent of the mortgagee and not as a Court executing the decree. Jackson, J. in a recent case in *Narayanan Nair* v. *Raman Nair* (8), observed that the "mere payment, however, is not a step-in-aid of execution and it is only a petition put into certify such payment that can constitute a step-in-aid of execution such as will give a fresh starting point of limitation under Art. 182 (5), of the Indian Limitation Act." We hold that in this case the payment out by the Court to the plaintiffs on their application on 31st March 1920 is not a step-in-aid of execution and the plaintiff's application, therefore, is barred by limitation.

The next contention is that the payment towards the decree amount was made by a person duly authorised on behalf of the defendant and such payment having been made by the Court as the agent of the judgment-debtor and the payment appearing in the hand-writing of the person making the same by reason of the cheque having been signed by the Court, the terms of s. 20 of the Limitation Act have been satisfied and, therefore, the application is within time. In the first place it is to be noted that the mortgagee was not authorised to pay the amount into Court. The terms of Ex. I are clear. The guardian of the defendant did, with the sanction of the Court, execute Ex. I a mortgage in favour of Kasturi Naicker and directed him to pay the amount to the plaintiff and obtain a receipt from him and to retain it as a title. The mortgagee, therefore, was not authorised to pay the money into the Court. Secondly, the document was executed on 14th October 1918 and the mortgagee was asked to pay the amount without any delay, for in the particulars of consideration the recital is "Rs. 17,690 the amount received by way of direction given (to you) for settling and discharging the sum (payable) under the decree obtained against the said minor by Appanackenpettai K. Guruswami Naicken and others in O. S. No. 64 of 1915." The mortgagee, therefore, was not authorised to keep money with him for a considerable time, *i. e.*, for more than a year and a half and then to pay it into Court. The agent who can give the creditor the benefit of s. 20 has to act within the terms of his authority. If he exceeds his authority or does some-

(6) 48 Ind. Cas. 226; 35 M. L. J. 575; (1918) M. W. N. 748; 8 L. W. 519; 24 M. L. T. 483.

(7) 22 M. 448; 8 Ind. Dec. (N. S.) 321.

(8) 82 Ind. Cas. 743; 20 L. W. 190; (1924) M. W. N. 674; (1925) A. I. R. (M.) 131.

thing which is not actually covered by his authority he cannot bind the principal so as to give the creditor the benefit of s. 20 of the Limitation Act. We think this case comes within the principle of the decision in *Linsell* v. *Bonsor* (9). In that case the defendant's agent had instructions to offer the claimant a part of the debt in discharge of the whole. The claimant refused to take the money on those terms and the agent paid it in part discharge. It was held that this was not a part payment by defendant to take the case out of the operation of the Statute of Limitations. In *Alagappa Chettiar* v. *Subramania Pandia Thevan* (10), it was held following *Linsell* v. *Bonsor* (9), that though the mortgagee had authority to pay off the debt in full, he had no authority to make a pure payment of interest as such so as to bring the case within s. 20 of the Indian Limitation Act.

Mr. T. M. Krishnaswami Iyer relied upon in *Govindasami Pillai* v. *Dosai Goundan* (11), as supporting his contention. In that case a certain amount paid by the Government under the Land Acquisition Act into Court was paid out to the decree-holder. It was held that the payment of that amount was part payment of the principal of the decree debt and the Judge by whose order the payment was made, was an agent duly authorised by the judgment-debtor to make it and the fact of the payment appeared in the handwriting of the Judge within s. 20 of the Limitation Act. This case is distinguishable from the present case on the facts. In that case a portion of the hypothecated property was acquired by the Government under the Land Acquisition Act and Rs. 3,400 was deposited in Court for the Government to the credit of the suit and the decree-holder drew the amount from Court. There the money was paid into Court by the Government under the provisions of the Land Acquisition Act. Seeing that the land acquired was subject to a mortgage and there was a decree for the sale of the property, the Government paid, the compensation for the land acquired into Court as it was bound to do. In the present case the mortgagee was not required by the mortgagor to pay money into Court. He chose to pay into Court out of his own sweet will and pleasure when it suited him. In the first place he had no power to pay it nearly one and a half years after the execution of Ex. I; and, in the second place, he was not asked to pay the amount into Court but was asked to pay the money directly to the decree-holder and obtain a receipt from him. Therefore, he was not a person specially authorised to pay the amount into Court so that it may be paid out to the decree-holder. This point also is found in favour of the appellant.

In the result the appeal is allowed and the order of the Subordinate Judge is set aside with costs throughout.

V. N. V. *Appeal allowed.*
Z. K.

(9) (1836) 2 Beng. (N. C.) 241; 2 Scott. 399; 1 Hodges 305; 5 L. J. C. P. 40; 132 E. R. 95.
(10) 23 Ind. Cas. 810; 26 M. L. J. 509.
(11) 68 Ind. Cas. 100; 41 M. L. J. 423; 14 L. W. 320; 92 1) M. W. N. 683; 44 M. 971.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 492 OF 1921.
EXECUTION MISCELLANEOUS APPLICATION No. 172 OF 1923.
June 30, 1924.

Present:—Mr. Rupchand Bilaram, A. J. C.

FIRM OF GOKALDAS KHATAOO—PLAINTIFFS—DECREE-HOLDERS—APPLICANTS
versus
FIRM OF VASSUMAL WADHUMAL—DEFENDANTS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 50 (2), O. XXX, scope of—Suit against firm, nature of—Deceased partner, whether party—Legal representatives, whether can be proceeded against.

Order XXI, r. 50 (2), C. P. C., is limited in its operation to the case of a partner, who is living at the date of the decree and the estate of a deceased partner in the hands of his legal representatives, as such, cannot be proceeded against under this rule. [p. 994, col. 1.]

Ellis v. *Wadeson*, (1899) 1 Q. B. D. 714 at p. 718; 68 L. J. Q. B. 604; 47 W. R. 420; 80 L. T. 508; 15 T. L. R. 274, referred to.

Jivraj Laloobhai Patel v. *Bhagvandas Gordhandas*, 68 Ind Cas. 627; 24 Bom. L. R. 1037; (1923) A. I. R. (B.) 66, dissented from.

Order XXX of the C. P. C. is not intended to recognize a firm as a legal entity but to provide, subject to certain limitations, a convenient mode of describing the partners who compose the firm in the plaint and in the summons. [*ibid.*]

A suit against a firm is in effect a suit against the individual partners of the firm and a dead partner cannot be assumed to be a party to the action. [*ibid.*]

Ellis v. *Wadesen*, (1899) 1 Q. B. D. 714 at p. 718; 68 L. J. Q. B. 604; 47 W. R. 420; 80 L. T. 508; 15 T. L. R. 274, referred to.

Mr. *Fatehchand Assudamal*, for the Applicants.

Mr. *Assudamal Rewachand*, for the Opponent.

ORDER.—The judgment-creditors have attached a sum of Rs. 21,118 in the hands of the Central Bank of India, Ld., and a further sum of Rs. 26,630 in the hands of the Mercantile Bank of India, Ld., as belonging to the firm of Vissumal Vadhumal who are the judgment-debtors in the suit. Both these sums are deposited in the two banks in the names of Jethanand, Pribhdas and Ghanshamdas. One of them, Jethanand has applied under O. XXI, r. 58, C. P. C. for raising attachment and contends that the money deposited in the two banks does not belong to the firm of Vissumal Wadhumal but to the minor Lachmandas son of Vissumal. In consequence of this application for raising attachment, the judgment-creditors have applied that leave may be granted to them under O. XXI, r. 50, C. P. C., to execute the decree against Lachmandas as the legal representative of Vissumal who was one of the partners of this firm. There are similar applications in three other suits filed by other creditors against the same debtors. All the applications have been tried together and the evidence recorded in this application and in execution application No. 998 of 1923 has been treated as evidence in all the applications.

There is very little dispute as to the facts. The firm of Vissumal Wadhumal was started by Vissumal several years ago as manager of the joint family consisting of himself and his brother Goumal who was then a minor six or seven years old. Vissumal died in October 1918. Before his death he entered into certain forward contracts for *bajri* of *Mangh* 1974 *vaida* which resulted in a loss. Certain suits including Suit No. 991 of 1918 were filed after Vissumal's death for recovery of this loss against the firm of Vissumal Wadhumal. Goumal who managed the family business after Vissumal's death defended the suits and pleaded *inter alia* that the contracts were wagering. Suit No. 991 of 1918 was treated as a test suit, and though keenly contested was decreed against this firm by Raymond, A. J. C. on 17th November 1921. Decrees in other suits followed.

It appears that on 14th November 1920 after the institution of some of the suits against the firm of Vissumal Wadhumal, disputes relating to the severance of the joint family tie and partition of property between Goumal and Lachmandas the minor son of Vissumal represented by his mother Tejibai were referred to arbitration, and on 12th January 1921 an award was passed partitioning the property between them. The business of Vissumal Wadhumal which was treated as a joint family business was allotted to Goumal as a going concern, he being held liable for the debts of this business. Certain property including the moneys now in dispute which were, however, realized by the sale of the immoveable properties belonging to the family was allotted to the minor, and the three persons in whose names this money has been deposited appointed as managers for the minors property. This award was objected to by Goumal and has recently been set aside by Aston, A. J. C., under s. 15 of the Indian Arbitration Act. The revision application filed against his order is still pending.

The application for attachment is misconceived. It is not disputed that the money under attachment has come out of the sale proceeds of the immoveable property belonging to the joint family. It did not form part of the assets of the business of Vissumal Wadhumal. At the date of the attachment it was not in the possession of the firm of Vissumal Wadhumal who are the judgment-debtors in this case, or in the possession of any person holding in trust for them within the meaning of O. XXI, r. 60, C. P. C. The money was held in trust for the minor as the minor's property and the applicant Jethanand is, therefore, entitled to have the attachment raised as having been improperly effected. The fact that the award has been set aside, also does not help the plaintiffs. The managers may have to account to Goumal for the money in their hands if the revision application is dismissed. They still hold it, whether rightly or wrongly, on behalf of the minor. At most it may be treated as the property of the joint family consisting of Goumal and the minor Lachmandas. This application is not for attachment either of the right, title and interest of Goumal in the joint family property or for attachment of the joint family property to pay off the debts incurred by the manager, for the joint family benefit or necessity, so as to enable the minor to raise proper issues as to his liability. As an application for attach-

ment of property belonging to the firm of Vissumal Wadhumal it must fail. The subsequent application for leave to execute the decree under O. XXI, r. 50, C. P. C. against Lachmandas as the legal representative of a deceased partner is equally incompetent.

Clause (2) of O. XXI, r. 50, C. P. C. is in my opinion limited in its operation to the case of a partner who was living at the date of the decree. *Jivraj Laloobhai Patel* v. *Bhagvandas Gordhandas* (1) Shah, Ag. C. J. has taken a different view. With all due respect, I beg to differ. A firm as such has no legal existence in our jurisprudence. Order XXX, C. P. C. which corresponds to O. XLVIII. R. S. C. is not intended to recognize a firm as a legal entity but to provide, subject to certain limitations a convenient mode of describing the partners who compose the firm in the plaint and in the summons. The suit is in effect a suit against the individual partners of the firm sued, and as pointed out by Romer, L. J. in *Ellis* v. *Wadeson* (2) a dead man cannot be sued and so a dead partner cannot be assumed to be a party to the action. Similarly no judgment except a judgment *nunc pro tunc* can be passed against a dead man. If a suit instituted against a firm or a decree passed against a firm is in substance a suit, and a decree against the individual partners of the firm, it would follow that there is no decree against a partner of the firm who died either before the action or even before judgment, and, therefore, the provisions of O. XXI, r. 50, cl. (2), C. P. C. would have no application.

This view can hardly be said to be either unjust or not to have been contemplated by the Legislature. Order XXX, C. P. C., is intended to save the plaintiffs the trouble of making inquiries to find out the names of partners and to avoid unnecessary delay in the disposal of suits pending service on partners. Ordinarily a plaintiff expects to realize his debt from the assets of the firm or at most out of the private property of the partner who is served under O. XXX, r. 3, C. P. C. But r. (1) affords him an opportunity of finding out of the names of the partners of the defendant firm after service and if he is not content with realizing his claim from the assets of the firm and wishes to enforce it against the estate of a deceased partner, it is his business to be vigilant and to apply for joining the legal representatives of the deceased partner at the proper time and before judgment. If he does not do so, he has to thank himself.

Vissumal having died prior to the institution of this suit, this application under O. XXI, r. 50, cl. (2) also fails.

I order the attachment to be raised and dismiss the execution application with costs and dismiss the application under O. XXI, r. 50, C. P. C., but make no separate order for costs.

K. S. D. *Appeal dismissed.*

(1) 68 Ind. Cas. 627; 24 Bom. L. R. 1037; (1923) A. I. R. (B.) 66.

(2) (1899) 1 Q. B. D. 714 at p. 718; 68 L. J. Q. B. 604; 47 W. R. 420; 80 L. T. 508; 15 T. L. R. 274.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2284 OF 1921.

March 17, 1925.

Present:—Mr. Justice Fforde and Mr. Justice Abdul Raoof.

LACHHA MAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HIRDE NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Specific Relief Act (I of 1877), s. 56 (1)—Contract for sale of land—Agreement to sell to third person—Injunction, suit for—Specific performance, subsequent suit for, whether maintainable.

The usual mode of proceeding in case of a breach of contract for the sale of land is to bring a suit for specific performance of the contract. The party aggrieved by the breach is not entitled to two reliefs in respect of the breach of such a contract, one by way of injunction restraining the defendant from selling the property to a third person and the other by way of specific performance. He is entitled only to one relief, namely, a suit for specific performance in which he can add a claim for compensation. The dismissal, therefore, of a suit for an injunction restraining the vendor from selling the property to a third person does not operate as a bar to the maintainability of a subsequent suit for specific performance. [p. 995, col. 2.]

Second appeal against the decision of the Sub-Judge, Delhi, dated the 19th May 1921.

Lala *Sardha Ram*, R. S., and Mr. *Shamair Chand*, for the Appellants.

Lala *Jagan Nath Aggarwal* (represented by Lala *Har Gopal* and Lala *Amar Nath Chona*), for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff from the decision of the Trial

Judge who dismissed the suit on the ground that it was barred by the provision of O. II, r. 2, of the C. P. C.

The only question which arises for determination in this appeal is whether or not the suit is so barred.

The facts out of which the appeal arises are shortly as follows:—

On the 21st September 1918, Hirde Nath acting on behalf of himself, as *mukhtar* for Pushkar Nath and as guardian for Brij Mohan, a minor entered into an agreement with the plaintiff to sell to the latter a certain plot of land. On foot of this agreement, the plaintiff paid to Hirde Nath a sum of Rs. 99 as earnest money. On the 23rd September, 1918, the plaintiff paid the defendant a further sum of Rs. 100 and the latter thereupon executed a formal agreement for the sale of the property in question. On the 27th of January, 1919, the plaintiff paid the defendant Rs. 200 on foot of the same transaction. The defendant, however, instead of completing the sale entered into a contract to sell the same property to another person, whereupon the plaintiff on the 28th of August, 1919, brought a suit against the defendants for a permanent injunction to restrain them from carrying out this latter sale.

This suit, was dismissed on the ground that a suit for an injunction did not lie, and the plaintiff then brought the present suit for specific performence of his agreement, with an alternative claim for damages by way of compensation.

Mr. Har Gopal for the defendant, contends that the present suit is prohibited by cl. 3 of O. II, r. 2 of the C. P. C. That clause reads as follows:—

"A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards, sue for any relief so omitted."

Mr. Sardha Ram for the plaintiff contends, firstly, that the two suits did not arise out of the same cause of action inasmuch as cause of action of the first suit was the agreement by the defendant to sell the property in question to some person other than the plaintiff, whereas the cause of action in the present suit is the breach by the defendant of his contract to sell the land to the plaintiff. He argues, secondly, that even if the cause of action in the two suits can be held to be the same a permanent injunction was not a relief which the plaintiff could sue for on foot of such a cause of action.

I do not think it necessary to decide whether or not the cause of action in the two suits is the same, for it is quite clear that a suit for a permanent injunction did not lie. The plaintiff was not entitled to come to the Court for such a relief in respect of the present cause of action. This is quite clear from the provision of s. 56 (*i*) of the Specific Relief Act, which provides that "an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceedings, except in case of breach of trust." The usual mode of proceeding on breach of a contract for the sale of lands is to bring a suit for specific performance of the contract. The plaintiff, therefore, was not entitled to two reliefs in respect of the breach of a contract, one by way of injunction and the other by specific performance. He was entitled only to the one relief, namely, a suit for specific performance, in which he could have added a claim for compensation. Order II, r. 2, therefore, is no bar to the present suit. A number of cases have been cited by Counsel, but I do not think it necessary to discuss them. It seems to me that no authority is required for the proposition that a plaintiff, who sues for a relief which the Courts cannot grant him, is not debarred from subsequently bringing a suit in respect of a relief which the Courts can grant him. There is certainly nothing in O. II, r. 2, to the contrary.

I would allow the appeal, set aside the decree of the lower Court and remand the case for trial on the merits; the plaintiff to have his costs in both Courts.

Z. K. *Appeal allowed; Case remanded.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 53 OF 1924.

December 17, 1924.

Present:—Mr. Baker, J. C.

SHEOKISAN—PLAINTIFF—APPELLANT

versus

DOMA—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 52—Lis

pendens, *doctrine of, applicability of—Mortgage suit —Transfer of mortgaged property* pendente lite, *effect of—Purchaser, rights of—Mortgage-decree—Private sale by judgment-debtor in favour of decree-holder—Decree-holder, whether can eject transferee* pendente lite.

Section 52 of the Transfer of Property Act does not say that any conveyance made *pendente lite* is void. It only says that such a conveyance does not affect the rights of any party under any decree or order which may be made in the suit. The effect of the doctrine of *lis pendens* is not to annul the conveyance made in contravention of it, but only to render it subservient to the rights of the parties to the litigation. [p. 996, col. 2.]

Nathaji Anandrav Patil v. *Nana Sarjerao Patil*, 9 Bom. L. R. 1173, relied on.

During the pendency of a mortgage suit the mortgagor sold a portion of the mortgaged property to the defendant. The plaintiff obtained a preliminary decree for sale which was made final, and the Court ordered the property to be sold and the case was sent to the Collector for execution. The mortgagor judgment-debtor applied to the Collector for permission to sell the property to the plaintiff and, permission having been given, the sale was effected. The plaintiff then brought the present suit to eject the defendant from the property purchased by the latter from the mortgagor during the pendency of the mortgage suit:

Held, that the defendant's purchase was subject to the decree eventually passed in the mortgage suit and that, therefore, the plaintiff was entitled to enforce the mortgage decree against the property in the hands of the defendant but was not entitled to eject the defendant from the property in his capacity of private purchaser of the property from the judgment-debtor in execution of the decree. [p. 997, col. 1.]

Thakur Prasad v. *Gaya Sahu*, 20 A. 349; A. W. N. (1898) 63; 9 Ind. Dec. (N. S.) 584, *Madan Mohan Singh* v. *Raj Kishori Kumari*, 39 Ind. Cas. 182; 21 C. W. N. 88, *Ganga Prasad* v. *Ganga Bakhsh Singh*, 29 A. 415; A. W. N. (1907) 112, and *Shivlingappa* v. *Chanbasappa*, 30 B. 337; 8 Bom. L. R. 16; 1 M. L. T. 46, distinguished.

Appeal against the decree of the District Judge, Bhandara, dated the 17th October 1923, in Civil Appeal No. 29 of 1923.

Mr. *Y. V. Jakatdar*, for the Appellant.

Messrs. *P. S. Deo* and *J. C. Ghosh*, for the Respondent.

JUDGMENT.—The facts of this case are set out in the judgments of the Courts below. They are rather complicated, but only a few of them are necessary for the determination of this appeal.

It is sufficient to state that one Sitaram Kalar had entered into various mortgages. The plaintiff, who is subsequent mortgagee, paid off the prior mortgagees and brought Suit No. 190 of 1918 against the mortgagor Sitaram to recover the amount so paid. The suit was instituted on 20th December 1918, and on the following day (21st December 1918) Sitaram sold the field in dispute in this appeal to the present defendant. It is admitted that the sale-deed was during the pendency of the suit and it is affected by the doctrine of *lis pendens*.

The plaintiff obtained a preliminary decree for sale in that suit, which was made final, and the Court ordered the property to be sold and the case was sent to the Collector for execution but in May 1922 the judgment-debtor applied to the Collector for permission to sell the land in dispute with other land to the plaintiff, and this was allowed by the Collector. Exhibit P-10 is the sale-deed to the plaintiff, dated the 10th May 1922.

The plaintiff brought this suit to eject the defendant from the field in suit, but his suit has been dismissed by both the Courts below.

It is contended that this transfer to the defendant during the pendency of the suit cannot, under s. 52 of the Transfer of Property Act, affect the rights which the plaintiff obtained under the decree, and, therefore, as it does interfere with them, it is void.

It is further contended that the sale by the judgment-debtor to the plaintiff with the permission of the Collector really amounts to a sale by the Collector in execution of the decree, and, therefore, the prior sale to the defendant which interferes with it is void. Section 52 of the Transfer of Property Act does not say that any conveyance made *pendente lite* is void. It only says that it does not affect the rights of any party under any decree or order which may be made in the suit. It has been held in *Nathaji Anandrav Patil* v. *Nana Sarjerao Patil* (1) that the effect of the doctrine of *lis pendens* is not to annul the conveyance made in a contravention of it, but only to render it subservient to the rights of the parties to the litigation. The result then is that the sale to the defendant will be liable to be affected by the decree which the plaintiff obtained, that is the property sold will be liable to the charge decreed in the plaintiff's favour, but that will not justify the plaintiff in ejecting the defendant.

The learned Counsel for the appellant has referred to two cases—*Thakur Prasad* v. *Gaya Sahu* (2) and *Madan Mohun Singh* v. *Raj Kishori Kumari* (3) but these do not apply to the point now in issue. The law

(1) 9 Bom. L. R. 1173.
(2) 20 A. 349; A. W. N. (1898) 63; 9 Ind. Dec. (N. S.) 584.
(3) 39 Ind. Cas. 182; 21 C. W. N. 88.

is that the purchaser is treated as standing in the place of the person from whom he has taken the assignment (Ghose's Law of Mortgage, 4th Edition, Vol. II, page 708). It is admitted on behalf of the respondent that he took the property liable to the charge, but the plaintiff is mistaken in seeking his remedy, for instead of enforcing the charge against the property he sues for ejectment.

It is further argued that there are no equities in the plaintiff's favour as he has tried to turn the respondent out of the property without executing his decree. The defendant paid a large sum for the property and also paid off a foreclosure decree obtained by the plaintiff against this property. There is no warrant for the contention that the sale by judgment-debtor with the permission of the Collector, when the Collector is in the management of the property under Sch. III, of the C. P. C., has the same affect as the sale by the Collector, and the cases quoted by the learned Counsel for the appellant—*Ganga Prasad* v. *Ganga Bakhsh Singh* (4) and *Shivlingappa* v. *Chanbasappa* (5)—do not lay down any such proposition; the latter of these cases is a case of attachment.

In these circumstances, I am of opinion, that the view of the lower Appellate Court is correct and that the plaintiff cannot succeed in ejecting the defendant in the present case. The sale to the plaintiff was a private sale made with the permission of the Collector and at that time Sitaram had already parted with his interest in the property and had none left to convey to the plaintiff. The sale to the defendant must be considered as subject to the charge which the plaintiff obtained by his decree, but that does not authorise the plaintiff to evict the defendant.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(4) 29 A. 415; A. W. N. (1907) 112.
(5) 30 B. 337; 8 Bom. L. R. 16; 1 M. L. T. 46.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST MISCELLANEOUS APPEAL No. 5 OF 1925.

February 27, 1925.

Present:—Mr. Daniels, J. C.

ALI ABBAS AND ANOTHER—APPELLANTS

versus

NARAIN DASS AND OTHERS—RESPONDENTS NOS. 1, 2 AND 3.

Civil Procedure Code (Act V of 1908), ss. 47, 151, O. XXI, r. 90—Execution of decree—Sale—Permission given to decree-holder to bid at auction—Restriction placed on permission without notice to decree-holder—Irregularity—Purchase by clerk of decree-holder's lawyer—Fraud—Inherent power of Court to refuse to confirm sale.

In execution of a decree the Court granted an unconditional permission to the decree-holder to bid at the auction-sale of the judgment-debtor's property. Subsequently the Court made an order, without giving any notice to the decree-holder, fixing the minimum amount of the decree-holder's bid. As a result of this restriction the property was sold at a grossly inadequate price:

Held, that the action of the Court in placing a restriction upon the permission given to the decree-holder to bid at the auction-sale, without giving notice to the decree-holder, amounted to an irregularity within the meaning of O. XXI, r. 90, or of s. 47 of the C. P. C. [p. 999, col. 1.]

The clerk of a lawyer retained by a decree-holder stands in a position of active confidence towards the decree-holder, and if in execution of the decree, the clerk proceeds to purchase the property of the judgment-debtor which has been put up for sale, without informing the decree-holder of his intention to bid, his conduct amounts to a gross abuse of confidence and fraud on the decree-holder, and the Court has inherent power in such a case to refuse to confirm the sale. [pp. 998, col. 1; p. 999, col. 2.]

Appeal from an order passed by the Subordinate Judge, Mohanlalganj, dated the 17th November 1924.

Messrs. *Niamat Ullah* and *Md. Ayub*, for the Appellants.

Mr. *M. Wasim*, for the Respondent No. 1.

JUDGMENT.—This is an appeal against an order setting aside an auction sale. The application was made under O. XXI, r. 90, C. P. C., the sale not having been confirmed. The applicant was the decree-holder Babu Narain Das. The opposite party were first the two judgment-debtors M. Ghazanfar Ali Khan and *Musammat* Afsar Jehan Begum, who are husband and wife, and the auction-purchasers Raza Ali Khan and Ali Abbas. The purchase was made by these two jointly. Raza Ali Khan is the son of the judgment-debtors, Ali Abbas is the clerk of the Pleader who represented the decree-holder in the suit.

Of the grounds on which it was sought

to set aside the sale three are now material. They are as follows:

1. That the purchase by Ali Abbas, who was in a position of active confidence towards the decree-holder constituted a fraud on the Court and the decree-holder.

2. That after the decree-holder had been given permission to bid, the Court without notice to him improperly added a condition that his bid must be one of at least Rs. 10,000. It is alleged that in consequence of this fraud and irregularity the property was sold at far below its real value. The learned Subordinate Judge has rejected the first plea but set aside the sale on the second. The decree-holder urges that the first ground also should have been decided in his favour. It was further alleged on his behalf that the auction-purchasers were really *benamidars* for the judgment-debtors. It is quite possible that this really was the case but the decree-holder has not been able to substantiate it and it is not now pressed. It was also urged that owing to the fraudulent action of the judgment-debtor bidders were kept away from the sale. It is said that the judgment-debtor persuaded the decree-holder to agree to a fortnight's time, that hearing of this agreement bidders went away, and that after they had gone the judgment-debtor refused to sign the joint application which was to have been presented to the Court. The learned Subordinate Judge disbelieves the evidence under this head, and the decree-holder has not been able to satisfy me that he was wrong in doing so. These two grounds, therefore, need not be further considered.

On the other issues the facts are quite clear. There is no doubt whatever that Ali Abbas did stand in a position of active confidence towards the decree-holder, and that the purchase by him without informing the decree-holder of his intention was a gross abuse of confidence and amounted to a fraud on the decree-holder. The learned Subordinate Judge concedes that B. Makund Bihari Lal, the Pleader whose clerk Ali Abbas is, represented Narain Das in the suit and drafted the application for making the decree absolute. He thinks that because he fell ill after that and the decree-holder employed another Pleader, and because none of the papers in the execution case are in the handwriting of Ali Abbas, the latter did not stand in a fiduciary relation to the decree-holder and B. Mukund Bihari Lal's connection with the case was purely nominal. The admitted facts do not warrant this finding. B. Mukund Bihari Lal in his evidence admits that he came to Court once or twice in connection with the execution proceedings, and it was Ali Abbas who informed him that the permission to bid granted to the decree-holder had been made subject to a condition. Witness went to the decree-holder and informed him of this and advised the decree-holder to take whatever course he thought best. It is not correct that there is no paper signed by Ali Abbas in connection with the execution proceedings. He admits signing a receipt for diet money for witnesses in these proceedings. There is, therefore, no doubt, whatever that both B. Mukund Bihari Lal and Ali Abbas stood in a position of active confidence towards the decree-holder at the time when the sale took place. I need not refer to the numerous authorities on the duty of a solicitor or a solicitor's clerk in dealing with the property of his client. They will be found collected in such standard works as Kerr on Fraud, and Storey on Equity. The purchase in this case was made at a price far below the real value of the property and the decree-holder is fully entitled to have it set aside.

The facts on which the second plea is based are equally clear. On the 10th of May an unconditional permission was given to the decree-holder to bid. This permission was given on an application by the decree-holder. On 27th May some officious clerk in the office put up a report stating that this permission contained no limitation on the amount which the decree-holder might bid and asking whether any such limitation should be imposed. The Subordinate Judge thereupon without issuing any notice to the decree-holder passed an order that the decree-holder's bid must not be below Rs. 10,000.

As the Courts were closed for the vacation from 1st June and the sale took place on 20th June the decree-holder had no opportunity to object. Indeed the decree-holder did not hear of the order until after the Courts were closed. There is no doubt, having regard to the value of the property, that the limit imposed was much too high.

There is also no doubt that the property

was sold far below its value. The price bid by Ali Abbas and Raza Ali was Rs. 1,900 only. The property was valued at Rs. 8,000 and there was a prior charge of Rs. 2,200 upon it. At the very lowest computation the amount bid was less than half of the real value of the property. There is also no doubt that this sale at a grossly inadequate price was the direct result of the limitation put on the decree-holder's right to bid. Had he been allowed to bid a reasonable sum he would certainly have made an attempt to buy in the property at something more nearly approaching its real value, especialy as the amount of his decree was over Rs. 11,000.

The main contention of the appellants is that even if these facts are admitted they do not constitute a fraud or material irregularity in publishing or conducting the sale and that O. XXI, r, 90 is strictly limited in its operation to irregularity or fraud in connection with the publication or conduct of the sale. They also contend that as it was purely at the discretion of the Court to give permission to the decree-holder to bid at all any condition imposed on him could not amount to a material irregularity. As to the latter point the Court, it is true, need not have given permission to the decree-holder to bid, but having passed such an order the Subordinate Judge had no right to review it to the decree-holder's prejudice on an office report without any intimation to the decree-holder and without his having any opportunity of being heard. In modifying its order in this way the Court did in my opinion commit a material irregularity. As to the former plea the words "publishing and conducting the sale" must receive reasonable latitude of interpretation. It is the Court which is responsible for the conduct of the sale and the officer by whom it is actually held merely acts in a ministerial capacity subject to the orders of the Court. This is clear from the rules as to the sale of property laid down in the Oudh Civil Digest. I, therefore, agree with the Court below that modifying the permission already granted to the decree-holder to bid on an office report behind the decree-holder's back amounted to a material irregularity. The question whether this irregularity is covered by O. XXI, r. 90 is not really very material, because if it is not covered by that rule it would certainly be covered by s. 47, C. P. C. This was held in the very case relied on by the appellants, namely *Parashram Hanmanta* v. *Balmukund Lachiram* (1), and in that case the Court actually did set aside the sale. The auction-purchaser is the representative of the judgment-debtor. *Anandi* [*Kunwari* v. *Ajudhia Nath* (2) and *Veyindramuthu Pillai* v. *Maya Nadan* (3)], and the question is one relating to the satisfaction of the decree. Moreover the judgment-debtors are also parties to the proceedings, and it was held as far back as 1892 by the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (4) that the fact of the auction-purchaser interested in the result of the proceedings had never been held to bar the application of s. 244 of the C. P. C., corresponding to the present s. 47. This case was followed by their Lordships in *Ganapathy Mudaliar* v. *Krishnama Chariar* (5). As regards the fraud committed on the decree-holder by Ali Abbas in purchasing the property I am content to follow the decision of the Madras High Court in *Raghavachariar* v. *Murugesa Mudali* (6), that in such a case the Court has inherent power in the interests of justice to refuse to confirm the sale. In the particular case before the Madras High Court the decree-holder had misled the Court as to the value of the property and thereby induced it to fix a reserve price which was far below the real value of the property, and the principle applies with equal strength to the facts of the present case.

For the reasons I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 10 Bom. L. R. 752; 32 B. 572.
(2) 30 A. 379; A. W. N. (1908) 157; 5 A. L. J. 557.
(3) 54 Ind. Cas. 209; 43 M. 107; (1919) M. W. N. 881; 26 M. L. T. 391; 38 M. L. J. 32 (F. B.).
(4) 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 898 (P. C.).
(5) 44 Ind. Cas. 855; 41 M. 403; 23 M. L. T. 198; 27 C. L. J. 367; 34 M. L. J. 463; 4 P. L. W. 310; (1918) M. W. N. 310; 22 C. W. N. 553; 16 A. L. J. 353; 20 Bom. L. R. 580; 8 L. W. 427.
(6) 72 Ind. Cas. 545; 46 M. 583; (1923) M. W. N. 323; 32 M. L. T. 285; 44 M. L. J. 680; 17 L. W. 750; (1923) A. I. R (M.) 635.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 305B OF 1923.

November 20, 1924.

Present:—Mr. Kinkhede, A. J. C.

DEORAO AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

VITHAL AND OTHERS—PLAINTIFFS AND DEFENDANT NO. 1—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 4, 5—Stranger claimant, suit by—Jurisdiction of Civil Court, when barred—Possession, whether proof of title—Presumption.

Long continued exclusive possession gives rise to a presumption that such possession had a lawful origin, *i. e.*, it originated in an exclusive title. [p. 1000, col. 2.]

If a stranger who is not bound to go to the Insolvency Court at all invites the decision of that Court upon the merits of a claim, he cannot afterwards turn round and question its jurisdiction. But where the Insolvency Court has refused to entertain and enquire into or adjudicate upon the rights of the stranger claimant or the latter has not preferred any claim for the consideration of the Bankruptcy Court there is no decision by it, which would operate to oust the jurisdiction of the Civil Court to decide the matter. [p. 1001, col. 1.]

Pita Ram v. *Jujhar Singh*, 43 Ind. Cas. 573; 39 A. 626; *Mohin* v. *Baij Nath*, 46 Ind. Cas. 394; 40 A. 582; 16 A. L. J. 456, *Irshad Husain* v. *Gopi Nath*, 49 Ind. Cas. 590; 41 A. 378; 17 A. L. J. 374; 1 U. P. L. R. (A.) 163, *Ex parte Swimbanks, In re Shanks*, (1879) 11 Ch. D. 525; 48 L. J. Bk. 120; 40 L. T. 825; 27 W. R. 898, and *Ex parte Butters, In re Harrison*, (1880) 14 Ch. D. 265; 43 L. T. 2; 38 W. R. 876.

Appeal against the decree of the Additional District Judge, Akola, dated the 19th June 1923 in Civil Appeal No. 16 of 1923.

Mr. *M. B. Niyogi*, for the Appellants.

Mr. *G. G. Hatwalne*, for the Respondents.

JUDGMENT.—One Yeshwanta was indebted to Deorao, who caused him to be declared insolvent and attached certain houses as his property and caused them to be sold by auction and defendant No. 3 Chihuji has become the auction-purchaser. The plaintiffs are related to Yeshwanta as his father Wansing's brother Harsing's great-grandsons. They asserted that the houses sold were their own property by virtue of a partition which took place 60 years ago; this was denied by the opposite party and it was asserted that they belonged exclusively to defendant No. 1.

The First Court held that house No. 2 was not sold by the Insolvency Court. That house No. 1 is the site on which the *kotha* was built by the plaintiff's father Pandhari 6 years ago and that the same has been in constant use of the plaintiffs and not of Yeshwanta, during the 12 years prior to suit. In this view of the case the plaintiffs' claim was decreed so far as it related to house No. 1 and the rest dismissed.

The Additional District Judge confirmed this decree upon an appeal preferred by defendants Nos. 2 and 3 and they have, therefore, come up in second appeal.

It is argued in appeal that the plaintiffs had to establish the fact of the partition as the first step for their success and that mere exclusive possession for a number of years would not suffice to prove their exclusive ownership. I say that long continued exclusive possession would give rise to a presumption that such possession had a lawful origin, *i. e.*, it originated on an exclusive title. I have, therefore, no hesitation in upholding that view taken by the lower Appellate Court that the plaintiffs have established their title to the house No. 1. This disposes of grounds Nos. 2 to 5 which relate to the merits of the case.

As regards ground No. 1 that this suit is not maintainable without the previous sanction of the Insolvency Court reliance is placed on the following cases and it is contended that the suit should have been thrown out in view of the prohibition contained in ss. 4 and 5 of the new Insolvency Act.

Official Receiver, Tinnevelly v. *Sankaralinga Mudaliar* (1), *Abdul Khader Sahib* v. *Official Assignee of Madras* (2), *Ramaswami Chettiar* v. *Ramaswami Iyengar* (3), *Govind* v. *Gopala* (4), *Bansidhar* v. *Kharagjit* (5) and *Trimbak* v. *Sheoram* (6).

On the other hand reliance is placed on the following cases on behalf of the plaintiff-respondents.

Pita Ram v. *Jujhar Singh* (7), *Mohni* v. *Baij Nath* (8), *Irshad Husain* v. *Gopi Nath* (9), *Bhairo Prasad* v. *S. P. C. Dass* (10) and *Ram Piyara* v. *Bhana Mal* (11).

(1) 62 Ind. Cas. 495; 44 M. 524; 40 M. L. J. 219; (1921) M. W. N 236; 14 L. W. 505.

(2) 36 Ind. Cas. 524; 40 M. 810; 20 M. L. T. 311; 4 L. W. 425.

(3) 65 Ind. Cas. 394; 45 M. 434 at p. 441; 15 L. W. 273; (1922) M. W. N. 110; 42 M. L. J. 185; 31 M. L. T. 86; (1922) A. I. R. (M.) 147.

(4) 22 Ind. Cas. 69; 9 N. L. R. 182.

(5) 26 Ind. Cas. 926; 37 A. 65; 12 A. L. J. 1273.

(6) 65 Ind. Cas. 941; 19 N. L. R. 126; 5 N. L. J. 144; (1922) A. I. R. (N.) 108.

(7) 43 Ind. Cas 573; 39 A. 626.

(8) 46 Ind. Cas. 394; 40 A. 582; 16 A. L. J. 456.

(9) 49 Ind. Cas. 590; 41 A. 378; 17 A. L. J. 374; 1 U. P. L. R. (A.) 163.

(10) 51 Ind. Cas. 113; 17 A. L. J. 787; 1 U. P. L. R (A.) 118.

(11) 61 Ind. Cas. 332; 3 L. L. J. 233; 3 U. P. L. R. (L.) 40; 2 L. 147.

I have gone through the cases cited on both sides and am of opinion that the present suit in a Civil Court is not barred by the provisions of the new Provincial Insolvency Act of 1920. The matter is very fully and exhaustively discussed in *Bhairo Prasad* v. *S. P. C. Dass* (10) and also in *Maharana Kunwar* v. *E. V. David* (12). The underlying principle of the rulings appears to be that where a stranger like the plaintiff in the present case has once come in and invited the decison of the Court of Bankruptcy upon the merits of a claim, he cannot afterwards turn round and question its jurisdiction. *Vide Ex parte Swinbanks, In re Shanks* (13) and *Ex parte Butters, In re Harrison* (14). When the merits of a dispute have once been finally determined it is the duty of the Court to make an end of the litigation. *Pita Ram* v. *Jujhar Singh* (7), *Irshad Husain* v. *Gopi Nath* (9). It, therefore, follows that where there is a decision after full enquiry, by a Bankruptcy Court, the same matter cannot be enquired into by the Civil Court because the idea is to give to such decision the force of *res judicata*. Where, therefore, the Insolvency Court has refused to entertain and enquire into or adjudicate upon the rights of the stranger claimant, or the latter has not preferred any claim for the consideration of the Bankruptcy Court there is no *decision* by it which would operate to oust the jurisdiction of the Civil Court to decide the matter. The necessary corollary of this proposition is that where property is sold by the Receiver as the property of the insolvent and a third party challenges the title of the insolvent to that property and seeks a declaration of title as against the purchaser, there is no need to implead the Receiver as a co-defendant, and it is unnecessary also to obtain the leave of the Insolvency Court to proceed against the purchaser. This principle was recognised in *Muhammad Umar* v. *Munshi Ram* (15) and also in *Kundan Lal* v. *Shadi Ram* (16). It was held in *Gangadhar* v. *Shridhar* (17), Civil Revision No. 94 of 1920, decided by Macnair, A. J. C., on 9th August 1920, that under s. 4 of the Provincial Insolvency Act 1920 a Court had full power to decide the merits of the claim of third parties.

In *Bhairo Prasad* v. *S. P. C. Dass* (10) which was a case under the old Provincial Insolvency Act of 1907, it was held that a stranger to the insolvency is not bound to go to the Insolvency Court at all. He has the ordinary right which every individual has, to seek redress in the ordinary Civil Courts, for any grievance or trespass to his property whether committed by an Official Receiver or anybody else, but he can if he pleases, if he complains against the act of the Receiver, apply under s. 22 to the Insolvency Court itself, and if he does so and obtains a decision upon the merits, that decision is final. [*Irshad Hussain* v. *Gopi Nath* (9)]. But if he applies under s. 22 he must do so within the period of limitation prescribed therefor and consequently if an application is made beyond time and the Insolvency Court declines to entertain it the application becomes rejected on the ground that it is barred by time and not on the merits. The Insolvency Court declines to exercise its jurisdiction and, therefore, there is no decision on the merits. If after such summary rejection of the petition without adjudication on the merits, the stranger claimant takes recourse to his ordinary remedy of a civil suit, he need not obtain the permission of the Insolvency Court for the institution of such a suit. As a matter of law such a permission could be neither given nor refused.

The question has been very satisfactorily dealt with in *Maharana Kunwar* v. *E. V. David* (12). It is pointed out there that the jurisdiction conferred by s. 4 of the new Act is not exclusive and that s. 68 of the Act gives an option to a claimant as it says he 'may apply'. "The language of the section is permissive, not mandatory. The person aggrieved has the choice either of applying to the Court or of seeking his ordinary remedy under the Civil Law". (page 747 *ibid**). The section is only an enabling section and does not bar civil suit. The following observations of Lindsay, J., at page 748* :—

"There is no statutory provisions for such sanction (of the Insolvency Court) being asked or given and on principle I fail to see why any such authority is required * * * * But he (Receiver) has no status as against parties who are entire

(12) 77 Ind. Cas. 57; 21 A. L. J. 737; (1924) A. I. R. (A.) 40; 46 A. 16.
(13) (1879) 11 Ch. D. 525; 48 L. J. Bk. 120; 40 L. T. 825; 27 W. R. 898.
(14) (1880) 14 Ch. C. 265; 43 L. T. 2; 28 W. R. 876.
(15) 41 Ind. Cas. 802; 54 P.R. 1917; 132 P.W. R. 1917.
(16) 41 Ind. Cas. 809; 55 P. R. 1917; 130 P. W. R. 1917; 134 P. L. R. 1917.
(17) 61 Ind. Cas. 589; 3 N. L. J. 279.

*Pages of 21 A. L. J.—[*Ed.*]

strangers to the proceedings in the Insolvency Court, and if under colour of his office as Receiver, or Official Receiver he commits an act of trespass, it is difficult to understand on what principle the person against whom the trespass is committed is under any obligation to ask permission of the Insolvency Court to bring an action against the Receiver. The remedy of the person complaining is the ordinary remedy at law and no question, therefore, of any sanction arises."

These observations have my entire concurrence and they apply here very clearly. The plaintiff respondent had applied to the Court on 4th March 1922 but his application was summarily rejected that very day. There was, therefore, a refusal to exercise jurisdiction and for the matter of that to give any decision under the insolvency jurisdiction. This does not in any way stand as a bar to the maintainability of the present suit on the ground that the permission of the Insolvency Court was not obtained. The suit is not by a '*creditor*' and, therefore, the case in *Trimbak* v. *Sheoram* (6) is easily distinguishable from this case.

The result is that the suit was perfectly tenable in the Civil Court. The wording of s. 4 of the new Insolvency Act is not to the effect that 'no Civil Court shall take cognizance' so as to oust the latter's jurisdiction to take cognizance of all matters of civil nature under s. 9 of the C. P. C.

For all the reasons I overrule the contention of the appellant that the present suit was not maintainable without permission of the Insolvency Court.

The case of *Seth Sheolal* v. *Seth Girdharilal* (18), Second Appeal No. 319 of 1922, decided on 3rd November 1923 by Baker J. C., is clearly distinguishable as there also the suit was by a creditor of the insolvent and proceedings for an annulment of a transfer in favour of Girdharilal by the insolvent were actually pending before the Insolvency Court and there was a decision on merits of the petition of objections by the transferee as regards the validity of the transfer in his favour on which he relied for raising the attachment of the property.

The appeal, therefore, fails on all the grounds urged and I accordingly dismiss it with costs. Costs in the lower Courts will be paid as already ordered.

G. R. D.

Z. K. *Appeals dismissed.*

(18) 78 Ind. Cas. 140; (1924) A. I. R. (N.) 361.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 577 OF 1921.

March 31, 1924.

Present:—Mr. Rupchand Bilaram, A. J. C.

SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFFS

versus

DINSHAW NAVROJI AND ANOTHER —DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 11, scope of—Signature to plaint, object of—Omission to sign, whether can be amended—Landlord and tenant, relations between—Tenancy, how can be terminated—Suit by tenant for possession—Court Fees Act (VII of 1870), s. 7 (xi) (e)—Person inducted with land, whether necessary party—Overvaluing plaint, effect of—Costs, how assessed.

The object of the signature to a plaint is to prevent as far as possible disputes as to whether a suit was instituted with the plaintiff's knowldge and authority or not. This authority may be established by other means besides the signature. [p. 1006, col. 1.]

Basdeo v. *John Smidt*, 22 A. 55; A. W. N. (1899) 172; 9 Ind. Dec. (N. S.) 1068, followed.

The provisions of O. VI, r. 11, C. P. C., relate to a mere matter of procedure and any mistake or omission in the signature may be amended at any time subsequent to the institution of the suit. [*ibid.*]

Bisheshar Nath v. *Emperor*, 44 Ind. Cas. 28; 40 A. 147; 16 A. L. J. 64; 19 Cr. L. J. 865, followed.

Where a tenancy has not terminated, or where on account of certain circumstances it is not open to a landlord to terminate a tenancy he cannot be allowed to dispossess his tenant without having recourse to law and then to retain possession which he could not obtain through a Court of Law. The tenant has a right apart from the provisions of s. 9 of the Specific Relief Act to sue to eject the landlord. [p. 1006, cols. 1 & 2.]

Reman v. *City of London Real Property Co.*, (1921) 1 K. B. 49; 89 L. J. K. B. 1105; 123 L. T. 617; 18 L. G. R. 691; 36 T. L. R. 869 and *Cruise* v. *Terrell*, (1922) 1 K. B. 664; 91 L. J. K. B. 499; 126 L. T. 750; 20 L. G. R. 418; 66 S. J. 365; 38 T. L. R. 379, referred to.

In India, the Common Law right of re-entry by a landlord does not exist, and even where a landlord has obtained possession of the premises let by him after the tenancy has been validly terminated, it is open to the tenant to institute a suit within six months of dispossession, under s. 9 of the Specific Relief Act. [p. 1006, col. 1.]

Rudrappa v. *Narsingrao*, 29 B. 213; 7 Bom. L. R. 12, relied on.

A suit by the Secretary of State for India under s. 9 of the Specific Relief Act is governed by Art. 149 and not Art. 3 of the Limitation Act. [p. 1006, col. 2; p. 1007, col. 1.]

A suit for possession by a tenant against his landlord falls within cl. *xi*, sub-cl. (*e*) of s. 7 of the Court Fees Act. [p. 1007, col. 1.]

A person inducted with land by the landlord is not in every case a necessary party to a suit between the dispossessed tenant and the landlord, but may be a proper party, and the fact that he is joined as a proper party does not take away the suit from the purview of cl. *xi* sub-cl. (*e*). [p. 1007, col. 2.]

Furzand Ali v. *Mohanth Lal Puri*, 32 C. 268, *Palaniappa Chetty* v. *Sithravelu*, 31 M. 14; 3 M. L. T. 8; 17 M. L. J. 478 and *Kader Bakhsh* v. *Sheo Parsad Missir*, 42 Ind. Cas. 111; 2 P. L. J. 713; 3 P. L. W. 195 and 277, distinguished.

The Court Fees Act being a fiscal enactment must in cases of ambiguity be construed in favour of the public. [p. 1007, col. 2.]

Where a plaint is overvalued and excessive Court-fees paid, in the taxation of costs the plaintiff is only entitled to costs as taxed on the proper valuation. [p. 1008, col. 1.]

Mr. *T. G. Elphinston*, for the Plaintiffs.

Mr. *Nadirshaw Navroji*, for Defendant No. 1.

JUDGMENT.—This is a suit for possession by the plaintiff who claims to be a monthly tenant of the first defendant.

The plaintiff's case is that the Police Department supply free quarters at Karachi to certain Police Officers and for that purpose rent premises from private owners; that the premises in suit were rented in 1916 from the first defendant for use of a Sub-Inspector of the C. I. Department in charge of the Passport Bureau and remained in occupation of different Sub-Inspectors in charge of the Bureau for the time being till 24th December 1919, the last Sub-Inspector who occupied the premises being one Jivatram that his successor went to occupy them on the 27th December 1919, and found that the first defendant had taken wrongful possession of the premises and had rented the same to the second defendant who was in occupation. A notice calling upon the first defendant to restore possession having proved futile this suit was instituted against both the defendants on the 18th February 1921. There was considerable delay in serving the first defendant with a summons, he being out of British India. The suit did not become ripe for framing issues for over a year. The written statement filed by the first defendant is dated 26th January 1922 and is signed and verified by him in London on that date. The first defendant has contended that the premises were not rented by the plaintiff but personally by each Police Officer in succession. He admits having received rent from the Police Department but under the directions of each tenant "without acknowledging the plaintiff as a tenant or looking to him as such." He has pleaded that the last of such tenants "to whom the premises were let in his personal capacity gave vacant possession of the premises to the defendant's brother without any reservation whatsoever and on such vacant possession being received the same were let to the second defendant."

The second defendant admitted being put in possession through the first defendant and raised certain legal defences which are incoroporated in the issues.

Before the final hearing of the case the second defendant had given up possession of the premises to the first defendant. He was absent at the hearing fixed for the 10th March 1924. The learned Government Pleader gave him up and the suit as against him was dismissed. The first defendant then applied for amendment of his written statement and for being permitted to raise certain further defences which was allowed so far as it related to legal defences and the issues accordingly amended.

The amended issues raised by the Court are as follows :—

1. Were the premises in suit hired by the plaintiff for Police Officers as alleged in para. 1 of the plaint?
2. Was the rent of the said premises paid by the plaintiff?
3. Where the premises let to Mr. Jivatram in his personal capacity as alleged in para. 4 of the written statement of defendant No. 1?
4. Did Mr. Jivatram give vacant possession to the defendant No. 1 without any reservation as alleged in para. 4 of the written statement?
5. Was defendant No. 1 justified in letting the premises to defendant No. 2 and was his action wrongful?
6. Is plaintiff entitled to possession of the premises in suit?
7. What should the decree be?
8. Is the defendant No. 1 entitled to rent not paid by Mr. Jivatram?
9. Does the plaint disclose any cause of action against defendant No. 2.?
10. Is the plaint over stamped, if so is not the plaintiff liable for excess of Court-fee stamps?
11. Is the suit competent as brought [covers points (*a*) and (*c*) of the further defence?]

Issues Nos. 1 to 4.—The Passport Bureau, Kiamari was started in 1916 and Mr. Barker. Ex. 11 then an Assistant Superintendent of Police was put in charge of it and one Abdulla Baghali, Ex. 9 appointed as Sub-Inspector under him. Mr. Barker

states that Abdulla was entitled to free quarters, that under his authority Abdulla selected the premises in suit as residential quarters, that he himself visited the premises and approved of them, and that he was then given to understand that the landlord was willing to let them out to the Police Department, that the rent was paid by the Police Department to the landlord, the procedure adopted by the Police at that time being that the Police Department rented the premises for their subordinates who were entitled to free quarters and was responsible for payment of the rent to the landlord, that the rent was paid by the Police Accountant after the officer in charge of the Department sanctioned the bills for rent, the bills, however, being made out in the name of the individual officer occupying the respective tenements, to prevent mistakes and fraud in the payment of rent of private premises.

It appears from Ex. 12 the rent bills submitted by the first defendant that the bills for rent from 8th August 1916 the date of the commencement of the tenancy upto 30th November 1918, were made out in the name of Abdulla. The first bill for 23 days of August 1916, Ex. 12 is made out in the name of Abdulla Bagali Khureshi Esquire c/o. District Superintendent of Police, Karachi, and several subsequent bills bear the same address. In Ex. 12/14 the bill of rent for September 1917, the name of Abdulla is scored out and the name of Alli Mahomed Ihsanali substituted in red ink and the same alteration has been made in several subsequent bills by the Police Department before making payment. The bill for December 1918, and the subsequent bills are made out by the first defendant in the name of Jivatram.

Abdulla Bagali, Ex. 9 states that he selected the premises under orders of Mr. Barker, that he informed the landlord that the Government was renting the premises and would be responsible for the rent that the Police Office settled the amount of rent and paid it to the first defendant, that he occupied the premises up to August 1917 and that on his transfer from the post of Sub-Inspector, Passport Bureau, he handed over possession thereof to Sub-Inspector Ali Mahomed Ihsanali who relieved him under orders of the Assistant Superintendent of Police.

Ali Mahomed Ahsanali, Ex. 6 has denied that he had anything to do with the landlord and has stated that he occupied the premises under orders of the A. S. P. for one year and handed over possession to his relief Sub-Inspector Ghulam Hussein who succeeded him as Sub-Inspector of the Bureau on his transfer. It appears that Sub-Inspector Ghulam Hussein died in Karachi in November 1918, and was succeeded by Sub-Inspector Jivatram, Ex. 7 who has again deposed that he had nothing to do with the landlord and has denied having handed over possession to the landlord on his transfer from Karachi. He stayed in the premises for about one year and in the ordinary course removed his belongings on his transfer from here on the 24th December 1919. Abdulla Fatehdin, Ex. 8 his successor has deposed to having gone to occupy the premises on 27th December 1919 under orders of the A. S. P. when he found that the premises were occupied by the second defendant.

Immediately after the Christmas holidays a notice Ex. 14 was sent to the first defendant calling upon him to put the Police Department in possession of the premises.

The plaintiff has put in three sample entries, Exs. 25 to 27 from the Police Department Receipt Book to show that the rent was paid by the Police Department direct to the representative of the landlord who called for payment.

The first defendant who has verified the written statement as true to his knowledge has not been examined as a witness. His son Kowas, Ex. 13, and his brother Kaikushro, Ex. 23 have been examined as witnesses. Kowas deposes to his having personally given the premises on rent to Abdulla Baghali, denies that he was informed that the Government would be the tenant and swears that if he had known that the Government or the Police Department would be the tenant or responsible for the rent he would not have let the premises. He states that he submitted the bill for the first month to Abdulla and at his request represented that bill and other subsequent bills to the Police Department for payment. Kowas did not inspire confidence of the Court when he pleaded ignorance of the handwriting of his cousin's son P. B. Kharas and N. M. Dastur who had signed Exs. 25 to 27, in the Police Receipt Book and also when he pleaded ignorance of the handwriting on the bills issued on behalf of the first

defendant except his own handwriting. His explanation that he would not have let out the premises if he had known that the Police Department would be the tenants or that they would pay rent is far from being true. It is inconsistent with his conduct in receiving payment of rent from the Police Department though the Rent Act was not in operation in 1916, and when he could easily have terminated the tenancy then by a month's notice. It appears that the premises in suit were not the first premises taken on rent from the first defendant for a Police Officer. On the 6th February 1916, another portion of the same block of buildings was taken on rent from the first defendant for use of the Police Officer, Ahmad Rashid. He was bold enough to assert that he let that particular tenement to Ahmad Rashid in his personal capacity and that he would not have put Ahmed Rashid in possession of his tenement if he had known that the Police Department would pay the rent and yet it appears from his counterfoil book, Ex. 24 that the very first bill, Ex. 15 was made out by him in the name of the Inspector of Police and not that of Ahmed Rashid which was altered by him in the name of the D .I. G. of Police for Sind. The subsequent bills for this tenement upto August 1916 are made out in the name of the D. I. G. and the rent received from the Accounts Department. His explanation that he had forgotten the name of his tenant in the very first month of the tenancy and, therefore, made out the bill in the name of the Inspector of Police and subsequently altered it to the name of the D. I. G. on being told that he would receive payment from the D. I. G. is palpably false. It is not unlikely that as from the 8th August 1916, two tenements in the same buildings were let out to the Police Department, the Police Department required that the bills should be made out in the names of the Police Officers and that this fact accounts for the two bills for the month of August 1916, Ex. 21 in the counterfoil bill book being made out in the name of Ahmad Rashid c/o. D. I. G. of Police for Sind and Ex. 22 which is the counterfoil of Ex. 12/1 being made out in the name of Abdulla Baghali c/o. D. S. P., Karachi the two officers being employed in two different offices and this amply corroborates the evidence of Mr. Barker, Ex. 11 on that point. It would also appear unreasonable that a Police Officer who is entitled to free quarters from Government should have been required in 1916, to rent the premises for himself, as he would be required to give a month's notice to his landlord before vacating his tenement which he could not possibly do when under orders of immediate transfer.

Though the premises in suit were occupied by different Sub-Inspectors and an assertion was made by the first defendant in para. 2 of the written statement true to his knowledge that each Sub-Inspector rented the premises in his individual capacity no attempt has been made to prove this assertion. Kowas pleads absence from Karachi. The bills submitted in the name of Abdulla Baghali upto December 1918, give a direct lie to the premises being let by the first defendant either to Ali Mahomed Ahsanali, Ex. 6 or Ghulam Hussain.

Kaikushro, Ex. 23, the uncle of Kowas is an equally unreliable witness. His story of having locked the premises before Jivatram occupied it, of his having let the premises by Jivatram in his personal capacity, and Jivatram having handed over possession to him, are a pure concoction and is flatly contradicted by Jivatram. I see no reason to disbelieve the plaintiff's witnesses. I hold on Issues Nos. 1 and 2 in the affirmative and on the Issues Nos. 3 and 4 in the negative.

Issue No. 5.—In view of my finding on Issues Nos. 1 to 4 it follows that the first defendant took possession of the premises without justification and wrongly let it out to the second defendant.

The Bombay Rent (War Restrictions) Act, 1918, was then in force in Karachi and I have no doubt that the first defendant's representative took advantage of the fact that Jivatram Sub-Inspecter had removed his kit leaving the premises unlocked on the 24th December and on the quiet he put the second defendant in possession. I hold on this issue against the defendant.

Issues Nos. 6 and 11.—It is contended that this suit has not been properly instituted as the District Superintendent of Police who has signed and verified the plaint has no power to do so. The institution of the suit has been duly sanctioned by the Government of Bombay, *vide* Ex. 10. The plaint was presented by the Government Pleader, a proper Law Officer of the Crown for presenting the plaint. If the D. S. P. is not the proper officer to sign and verify the

plaint this defect is not fatal to the suit. The object of the signature to the plaint is to prevent as far as possible disputes as to whether a suit was instituted with the plaintiff's knowledge and authority or not. This authority may be established by other means besides the signature *Basdeo* v. *John Smidt* (1) remarks at page 61. The provisions of O. VI, r. 11, C. P. C. relate to a mere matter of procedure and any mistake or omission therein may be amended at any time subsequent to the institution of the suit *Bisheshar Nath* v. *Emperor* (2). Under r. 103 of the Rules of the Conduct of Legal Affairs the Government Pleader can sign and verify the plaint in suit which has been duly sanctioned by the Government. I think, in the circumstances of this case, it will be proper to allow the Government Pleader to sign and verify the plaint and cure any defect that there may be, on account of want of authority of the D. S. P., if any, to sign and verify the plaint, and I order that the Government Pleader should do so.

The next objection is that this suit is incompetent whether it be treated as a suit for specific performance of the monthly lease or as a suit by the tenant for recovery of possession from the landlord. It is not a suit for specific performance of an agreement to lease the property and it is therefore not necessary to consider the first point or to consider the authorities relied on by Mr. Nadirshah in support of this point. The plaintiff's suit is in tort and so long as the right of action continues he has a right of suit. In India the Common Law right of re-entry by the landlord does not exist and even where the landlord has obtained possession of the premises after the tenancy has been validly terminated it is open to the tenant to institute a suit within six months of dispossession under s. 9 of the Specific Relief Act: *Rudrappa* v. *Narsingrao* (3). Where the tenancy has not terminated or where on account of certain circumstances it is not open to the landlord to terminate the tenancy there is no reason why he should be allowed to dispossess his tenant without having recourse to law and then to retain possession which he could not obtain through a Court of Law. In the present case, though the tenancy is a monthly tenancy it has not been terminated. Apart from the provisions of the Bombay Rent War Restrictions Act a monthly tenancy can be terminated only in the manner prescribed under s. 108 of the Transfer of Property Act which applies to Sind. In this case no notice to terminate the tenancy has been given by the landlord. There is no express or implied surrender of the tenancy and the non-payment of rent if any is due to the landlord having disturbed the possession of the tenant which undoubtedly gives the tenant a right to suspend payment of the rent. The effect of the Bombay Rent (War Restrictions) Act, 1918, is however, to convert this monthly tenancy into a statutory tenancy and to empower the Court to grant relief to the landlord only under certain specified circumstances. The first defendant could not, therefore, have obtained possession by resort to Court even if he had given a month's notice to the tenant to vacate the premises.

Under the English Law it has been held that a tenant can claim the benefit of the Increase of Rent and Mortgage Interest (Restriction) Act, 1920, which is a Statute in *pari materia* with the Bombay Rent Act and can sue to eject the landlord who has obtained peaceful possession of the demised premises in exercise of his Common Law right of re-entry. *Cf. Remon* v. *City of London Real Property Co.* (4), *Cruise* v. *Terrell* (5).

It would be defeating the objects of the Bombay Rent War Restrictions Act to allow the plaintiff to obtain lawful possession of the premises and to retain them and I am of opinion that this is a fit case for a decree for possession. In the view I have taken of this case it is not necessary for me to consider the further question raised by Mr. Elphinston that the present suit is one falling under s. 9 of the Specific Relief Act, and that apart from any other considerations he is entitled under s. 9 of the Act to possession of the premises. He contends that a suit by the Secretary of State for India whether it be under s. 9 of the Specific Relief Act or otherwise is governed by Art. 149 and not

(1) 22 A. 55; A. W. N. (1899) 172; 9 Ind. Dec. (N. S.) 1068.
(2) 44 Ind. Cas. 28; 40 A. 147; 16 A. L. J 64; 19 Cr. L. J. 865.
(3) 29 B. 213; 7 Bom. L. R. 12.
(4) (1921) 1 K. B. 49; 89 L. J. K. B. 1105; 123 L. T. 617; 18 L. G. R. 691; 36 T. L. R. 869.
(5) (1922) 1 K. B. 664; 91 L. J. K. B 499; 126 L. T. 750; 20 L. G. R. 418; 66 S. J. 365; 38 T. L. R. 379.

by Art. 3 of the Limitation Act. There is considerable force in his argument as the period of six months limitation prescribed for a suit under s. 9 which was originally contained in the section itself, has been transferred by Act XII of 1891 to the Limitation Act. Both Arts. 3 and 149 are in the first division of the Second Schedule of the Limitation Act. It would, therefore, appear that the latter Article which expressly provides for a suit by or on behalf of the Secretary of State for India would govern the present case though it is anomalous that the Secretary of State should be allowed sixty years to institute a summary suit under s. 9, and that though it could not on the one hand have been the intention of the Legislature to allow such a long period for a summary suit on the other hand the period of six months provided in Art. 3 may be considered as too short a period for the Government machinery to be moved and the necessary sanction obtained to institute a suit of this nature.

I hold that the present suit is maintainable.

Issue No. 8.—It would appear that as the first defendant took wrongful possession of the premises on or before the 27th December, he is not entitled to rent for the month of December 1919. As, however, the first defendant has not paid Court-fee on the rent claimed by him for the month of December, I hold that he is not entitled to recover the rent for this month in this suit.

Issue No. 9.—This issue does not now arise.

Issue No. 10.—The annual rent of the premises is Rs. 240. Mr. Elphinston has valued the subject-matter of the suit for the purpose of Court-fees at Rs. 3,000. He states that this is the value of the premises but cannot explain how he has based his valuation. The premises consist of certain rooms on the first floor and form a part of a block of buildings. It is not possible to value them. They have no saleable value unless the whole block of building is sold.

This suit being a suit for possession by a tenant against his landlord it would on the face of it appear to fall within cl. *xi*, sub-cl. (*e*) of s. 7 of the Court Fees Act which refers specifically to a suit to recover the occupancy of immoveable property by a tenant against his landlord. In *Furzand Ali* v. *Mohanth Lal Puri* (6) a suit filed by a tenant against his landlord and a third person whom the landlords had inducted into the land was however held not to fall within this clause. It would appear from the statement of facts given in the report that in that case the landlords defendants Nos. 1 and 2 executed a *thika patta* in favour of defendant No. 3 and all the three defendants thereafter dispossessed the plaintiff. Under the circumstances the defendant No. 3 was both a tort feaser and a trespasser and a suit against him would lie in consequence of his wrongful act in personally ejecting the plaintiff apart from his being a trespasser on the land. If this ruling is intended to lay down that in every case where a person inducted on the land by the landlord is joined as a party to a suit between the dispossessed tenant and the landlord such suit does not fall within cl. (*e*) then with all due respect I demur. Such a person may be a proper party to the suit but is not in every case a necessary party to the suit, and the fact that he is joined as a proper party to the suit does not thereby take away the suit from the purview of cl. *xi* sub-cl. (*e*). It is still a suit between the tenant and the landlord. This ruling has been referred to with approval in *Palaniappa Chetty* v. *Sithravelu* (7). This decision is based on two grounds; the second ground which would appear to have been a good ground was that prior to the Amending Act VI of 1905, cl. *xi* (*e*) was limited to a suit for recovery of occupancy of land, and did not extend to a suit for occupancy of immoveable property as at present and as in that case the claim was in respect of *melvaram* rights and not a suit by dispossessed *ryot* for physical possession of land the suit was rightly held not to fall within this clause. The only other ruling referred to by Mr. Elphinston is *Kadir Baksh* v. *Sheo Prasad Missir* (8) which does not deal with the question of Court-fees. It holds that a person inducted to the land by a lessor during the continuance of a lease is a trespasser and may be ejected by the lessee.

The Court Fees Act being a fiscal enactment must in cases of ambiguity be construed in favour of the Public. Clause *xi* refers to suits between the landlord and the tenant. It

(6) 32 C. 228.
(7) 31 M. 14; 3 M. L. T. 8; 17 M. L. J. 478.
(8) 42 Ind. Cas. 111; 2 P. L. J. 713; 3 P. L. W. 195 & 277.

does not restrict such suits to suits between the landlord and the tenant only. There is, therefore, no reason why cl. *xi* should be limited to suits where the landlord and the tenant alone are parties and should not apply to a suit of this nature where in order to avoid any unnecessary delay in execution proceedings the second defendant was joined as a proper party to the suit. This suit would have been equally efficacious if he had not been joined as a party. As a matter of fact he has given up possession before the date of the decree. I am of opinion that this suit has been overvalued and in the taxation of costs the plaintiff is only entitled to costs as taxed in a suit falling under s. 7, cl. *xi*, sub-cl. (*e*) of the Court Fees Act.

Issue No. 7.—I pass a decree in favour of the plaintiff against the first defendant for possession and costs as taxed in a suit for possession under s. 7 cl. *xi* (*e*) of the Court Fees Act.

K. S. D. *Order accordingly.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 3061 OF 1924.

December 19, 1924.

Present:—Mr. Justice Taraporewala.

BAHADARMAL GURMUKHRAI NEMANI —PLAINTIFF

versus

MOHANLAL SURCHAND AND OTHERS—DEFENDANTS.

Easements Act (V of 1882), s. 4—Easement, definition of—Easement and freehold right, distinction between —Adverse possession—Projection over neighbour's land —Right acquired, nature of.

Where any part of the house of one owner projects over the soil of a neighbouring owner, the right acquired by the first owner is in the nature of possession of the column of air occupied by the said projection and the right is in the nature of the diminution of the freehold of the neighbouring owner and not merely in the nature of an easement. [p. 1009, col. 1.]

The right of easement as defined by s. 4 of the Easements Act is something less than the right of freehold and that something can be acquired for the benefit of the freehold under certain circumstances as laid down in the Easements Act, but this does not mean that whatever is for the benefit of the dominant owner must necessarily be an easement and nothing else. [p. 1009, col. 2.]

The shutters of the windows of the plaintiff's house opened on the defendant's land and the plaintiff also had certain weather-frames attached to his windows which projected over the defendant's land. The shutters and the weather-frames had existed for a period of over twelve years:

Held, that the plaintiff had acquired a right to maintain the shutters and the weather-frames by adverse possession and that he was entitled to restrain the defendant from building on his land so as to interfere with the right of the plaintiff to open the shutters on the defendant's land or to interfere with the weather frames. [p. 1010, col. 2.]

Case-law discussed.

Mr. *Kanga*, Advocate-General (with him Mr. *Mulla*), for the Plaintiff.

Mr. *Bahadurji*, for the Defendants.

JUDGMENT.—In this case the plaintiff abandoned at the hearing his claim that certain windows in the west wall of his building were ancient windows and that he was entitled to an easement of light and air through the said windows. He has confined his claim to an alleged right to open the shutters of the said windows on the defendants' property, and, further, to maintain weather-frames on the windows in the west wall on the second and third floors of the plaintiff's building as they exist at present. The said right to open the shutters at will and to maintain the said weather-frames on the windows is based on the ground that the said windows have been so opened and the said weather-frames have been in existence for more than twelve years and that the plaintiff is entitled to the said rights not by way of easement but by way of adverse possession of the column of air on the defendants' property, in which the said shutters open and on which the said weather-frames project.

The defendants have contended that the right to open the shutters of the windows as well as the right to maintain the weather-frames on the windows are in the nature of an easement and they can be acquired only, under the Indian Easements Act, by enjoyment for twenty years prior to the date of the suit. It is conceded by the plaintiff that if the said rights can only be acquired by way of easement, he has not done so, and he must fail.

The question as to the nature of the right acquired by the owner of one tenement having a part of his tenement projecting over his neighbour's tenement was considered in *Mohanlal Jaichand* v. *Amratlal Bechardas* (1). In that case the projecting part was the roof of the defend-

(1) 3 B. 174; 2 Ind. Dec. (N. S.) 117.

ant's house. The said roof had projected for more than thirty years. Therefore, in either view of the case whether it was treated as an easement or as possession of the space occupied by the projecting roof, the defendant was entitled to succeed. Mr. Justice West, however, expressed his opinion, that the view that the enjoyment by the defendant of the right to project his roof was in the nature of possession by him of the space occupied by the projecting roof, commended itself to the Court.

The question again came before this Court in *Ranchod Shamji* v. *Abdulbhai Mitabhai* (2). There the question was whether the plaintiff's beams which were over-hanging the defendant's soil gave the plaintiff a right to the column of air above the said beams. Jenkins, C. J., who gave the judgment of the Court, held that the defendant being the owner of the soil was entitled *prima facie* to all above it, that the diminution in his rights by reason of the beams did not extend beyond the protrusion of the beams themselves, that is to say, so far as the beams protruded on the defendant's soil, the plaintiff was entitled by possession to the column of air on which the beams rested. He relied upon the judgments in *Corbett* v. *Hill* (3) and *Harris* v. *De Pinna* (4). Those cases clearly lay down that where any part of the house of one owner projects over the soil of the neighbouring owner the right acquired by the first owner is in the nature of possession of the column of air occupied by the said projection and that the said right is in the nature of the diminution of the freehold of the neighbouring owner and not merely in the nature of an easement.

It was contended before me by Mr. Bahadurji on behalf of the defendants that in view of the definition of "easement" in the Indian Easements Act those cases do not apply to India. The "easement" is defined by s. 4 as follows :—

"An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own."

(2) 28 B. 428; 6 Bom. L. R. 356.
(3) (1870) 9 Eq. 671; 39 L. J. Ch. 547; 22 L. T. 263.
(4) (1886) 33 Ch. D. 238; 56 L. J. Ch. 344; 54 L. T. 38; 50 J. P. 308.

Mr. Bahadurji has argued that the opening of the windows and the maintenance of the weather-frames being for the benefit of the dominant tenant, the rights acquired in respect thereof come within the definition of "easement." In my opinion, the fallacy in the argument is this that whatever is for the benefit of the dominant tenant must be an easement and cannot be anything else. The enjoyment of the freehold is also for the benefit of the dominant owner. The right of easement is something less than the right of freehold and that something can be acquired for the benefit of the freehold under certain circumstances as laid down in the Indian Easements Act, but that does not mean that whatever is for the benefit of the dominant owner must necessarily be an easement and nothing else.

Mr. Bahadurji has relied upon two later judgments of this Court in support of his contention, namely, *Chhotalal Hirachand* v. *Manilal Gagalbhai* (5) and *Mulia Bhana* v. *Sundar Dana* (6). The question in those cases was a claim to maintain eaves projecting on the defendant's soil for the purpose of discharge of water on the defendant's land. Now the right to discharge water over the defendant's land clearly can never be in the nature of possession of freehold. It must necessarily be in the nature of an easement. The cases, therefore, are not directly in point so far as the claim to maintain a projection over the defendant's soil, which may be in the nature of possession, is concerned.

The learned Chief Justice has tried to distinguish the decisions in *Corbett* v. *Hill* (3) and *Ranchood Shamji* v. *Abdullabhai Mithabhai* (2). He concedes that the projection in *Corbett* v. *Hill* (3) was reserved from the freehold by the transferor, which means that a projection on the neighbour's soil might be in the nature of a freehold; if it could not be, then, it could not be reserved even by the transferor. If such a part of the freehold could be reserved by the transferor by allowing a projection on his own soil, there is no reason why the neighbouring owner should not be entitled to acquire a right to such projection by adverse possession by encroaching upon the freehold of his neighbour to the extent of the projection.

(5) 20 Ind. Cas. 246; 37 B. 491; 15 Bom. L. R. 551.
(6) 21 Ind. Cas. 352; 38 B. 1; 15 Bom. L. R. 876.

Mr. Bahadurji had to contend that possession could only be of the soil and everything above and everything below it: and that there could not be possession of a column of air over-hanging the soil, because once it is conceded that you can have freehold in a projection over-hanging on the defendant's soil, and occupying a certain column of air above that soil, a neighbouring owner would be entitled by adverse possession to claim such a right in freehold. What was considered in *Corbett* v. *Hill* (3) was whether the projection carried with it the right not only to the column of air occupied by the projection but the air above and the air below it to the soil, and the Court held that the possession was only of the column of air occupied by the projection and that the column of air above and below belonged to the neighbouring owner who was the owner of the soil.

The same principle is laid down in *Harris* v. *De Pinna* (4). In that case also the projection was treated as part of the freehold and the claim to the air above the projection which was in dispute was considered to be in the nature of an easement. There was no question in that case of the plaintiff being entitled to maintain his projection which had been there for 12 years.

The point was also considered in *Rathinavelu Mudaliar* v. *Kolandavelu Pillai* (7). The Madras High Court followed the decision in *Mohanlal Jechand* v. *Amratlal Bechardas* (1), and held that the cornice over-hanging a neighbour's land could not be removed, if it had been in existence for more than 12 years. There also it was held that such projection was in the nature of possession and not an easement.

A later English case, *Laybourn* v. *Gridley* (8), was also cited to me where *Corbett* v. *Hill* (3), was followed by the learned Judge.

The last case cited before me was a judgment of this High Court in *Kashibai Kalidas* v. *Vallavbhai Wagjibhai* (9). There also the right in question was the right of the discharge of water from the eaves of the defendant on to the plaintiff's land. In that case, the real point considered was the right which was claimed, namely, to discharge rain water from the projecting eaves. There the learned Appellate Judge, from whose judgment the appeal was preferred to this Court, held that the plaintiff had lost his title to the land up to the line of the defendant's projection. Macleod, C. J., rightly criticised that decision as very startling and obviously wrong. No doubt even where the projection exists over a neighbour's property for more than 12 years, the person owning the projection cannot claim anything more than the right to possession of the column of air which the projection occupies.

The point which is before me was not before this Court in any of these three subsequent cases, but in my opinion, it was directly in issue in the first two cases of *Mohanlal Jechand* v. *Amratlal Bechardas* (1) and *Ranchod Shamji* v. *Abdulabhai Mithabhai* (2). I entirely agree with the views in those judgments. I hold that the plaintiff having opened his shutters and maintained his weather-frames projecting for more than 12 years on the defendants' soil, he has acquired a right thereto by adverse possession, and he is entitled to an injunction against the defendants restraining them from building so as to interfere with the right of the plaintiff to open the shutters on the defendants' land or to interfere with the said weather-frames.

There will, therefore, be a decree in favour of the plaintiff for an injunction restraining the defendants from building so as to interfere with the weather-frames and the column of air on which the plaintiff's shutters open. Plaintiff to pay all the defendants' costs occasioned by the plaintiff's claim as regards easement of light and air, and the defendants do pay the plaintiff's costs of the issues raised in the suit.

Z. K. *Suit decreed.*

(7) 29 M. 511; 16 M. L. J. 281.
(8) (1892) 2 Ch. 53; 61 L. J. Ch. 352; 40 W. R. 474.
(9) 57 Ind. Cas. 356; 24 Bom. L. R. 305; (1922) A. I. R. (B.) 83; 46 B 827.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 50-B OF 1924.
February 17, 1925.
Present :—Mr. Baker, J. C.
KRISHNA AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS
versus
BAYAJI—PLAINTIFF AND OTHERS—DEFENDANTS NOS. 3 AND 4—RESPONDENTS.

Hindu Law—Berar—Stridhan—Property inherited by woman from father—Succession.

Under the Hindu Law prevalent in Berar a woman takes an absolute interest in property inherited by her from her father, and on her death it devolves on her daughter in preference to her son.

Gulappa v. *Tayawa*, 31 B. 453; 9 Bom. L. R. 834, followed.

Appeal against a decree of the Additional District Judge, Amraoti, dated the 22nd January 1924, in Civil Appeal No. 84 of 1923.

Mr. *N. G. Bose*, R. B., for the Appellants.

Mr. *R. B. Gadgil*, for the Respondents.

JUDGMENT.—This was a suit between a brother and a sister for possession of the land in suit. The plaintiff is the daughter of one Gujaba by his wife Gopi and claimed the land in dispute as her mother's *stridhan*, from defendant No. 1, her brother. Defendants Nos. 2 and 3 are transferees from the father of the plaintiff and defendant No. 1, Gujaba acting as guardian of his minor son Krishna.

It was never disputed in the lower Courts that the land was *stridhan* of Gopi, the plaintiff's mother, the case set up being that the plaintiff was not the daughter of Gopi but was of another wife of Gujaba, and that she was born in 1897, consequently the suit brought in 1922 is barred by limitation and adverse possession.

All these points have been found against the defendants by the lower Courts.

Defendants Nos. 1 and 2 make this second appeal.

The first point raised is one of limitation on the ground that Ex. D 1 shows that Krishna was born in 1902, and as the plaintiff admits that she is 3 years older than Krishna she must have been born in 1899, and the suit is barred by limitation.

The Courts below found on the evidence that the plaintiff is the daughter of Gopi and that she was born in 1901 and not in 1899. There is thus no question of limitation, and I cannot go behind this finding in second appeal.

It is further contended that no enquiry was made as to the right of the plaintiff's mother in the property. It is contended that if she got it from her mother or husband, it would go, under the ordinary law, to the male reversioner. It was, however, never contended in the Courts below or in the grounds of appeal that the property was not her *stridhan*, and it is now too late to raise this contention. Even if the plaintiff's mother inherited it from her father, then under the law prevalent in Bombay and Berar, Gopi would take an absolute interest in it and on her death it would devolve on her daughter in preference to her son: *cf. Gulappa v. Tayawa* (1).

It is next contended that defendants Nos. 2 and 3, Vithoba and Manohar, are subsequent transferees from Gujaba, Ex. P 2, being a lease executed by Gujaba, guardian of his minor son Krishna, to Manohar, from whom Vithoba took a sub-lease. It is contended that they are transferees in good faith and even if Krishna is not heir they are entitled to return of the consideration or to a proportionate part of it, about half the term of the lease, which was for 25 years, having expired.

It is also contended that they are not liable to mesne profits as they are not in wrongful possession. Both the plaintiff and defendant No. 1 lived with their father who was their guardian, and the defendants had no reason to suppose that Gujaba had no right to lease out the land on behalf of Krishna. The defendants, however, held under a person who had no title. The plaintiff obtained no benefit from the lease. The defendants can sue their lessor in respect of the failure of consideration.

I see no reason for interference and the appeal is dismissed with costs.

G. R. D. *Appeal dismissed.*

(1) 31 B. 453; 9 Bom. L. R. 834.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 1162 OF 1919.

February 12, 1925.

Present:—Mr. Justice Taraporewala.

HARDAYAL SHIVLAL—PLAINTIFFS

versus

Haji ADAM GOOLMAHOMED—DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 52—Insolvency—Dividend payable to creditor of insolvent, whether can be attached by person holding decree against creditor.

Moneys in the hands of an Official Assignee which are payable to a judgment-debtor who is a creditor of the insolvent by way of dividend declared by the Official Assignee, are attachable under O. XXI, r. 52, of the C. P. C. [p. 1012, col. 1.]

Prout v. *Gregory*, (1890) 24 Q. B. D. 281; 59 L. J. Q. B. 118; 61 L. T. 696; 38 W. R. 204; 7 Morrell 1, *Dolphin* v. *Layton*, (1879) 4 C. P. D. 130; 48 L. J. C. P. 426; 27 W. R. 786 and *Joosub Haji Alli* v. *N. W. Kemp*, 4 Bom. L. R. 929; 26 B. 809, referred to.

Mr. *Mody* of *Malvi, Mody, Ranchhoddas & Co.*, for the Applicants.

JUDGMENT.—The point for decision in this matter is whether moneys in the hands of the Official Assignee, which are payable to the judgment-debtors as creditors of the insolvent by way of dividend declared by the Official Assignee, are attachable under O. XXI, r. 52, of the C. P. C.

I have been told that there have been judgments of single Judges of this Court disallowing such attachment, following the English cases on the point. There is no judgment of a Judge of this Court with reasons given for the decisions on the point which might be of some assistance to me in deciding this question. The judgments of single Judges, however, are not binding on me.

Now there is no doubt that in England it has been held that the moneys in the hands of the Official Receiver payable by way of dividend to the judgment-debtor as creditor of the insolvent are not a debt liable to be attached within the meaning of O. XLV, r 1, of the Supreme Court Rules. The point was decided in *Prout* v. *Gregory* (1), on appeal from the Order of a Master discharging a garnishee order *nisi*, referred by a Judge at Chambers to the Court. The judgment of Lord Coleridge, C. J., is no doubt based on a broad ground, namely, that to make a garnishee order in such a case would be to interfere with the administration of an estate which has to be administered under the provisions of a Statute (Bankruptcy Act 1883, 46 & 47 Vic. c. 52) expressly dealing with the subject-matter, and containing express directions as to the manner in which the subject-matter is to be dealt with.

The judgment of Mathew, J., however, is put on the ground that the amount of the dividend so payable to the creditor of the insolvent cannot be treated as a debt and that the Official Receiver is not a debtor. In support of the opinion he cites the judgment in *Dolphin* v. *Layton*. (2), where it was held that money in the hands of the Registrar of a County Court as an Officer of the Court was not subject to the process of attachment on the ground that the moneys were not a debt due by the Registrar.

Whether Lord Coleridge, C. J., was right under the English Law in laying down the broad ground on which he disallowed the attachment or not, in my opinion, the matter is covered by O. XXI, r. 52, of the C. P. C. That rule provides for attachment of property in the custody of any Court or public officer. I find that there is no similar provision in the Supreme Court Rules, the only provision in the Supreme Court Rules being the rules under the heading "Attachment of Debts" and, as put by Mr. Justice Mathew in *Prout* v. *Gregory* (1), unless the moneys sought to be attached are a debt, they cannot come under O. XLV, r. 1, of the Supreme Court Rules, so as to be liable to be attached. The provision in the C. P. C. for attachment of debts is made by O. XXI, r. 46. Rule 52 deals with attachment of moneys in the custody of any Court or public officer. A public officer is defined by s. 2, cl. 17, sub-cl. *(h)*, of the C. P. C., and the Official Assignee is a public officer coming within that definition. It was so held in *Joosub Haji Alli* v. *N. W. Kemp* (3).

There is no doubt that the amount in the hands of the Official Assignee which is payable by way of dividend to the judgment-debtors in this matter is the amount in the hands of a public officer and is payable by the public officer to the judgment-debtors. I do not think that by making an order on the Official Assignee to pay the amount to the decree-holder, who is the creditor of the person entitled to the dividend, I should be in any way interfering with the administration of the insolvent's estate. Immediately the creditor goes to the Official Assignee and asks for the moneys he is entitled to receive the same.

If the Official Assignee does not pay the dividend to the creditor, no suit can be filed against him, but the Court may, on the application of the creditor who is aggrieved by such refusal, order him to pay it, and also to pay out of his own money interest thereon at such rate as may be prescribed for the time that it is withheld, and the costs of the application as provided by s. 74 of the Presidency Towns Insolvency Act.

By this order I direct the public officer

(1) (1890) 24 Q. B. D. 281; 59 L. J. Q. B. 113; 61 L. T. 693; 38 W. R. 204; 7 Morrell 1.

(2) (1879) 4 C P. D. 130; 48 L. J. C. P. 426; 27 W. R. 786.

(3) 4 Bom. L. R. 929; 26 B. 809.

to pay the moneys to the decree-holder of the creditor instead of to the creditor.

Z. K. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND RENT APPEAL No. 16 OF 1924.

February 16, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

KUNJAN LAL—DEFENDANT No. 5—APPELLANT

versus

Raja RUKMANGAD SINGH AND OTHERS—PLAINTIFFS AND BALDEO SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), ss. 108 (15), 126 (1), (2)—Co-sharers—Suit for profits—Lámbardar, *liability of—Gross negligence, proof of—Decree, basis of.*

In a case falling under cl. (2) of s. 126 of the Oudh Rent Act, the *lambardar* is entitled to collect rent from the tenants and to act on behalf of the other co-sharers, and is liable to the latter for the collections. [p. 1013, col. 2.]

Where in a suit for profits against the *lambardar* the plaintiff establishes gross negligence on the part of the *lambardar*, it is the duty of the *lambardar* to prove that he could not collect more than a certain percentage of the gross rental. In the absence of such proof the plaintiff is entitled to a decree on the basis of the gross rental. [p. 1014, col. 1.]

Appeal against a decree of the District Judge, Hardoi, dated the 22nd April 1924, confirming that of the First Class, Tahsil Bilgram, District Hardoi, dated the 15th July 1922.

Mr. *A. P. Sen*, for the Appellant.

Mr. *Bishesharnath Srivastava*, for Respondent No. 1.

JUDGMENT.—The defendant-appellant Kunjan Lal is the *lambardar* of village Marai which is a *pattidari* estate. The plaintiffs-respondents brought a suit for recovery of their share of the rent from the hands of the appellant. On the pleadings in the case the following issue arose for decision:—"What should be the basis of calculating profits, gross rental (on the plaintiffs) or actual collections (on the defendants)" and this is the only issue with which now I am concerned in second appeal. On the evidence in the case the Court of first instance came to the conclusion that the true basis for calculating the profits was the gross rental and on that basis decreed the suit of the plaintiffs. The defendant took the matter in appeal to the Court of the District Judge of Hardoi. The learned Judge at the outset of his judgment says that several grounds of objections were taken in appeal but the appellant's Counsel confined his argument to one point only and that point was that the profits should have been calculated on the actual collections and not on gross rental. On a careful consideration of the evidence in the case the learned Judge in agreement with the Court of first instance has come to the conclusion that the defendant-appellant was guilty of gross negligence and in the absence of any other evidence produced by the appellant he found that the gross rental was the only possible basis on which the profits could be calculated.

At the hearing of the appeal two points were urged against the decision of the learned Judge. It was urged that some of the co-sharers including some of the plaintiffs-respondents have partly collected their own share of rent from the tenants and have also ejected some of them. In those circumstances it was contended that the *lambardar's* liability ceased because his right to collect the rent of the tenure also ceased. In support of this contention reliance was placed upon a decision of the Board of Revenue in *Hanuman Singh* v. *Raja Syed Ahmad Ali* (1).

The learned members of the Board held in that case that a *lambardar* is not entitled to collect rent from tenants or otherwise act on behalf of the other co-sharers under s. 126 (1) of the Oudh Rent Act, except in *mahals* in which by custom of agreement he has the power of so acting. The lower Court has with reference to a series of decisions of this Court given its finding against the appellant's contention. I am satisfied that the opinion of the Court below is correct on that point.

In so far as the decision of the Board of Revenue is concerned it is enough to say that that was a case under cl. 1 of s. 126 and not under cl. 2 of the same section. That there is a difference in the two clauses is admitted by the learned Members of the Board themselves. The case before me is admittedly one which falls under the second clause of s. 126. The first argument, therefore, fails.

The second argument urged on behalf of the appellant is that the finding that the

(1) Select Decision No. 6 of 1922.

appellant was guilty of gross negligence should not result in saddling him with entire liability for the gross rental, and prayer is made for remission of an issue as to what amount of rent remained uncollected for the reason of the gross negligence of the appellant. I am not prepared to accede to this prayer and the reason is very simple. In the first place no such case was put forward by the appellant either in the Court of first instance or before the learned District Judge in appeal. In the second place the plaintiffs-respondents having discharged the onus of establishing gross negligence on the part of the *lambardar* it was obviously the duty of the *lambardar* to prove that he could not collect more than a certain percentage of the gross rental. He has produced no evidence whatsoever to sustain the onus which lay on him. On the other hand he has produced no accounts. He himself did not give evidence nor he invited either of the Courts below as I have already said to consider the question which he has now raised before me. In the circumstances there was no alternative left to allow profits to the plaintiffs except on the basis of gross rental.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS Nos. 30 AND 31 OF 1923.

November 23, 1923.

Present:—Mr. Justice Mookerjee and Mr. Justice Rankin.

RAMA NATH SAUT AND OTHERS—DEFENDANTS—APPELLANTS

versus

OFFICIAL TRUSTEE OF BENGAL AS TRUSTEE TO THE ESTATE OF LATE MANIKLAL SEAL—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 102 (e), 103B—Record of Rights, entry in—Presumption of correctness—Rebuttal—Landlord and tenant—Suit for rent—Entry in Record of Rights proved incorrect—Procedure.

Section 102 (e) of the Bengal Tenancy Act requires a Revenue Officer to determine the existing rent and not to settle a fair rent in respect of a tenancy. [p. 1016, col. 1.]

After a Record of Rights has been finally published a presumption arises under s. 103B of the Bengal Tenancy Act that the entry therein with regard to the rent of a tenancy is correct; in other words in respect of an entry of rent, the presumption arises that what has been recorded is a correct statement of the existing rent. This presumption may, however, be rebutted and the entry may be proved by evidence to be incorrect. This evidence may be either evidence external to the settlement proceedings, or evidence of matters apparent on the face of those proceedings. Where, for instance, the very statement of his reasons for his conclusions given by the Revenue Officer shows that he did not determine the existing rent but an imaginary rent, the presumption with regard to the correctness of the entry in the Record of Rights is sufficiently rebutted. [p. 1016, cols. 1 & 2.]

Case-law reviewed.

Where in a suit for rent the landlord relies upon the relevant entry in a finally published Record of Rights, but the entry is proved to be incorrect, the only course open to the Court is to make a decree on the basis of the admission of the tenant. [p. 1016, col. 2.]

Letters Patent Appeals against the decrees of Mr. Justice Newbould, dated the 11th of May 1923, in Appeals from Appellate Decrees Nos. 1010 and 1006 of 1921.

FACTS appear from the following judgment of

Newbould, J.—These five appeals are preferred against the decision of the District Judge of Midnapur in appeal against the decision of the Munsif of Tamluk in certain rent-suits. The question in each of these appeals is whether the plaintiff who is the appellant before me, is entitled to recover rent at the rates stated in the duly published Record of Rights. In three of these second appeals Nos. 1007 to 1009 arising out of Suits Nos. 2176, 2232 and 2259 both Courts have held that the entries in the Record of Rights have been rebutted by the decrees in contested rent-suits prior to the Record of Rights. On behalf of the appellant it is contended that if the judgments were read as well as the decrees it would show that the question of the rate of rent was not contested. It is stated that at that time the Record of Rights was being prepared and the plaintiff was willing to leave the question of the rental to be settled by the Settlement Officer and did not think it necessary to prove the rates claimed by him in the suits. I was asked to admit the judgments at the hearing of these appeals and this I refused to do as it was clearly the duty of the appellant if he wished to rely on those judgments to have filed them if not in the First Court certainly in the lower Appellate Court.

But it appears from the judgment of the Munsif that one of these judgments was filed with the decree relied on. The examination of that judgment does not support the appellant's contention. I am unable to hold that on the material before them that the lower Courts were wrong in holding that the presumption arising from the entries in the Record of Rights had been rebutted by these decrees.

In Appeals Nos. 1006 and 1010 arising out of Suits Nos. 2225 and 2231 the evidence of the Record of Rights had been rejected on another ground, and that is, that the mode of calculation adopted by the Revenue Officer in assessing rent was illegal and consequently the entries in the Record of Rights relating to the rate of rent must be held to be incorrect.

It appears that in the draft Record of Rights the rents payable were not entered but the entry was made that the tenancies were liable to assessment of rent. Thereupon the plaintiff filed an objection under s. 103 of the Bengal Tenancy Act asking that rent might be recorded as stated in his petition. In the two cases which I am now considering the tenants first appeared and asked for time for compromise. Time was granted but no compromise was effected. Then the landlord appeared and the tenants did not again appear and the landlord produced certified copies of certain *solenamas* as well as collection papers. The Revenue Officer recorded rents on certain principles which had been laid down by the Settlement Officer in an inspection note. Both the lower Courts have held that the directions of the Settlement Officer were not binding on the Revenue Officer performing the function of a judicial character under the Bengal Tenancy Act and that, therefore, the Revenue Officer acted illegally and the entries in the Record of Rights cannot be treated as properly made.

In support of this view of the case they relied on the case of *Bagha Mowar* v. *Ram Lakhan Misser* (1). But the facts of that case are clearly distinguishable. In that case the only material on which the rents were recorded was an unregistered document which was inadmissible in evidence, because it ought to have been registered. Here it would appear that there was evidence to support the case made out by the landlord and that evidence was unrebutted. There is no reason to suppose that the rents recorded were higher than the rents claimed by the landlord. If in applying the rule laid down by his superior officer the Revenue Officer recorded rents at a lower rate than the evidence supported the tenant certainly has no cause of complaint and I am unable to hold his conduct was such as to render the entries in the Record of Rights illegal, or such that the legal presumption of their correctness did not apply. In these two cases no evidence has been given to rebut that presumption or such as has been given has been held by the lower Courts to be insufficient to rebut the presumption. In these two cases I hold that the plaintiff is entitled to rent at the rate claimed by him.

There is one other small point that has been taken by the appellant and that is, that in order to prove the ground in which the Revenue Officer recorded the rent in Suit No. 2225 it was necessary to depend on a document, Ex. Q, which wes filed for the first time in the Court of Appeal. This was necessary in order to show that the Revenue Officer's judgment, Ex. Q, referred to this case as well as to Suit No. 2231. Though the learned District Judge did not, as he should have done, record his reasons for admitting this document I hold that there were sufficient reasons for allowing it to be admitted. It has been held that the omission to record the reasons does not make such evidence inadmissible. However as I said with regard to this Suit No. 2225 the appellant's case succeeds. It is, therefore, unnecessary to say more in this point.

The result is that Appeals Nos. 1007, 1008 and 1009 are dismissed with costs. Appeals Nos. 1006 and 1010 are decreed with costs and the judgments and decrees of two lower Courts are set aside and the plaintiff will get decrees in those suits for the full amounts he claimed.

Babu *Apurba Chandra Mukherjee*, for the Appellants.

Babus *Gunada Charan Sen* and *Santosh Kumar Bose*, for the Respondent.

JUDGMENT.—These are two appeals under cl. 15 of the Letters Patent from the judgment of Mr. Justice Newbould in two suits for recovery of arrears of rent.

In each suit the question was as to the amount of rent annually payable by the tenant to the landlord. The landlord relied

(1) 41 Ind. Cas. 801; 27 C. L. J. 107.

upon the relevant entry in a finally published Record of Rights. The tenant contended that the entry had been rebutted and no reliance should be placed thereon. The primary Court took divergent views in the two suits. In one instance, it was held that the decree should be based on the entry, while in the other it was ruled that the decree should be in accordance with the admission of the tenant. There were appeals to the District Judge in both the cases. He came to the conclusion that in neither suit should the decree be based upon the entry in the Record of Rights. In second appeal to this Court, Mr. Justice Newbould has reversed the decision of the District Judge and has directed that the decree in each case be entered in favour of the landlord on the basis of the entry in the Record of Rights. The substantial question in controversy consequently is, whether the entry in the Record of Rights has been effectively rebutted.

Under s. 102, cl. (*e*) of the Bengal Tenancy Act, the Revenue Officer is required to record the rent payable at the time the Record of Rights is being prepared. As pointed out in *Secretary of State* v. *Nityе Singh* (2) and *Luchmi Pershad* v. *Ekdeshwar Singh* (3), this provision requires the Revenue Officer to determine the existing rent and not to settle a fair rent in respect of the tenancy. After the Record of Rights has been finally published, s. 103B comes into operation. Sub-section (3) of that section provides that every entry in a Record of Rights so published shall be evidence of the matter referred to in such entry and shall be presumed to be correct until it is proved by evidence to be incorrect. Consequently, after final publication the presumption arises that the entry is correct; in other words, in respect of an entry of rent, the presumption arises that what has been recorded is a correct statement of the existing rent. This presumption may be rebutted, and the entry may be proved by evidence to be incorrect. This evidence, as was explained in the case of *Bogha Mower* v. *Ram Lakhan Misser* (1) may be either evidence external to the settlement proceedings or evidence of matters apparent on the face of those proceedings. To take one illustration, in the case of *Sheonandan Persad Sukul* v. *Bacha Raut* (4) evidence was produced to show that the rent actually payable at the time of the preparation of the Record of Rights was different from the rent entered in the Record of Rights. This evidence may be either anterior in point of time or subsequent in date to the Record of Rights. To take another illustration, as pointed out in the case of *Bogha Mower* v. *Ram Lakhan Misser* (1), it may appear on the face of the proceedings of the Revenue Officer that the entry is erroneous. The case before us is of the latter description.

The Revenue Officer had to determine the existing rent in respect of each of these tenancies. But the very statement of his reasons for his conclusions which are set out in his order, dated the 9th December 1916, shows that he did not determine the existing rent. He had, indeed, relevant evidence before him ; but in the consideration of that evidence, he did not apply his own judgment; on the other hand, he applied the principles which had been formulated for his guidance by his superior officer. It is plain that what he has determined is not the rent actually payable, but an imaginary rent. Whether that is fair rent it is impossible to determine; but this much is plain that it is not the existing rent in respect of either of these tenancies. In such circumstances, the conclusion is inevitable that the entry has been rebutted by evidence, namely, by such evidence as appears on the face of the proceeding of the Revenue Officer himself. We have consequently no doubt that the entry must be deemed to have been proved incorrect. This leads to the position that the landlord has failed to establish the rate of rent as alleged by him, and the only course open to the Court is to make a decree on the basis of the admission of the tenants.

We have been pressed by the landlord to remand the case to the Court of first instance in order that the suit may be re-tried; but we are clearly of opinion that we should not accede to this request. We cannot ignore the fact that the litigation has already lasted for more than five years in four Courts; and the circumstance that the decree will be made on the basis of the admission made by the tenants, will not preclude an enquiry by the Court as to the actual contract rate of rent in a subsequent suit.

The result is that these appeals are allowed, the decrees of Mr. Justice Newbould set aside and those of the District Judge

(2) 21 C. 38; 10 Ind. Dec. (N. s.) 658.
(3) 4 Ind. Cas. 577; 13 C. W. N. 18.
(4) 4 Ind. Cas. 54; 9 C. L. J. 284.

restored with costs of two hearings in this Court.

Z. K. *Appeals allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 1 OF 1924.

December 11, 1924.

Present:—Mr. Dalal, J. C.

GANESH PARSHAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JOT SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, Expl. IV —Limitation Act (IX of 1908), Sch. I, Art. 96—Mortgage—Payment made by mortgagor to one of several mortgagees—Suit on mortgage—Decree for sale—Suit by mortgagor to recover money paid by him—Res judicata—*Limitation—Hindu Law—Money received by father—Pious duty of sons to re-pay amount received.*

B, L, and *S* were joint mortgagees of certain property. The mortgagor remitted the mortgage-money to the names of the three mortgagees by Money Order, but the amount was received by *S* alone who did not pay their share of the mortgage-money to the other mortgagees. *L* and *S* having died the sons of *L* and *S* and *B* subsequently brought a suit for sale on foot of the mortgage in which the mortgagor put forward the defence of payment but the Court held that payment to *S* alone did not amount to satisfaction of the mortgage-deed and made a decree. Thereupon the mortgagor brought the present suit against the sons of *S* to recover from them the amount received by *S* together with interest:

Held, (1) that with regard to one-third of the amount in suit the plaintiff's claim was barred by the doctrine of *res judicata* inasmuch as in the previous suit he should have put forward the claim that at least one-third of the amount received by *S* should be given credit for to him as against the sons of *S*; [p. 1018, col. 1.]

(2) that the claim with regard to the remaining two-thirds was not barred by *res judicata* as the Court in the previous case could not have given a decree to the mortgagor against the sons of *S* for that amount; [*ibid*]

(3) that the suit was governed by Art. 96 of Sch. I to the Limitation Act and that limitation began to run from the date of the judgment in the mortgage suit when the mortgagor discovered his mistake that *S* alone had been paid the money by the Post Office; [*ibid.*]

(4) that the mere keeping of the money by *S* or delay in distributing it did not amount to mis-appropriation on the part of *S* and that the sons of *S* were, therefore, under a pious duty to re-pay the money received by their father; [*ibid.*]

(5) that the present suit was not premature inasmuch as a decree for sale had been passed against the plaintiff and the plaintiff had been damaged by the threat of the sale of his property. [p. 1018, cols. 1 & 2.]

Second appeal against a decree of the Additional Subordinate Judge, Sitapur, dated the 15th September 1923, setting aside that of the Munsif, Sitapur, dated the 13th May 1922.

Mr. *Radha Krishen*, for the Appellants.

Messrs. *H. D. Chandra* and *Bhagat Sarup*, for the Respondent.

JUDGMENT.—The issues which arise in this appeal are clearly stated in the carefully drawn up grounds of appeal. A mortgage was executed by one Ajudhia Singh, father of the plaintiff, on 23rd of March, 1914, in favour of Lalta Prasad for Rs. 99-4. A partition suit was instituted to which the members of the family of the mortgagee were parties. This was in October 1914. These parties, therefore, issued a notice to the plaintiff, Jot Singh, whose father had died in the meantime, that he should not pay the mortgage-money to Lalta Prasad alone. On 18th February 1915, Jot Singh remitted Rs. 120 by Money Order to three persons of the family Barmha Din, Lalta Prasad and Sita Ram, each of them heads of their branches of the family and owning one-third of the joint family property. Unfortunately Sita Ram alone received the money and apparently did not pay their share to the others.

On 29th October, 1920, two sons of Lalta Prasad, two sons of Sita Ram (Lalta Prasad and Sita Ram having died in the meantime) and Barmha Din sued for sale and obtained a decree on foot of the mortgage on 14th January, 1921 (see judgment Ex. 4). In that suit Jot Singh put forward the defence of payment, but the Court held that payment to Sita Ram alone was not satisfaction of the debt and secondly that payment to Sita Ram also was not proved because his signature on the receipt was not proved.

On 17th November, 1921, the present suit was filed by Jot Singh for recovery of Rs. 120 with interest from the sons of Sita Ram by name Ganesh Prasad and Jwala Prasad. The defence was:—

(1) *res judicata* by virtue of the judgment of 14th January 1921,

(2) limitation on the ground that cause of action accrued on the date of payment on 18th February, 1915,

(3) that Sita Ram had misappropriated the money and so it was not the pious duty of his sons to r-epay, and

(4) that the suit was premature as the

decree for sale had neither been satisfied nor executed.

These defences were repelled by the lower Appellate Court and hence this appeal.

One argument as regards *res judicata* must prevail. At the time of the former suit the sons of Lalta Prasad, the sons of Sita Ram and Barmha Din were separate. Jot Singh, therefore, ought to have insisted that at least the money which fell to the share of Sita Ram should be deducted from the amount found due by the Court. As regards that one-third share of the money it appears to me that the argument of the learned Counsel for appellant must succeed. As regards the two-thirds of the money that question could not have been decided in the former suit. Even if it had been held in the former suit that the entire money had been received by Sita Ram, remission would have been allowed by that Court only to the extent of one-third due to Sita Ram because it was not possible in a suit for sale by the mortgagee to pass a money-decree in favour of the defendant. I hold that the present suit is barred as regards one-third of the amount claimed.

As to limitation the appellants' learned Counsel himself referred to Art. 96 of the Limitation Act. Accepting that contention the time from which the period of limitation begins to run is when the mistake becomes known to the plaintiff. In the present case the plaintiff became aware of the mistake that Sita Ram alone had been paid the money by the Post Office and not all the payees, when judgment was delivered on 14th January 1921. No evidence was led either by examination of the plaintiff or otherwise that the plaintiff had become aware of the mistake earlier. The suit is, therefore, within limitation.

As regards the question of mis-appropriation there is no proof that Sita Ram misappropriated the money. The circumstances under which Sita Ram kept the money to himself are not known to the Court. It is quite possible that soon after receiving the money he may have died and been unable to distribute the money. Misappropriation is a question of intention and the mere keeping back of the money or delay in distributing it would not amount to mis-appropriation. As there is no proof of mis-appropriation the sons of Sita Ram are under a pious duty to pay the money received by their father and recoverable by the plaintiff. The suit is not premature because a decree for sale has been passed and the plaintiff has been damaged by the threat of sale of his property. Damage has been done to him and he is entitled to recover the money kept back by Sita Ram and not distributed to his co-sharers.

As to interest, I shall not interfere with the discretion exercised by the lower Court.

The appeal succeeds as to one-third. I decree it accordingly with proportionate costs of all Courts. The rest of the appeal is dismissed with proportionate costs of all the Courts.

Z. K. *Appeal partly accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 282-B AND 283-B OF 1923.

September 4, 1924.

Present:—Mr. Baker, J. C.

PUNJABRAO—PLAINTIFF—APPELLANT

versus

ATMARAM AND ANOTHER—DEFENDANTS—RESPONDENTS

Hindu Law—Marriage in approved form—Presumption—Asura form—Test-marriage by exchange, whether asura Married sister, whether legal guardian—Limitation Act (IX of 1908), Sch. I, Art. 44, scope of—Alienation by person not de jure guardian, how far binding on minor—Right to impeach void alienations, whether personal.

The presumption under Hindu Law is that a marriage is in an approved form. [p. 1019, col. 2.]

The essence of the *Asura* form of marriage is the taking of a price for the bride. [*ibid.*]

In the case of a marriage by exchange, where a girl from one family is married to a boy of another family and *vice versa*, there being no question of the price for a bride, the marriage is in an approved form and not in the *asura* form. [*ibid.*]

Under the Hindu Law the married sister is not the guardian of her unmarried sister. [p. 1019, col. 2.]

Article 44 of the Limitation Act has no application to a sale effected not by a guardian but by a wholly unauthorized person. [p. 1020, col. 1.]

A person who is not a *de jure* guardian but purports to assume the guardianship of the estate of a minor Hindu is not in a better position than a stranger and has no authority to make any alienation. [p. 1020, col. 2.]

The right of a minor to set aside an alienation which is void is not personal but is also available to the transferee or the heir of the minor. [*ibid.*]

Appeals against the decrees of the Additional District Judge, Amraoti, dated the

18th July 1923, in Civil Appeals Nos. 15 and 16 of 1923.

Sir *B. K. Bose*, Messrs. *M. Gupta*, *V. Bose* and *P. N. Rudra*, for the Appellant.

Mr. *M. B. Niyogi*, for the Respondents.

JUDGMENT.—These two appeals are on the same point and may be disposed of in one judgment. They raise several points of law.

The facts are set out in the judgments of the Courts below. One Abhiman had three daughters, Saraswati, Bani and Gaya, a minor. Saraswati and Bani were married and Gaya was unmarried. After Abhiman's death Saraswati executed two sale-deeds, purporting to act for herself and Bani and as guardian of Gaya. The sale-deeds were executed to pay off her father's debts. Gaya subsequently married Kashirao. She died a minor and Kashirao as her heir sold the property to plaintiff, who brings these suits against the alienees from Saraswati. Both the suits were dismissed and the decrees were confirmed on appeal by the Second Additional District Judge, Amroati.

The following points arise in second appeal:—

(1) Had Saraswati authority to alienate Gaya's property?

(2) If so, was the alienation for legal necessity?

(3) Was Kashirao married to Gaya in an unapproved form?

(4) Has the plaintiff a right to seek to avoid these transactions?

The lower Appellate Court held that the existence of the debts due by Abhiman being proved, the onus was on the plaintiff to prove that the debts were barred by limitation, which he has failed to do. It further held that the alienations were thus for legal necessity and were made by a person who by reason of her near relationship to the minor and by her continued management could be looked upon as a person entitled to deal with the property as guardian; and hence her acts bind Gaya and her heirs.

The fact that the two married sisters believed that they were owners of 2/3rds of the property makes no difference, as they intended to transfer the whole field to pay off their father's debt.

The Additional District Judge further held that Kashirao was married to Gaya by exchange, which is not a marriage in an approved form, and hence his vendee cannot question the sale. It was also held by the First Court, and apparently accepted by the lower Appellate Court, that a purchaser from a minor's heirs cannot question the validity of a sale by the minor's guardian on the ground of absence of benefit or legal necessity.

I deal first with the question of marriage of Kashirao and Gaya being in an unapproved form. The presumption of law is that the marriage is in an approved form. It is contended that there is no evidence that the marriage is by exchange, but assuming it to be so, this does not necessarily cause the marriage to be in an unapproved form. In *Chunilal Pranshankar* v. *Surajram Haribhai* (1) it is laid down at page 442* that "the taint of the *asura* form lies in the gratuity paid to the giver of the bride for his benefit, not in anything paid to her; and it is the taint which determines the form." At page 437* it is stated: "Where the person who gives a girl in marriage receives money consideration for it, the substance of the transaction makes it, according to Hindu Law, not a gift but a sale of the girl. The money received is what is called bride-price; and that is the essential element of the *asura* form. The fact that the rites prescribed for the *brahma* form are gone through cannot take it out of that category, if there was pecuniary benefit to the giver of the girl." The essence of the *asura* form, therefore, would appear to be the taking of a price for a bride. There is no question of the price for a bride in the case of a marriage by exchange where a girl from one family is married to a boy of another family, and *vice versa*. I hold, therefore, that the marriage of Gaya and Kashirao is not in an unapproved form.

The next question is the right of Saraswati to dispose of Gaya's property, and whether it was for legal necessity or otherwise. It is perfectly clear that under Hindu Law the married sister is not a guardian. The learned Counsel for the appellant refers to *In re, Gulbai* (2), *Thayammal* v. *Kuppanna Koundan* (3) and Mayne's Hindu Law, page 284, para 211. It appears to be admitted by the lower Courts that Saraswati was not a *de jure* guardian. They have based their decision on Saraswati being a *de facto* guardian of the girl.

It has been laid down by the Privy

(1) 3 Ind. Cas. 765; 33 B. 433; 11 Bom. L. R. 708.
(2) 32 B. 50; 9 Bom. L. R. 923.
(3) 26 Ind. Cas. 179; 38 M. 1125; 27 M. L. J. 285.
*Pages of 33 B.—[*Ed.*]

Council in *Mata Din* v. *Ahmad Ali* (4) that "it is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a *de facto* guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it." In this connection it may be pointed out that Art. 44 of the Limitation Act has no application to the present case where the sale is effected, not by a guardian, but by a wholly unauthorised person: this is laid down in the same Privy Council judgment at page 223.*

The case, above quoted, was again followed by the Privy Council in *Imambandi* v. *Mutsaddi* (5), where at page 892† it is said that "the term '*de facto* guardian'..... .....is misleading: it connotes the idea that people in charge of a child are by virtue of that fact invested with certain powers over the infant's property. This idea is quite erroneous; and the judgment of the Board in *Mata Din* v. *Ahmad Ali* (4) clearly indicated it."

It is true that both these cases are under Muhammadan Law, but it has been held by this Court in *Husen* v. *Rajaram* (6), that an alienation of the property of a minor by a person who is that minor's guardian *de facto* but not *de jure* is not mere voidable but absolutely void, and the minor need not sue to have it set aside before he can obtain possession of the property. Articles 44 and 91 of the First Schedule of the Limitation Act do not apply to such a case. This is also a case of a Muhammadan. The same view has been taken by this Court in *Vithu* v. *Devidas* (7), which is a case of a Hindu where it was held that under the Hindu Law the step-mother is not the natural guardian of her minor step-son. She is not, therefore, a guardian within the meaning of Art. 44 of the Limitation Act, 1908, and so, that Article does not apply to an alienation by her. This has been followed in *Shahoo* v. *Sheikh Mohiddin*, (Second Appeal No. 140 B of 1916), decided on 20th April 1918.

The law, therefore, is clear. That a person who is not a *de jure* guardian but purports to assume the guardianship of the estate of a minor (Hindu), is not in a better position than a stranger and has no authority to make any alienations. It follows, therefore, that the view of the lower Courts as to the powers of Saraswati alienating the minor's property is wrong. The alienation is void and no question of necessity arises.

The only remaining question is as to the right of the plaintiff who is the alienee of the heir of the minor (for Kashirao being married in an approved form was the minor's heir). It has been contended on behalf of the respondents that the plaintiff cannot challenge the transfer. Reliance is placed on *Muhammad Hafizullah Khan* v. *Bulaqi Mal* (8) following *Muthukumara Chetty* v. *Anthony Udayar* (9), where it is held that the right to avoid appears to be a personal privilege, and though a minor may sue through a next friend to set aside a transfer even during his minority, he and he alone can exercise this personal privilege, and it was held in the Lahore case that the transferee is not entitled to question the previous transaction or to assume the privileges which are personal to the minor and to nobody else, whether the transfer was effected after or before the minor attained majority.

It may be observed that in both cases the transaction was treated as voidable, whereas in the present case it has already been shown that the transaction is void. The ruling in the Lahore case expressly dissents from the ruling of this Court in *Mohanlal* v. *Kisan* (10) which follows *Dalchand* v. *Chand Khan* (11) in which the ruling in *Muthukumara Chetty* v. *Anthony Udayar* (9), was considered and the view taken in *Dalchand* v. *Chand Khan* (11) was accepted.

In these circumstances I see no reason to differ from the view which has been consistently taken by this Court in published rulings and hold that the

(4) 13 Ind. Cas. 976; 34 A. 213 at p. 222; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183: 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49 (P. C.).

(5) 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 809; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.).

(6) 26 Ind. Cas 813; 10 N. L. R. 133.

(7) 51 Ind. Cas. 943; 15 N. L. R. 55.

(8) 75 Ind. Cas. 99; 4 L. 156; (1923) A. I. R. (L.) 299; 5 L. L. J. 355 & 6 L. L. J. 42.

(9) 24 Ind. Cas. 120; 38 M. 867 at p. 877; 15 M. L. T. 361; 29 M. L. J. 617.

(10) 62 Ind. Cas. 313; 17 N. L. R. 53

(11) 27 Ind. Cas. 859; 11 N. L. R. 1.

*Page of 34 A.—[*Ed.*]

†Page of 45 C.—[*Ed.*].

plaintiff was entitled to challenge the validity of the transaction.

There can be no doubt that the transaction was absolutely invalid and that Saraswati had no authority to transfer any title in the minor's property. The question of legal necessity does not arise.

The decree of the lower Appellate Court must, therefore, be set aside and the plaintiff's suits decreed, but as the plaintiff has offered to pay the amount of the payment made by defendant No. 1 for the liquidation of his father's debt, as it was admittedly an ancestral debt, I direct that the plaintiff should pay Rs. 1,000 to Atmaram, defendant No. 1 in Suit No. 286 of 1922, Second Appeal No. 282-B of 1923; and Rs. 980 to Tukaram, defendant No. 1 in Suit No. 272 of 1922, Second Appeal No. 283-B of 1923, before taking possession. Defendant No. 2 Kashirao will bear his costs, and respondent No. 1 will bear the costs of the appellant in these appeals.

G. R. D. *Decree set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 326 OF 1923.

January 20, 1925.

Present:—Mr. Dalal, A. J. C.

BHAGWAN DIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

AJUDHIA—PLAINTIFF—RESPONDENT.

Hindu Law—Widow, possession of—Adverse possession by widow—Possession during lifetime of male holder, continuance of—Appeal, second—Possession, whether adverse or in lieu of maintenance—Finding, whether binding.

Where adverse possession in respect of property belonging to a male Hindu starts in his lifetime it will continue to run after his death during the tenure of his widow, but if adverse possession begins after the death of the last male-holder during the life-tenancy of the widow, the period of limitation against the reversioner would run from the date of the death of the widow. [p. 1022, col. 1.]

Where a Hindu widow is entitled only to maintenance out of the estate of her deceased husband, her possession of the estate would be regarded as adverse to the reversioners unless they are able to prove that it was the result of some arrangement between the widow and the reversioners. [p. 1023, col. 1.]

Bisheshar Dayal v. *Hira Lal*, 36 Ind. Cas. 941; 4 O. L. J. 49; 19 O. C. 221 and *Parbati* v. *Mohammad Hadi*, 68 Ind. Cas. 534; 9 O. L. J. 304; (1923) A. I. R. (O.) 31, distinguished.

Sham Koer v. *Dah Koer*, 29 C. 664; 29 I. A. 132; 6 C. W. N. 657; 4 Bom. L. R. 547; 8 Sar. P. C. J. 280 (P. C.) and *Satgur Prasad* v. *Raj Kishore Lal*, 55 Ind. Cas. 486; 42 A. 152; 22 Bom. L. R. 451; 2 U. P. L. R. (P. C.) 55; (1920) M. W. N. 3; 24 C. W. N. 394; 38 M. L. J. 259; 18 A. L. J. 235; 11 L. W. 384; 46 I. A. 197; 27 M. L. T. 200 (P. C.), followed.

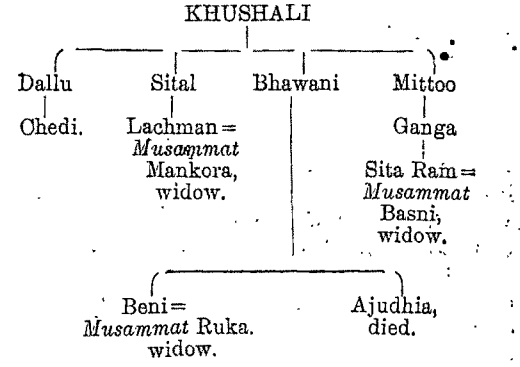
Whether the possession of a widow is only in lieu of maintenance or is adverse is a question to be decided by legal inferences drawn from documents, and where wrong conclusions have been formed from such inferences, they are open to be reversed in second appeal. [p. 1023, col. 1.]

Second appeal against a decree of the District Judge, Rai Bareli, dated the 12th October 1923, setting aside that of the Subordinate Judge, Rai Bareli, dated the 14th February 1923.

Mr. *M. Wasim*, for the Appellants.

Mr. *G. N. Misra* for Mr. *B. N. Srivastava*, for the Respondent.

JUDGMENT.—The cases of the three appellants will have to be discussed separately. It is now admitted that the plaintiff-respondent Ajudhia is the next reversioner to the property of Lachman and that in the line of Khushali, Lachman was the last male owner to die. The following pedigree may be referred to:



In Khushali's line finally there remained the male owners Sita Ram, Beni and Lachman; Sita Ram holding $\frac{3}{4}$th, Beni $\frac{1}{2}$ Lachman $\frac{1}{4}$, if they partitioned. It is common ground that they were all three members of a joint Hindu family. Sita Ram died in 1887, and on 15th April, 1887 the name of *Musammat* Basni was entered in the village record. It is noted there that the entry is made by virtue of the right of inheritance (Copy Ex. C-3). Lachman was alive at the time and so was Beni. Beni died in 1899 and a month later Lachman died in the same year. On 10th June 1899 *Musammat* Ruka's name was entered as against $\frac{1}{4}$th share in the place of Beni and *Musammat* Mankora's as against

the same amount of share in the place of Lachman.

On 4th April 1899 the three widows, *Musammat* Mankora, *Musammat* Ruka and *Musammat* Basni made gifts of their several shares by a joint deed. It is not necessary to mention the names of the donees or how the donees were succeeded. It will be sufficient for our purposes to mention that:

Bhagwan Din appellant derives title from the gift by *Musammat* Basni.

Musammat Basanta appellant from *Musammat* Mankora, and *Musammat* Murta appellant from *Musammat* Ruka.

The plaintiff reversioner's suit against these defendants was decreed by the lower Appellate Court and hence these defendants have brought this second appeal.

The appellants' learned Counsel Mr. Wasim admitted that *Musammat* Basanta's appeal cannot succeed as *Musammat* Mankora was a life-holder of Lachman's ¼th share and she died within the period of limitation.

As regards *Musammat* Murta also I think that the appeal must fail. The principle of law was admitted on both sides, so there is no necessity of quoting authorities, that if adverse possession started in the lifetime of the last male Hindu owner it will continue to run during the widow's possession but that if adverse possession began after the death of the last male-holder during the life-tenancy of the widow, the period of limitation against the reversioner would run from the date of the death of the widow. In the present case it is admitted that Beni died only one month prior to Lachman's death and there is no definite evidence that Beni's widow took possession adversely to Lachman during the one month of Lachman's surviving Beni. It was pointed out that the plaintiff's own witnesses deposed that *Musammat* Ruka took possession on the death of Beni. That is an ordinary way of talking and does not indicate a specific admission that during the lifetime of Lachman *Musammat* Ruka had taken possession adversely to Lachman. The deed of gift was admittedly executed subsequently to the death of Lachman because Lachman's widow also joined in it, and the mutation was made in favour of *Musammat* Ruka more than two months after this deed of gift. The balance of probability would be in favour of holding that *Musammat* Ruka took adverse possession after the death of Lachman. *Musammat* Murta's appeal must, therefore, fail.

The case of Bhagwan Din is different. *Musammat* Basni, widow of Sita Ram, took possession in the lifetime of Lachman and continued in such possession until Lachman's death and until she executed the deed of gift on 4th April 1899. The learned Counsel for the plaintiff-respondent asked the Court to presume, as the lower Appellate Court has done, that *Musammat* Basni was in possession of this property in lieu of maintenance. Personally I attach great importance to pleadings and when I refer to the plaint I find no such allegation there. The fact of the entry of *Musammat* Basni and *Musammat* Ruka's names in the village record was concealed by the plaintiff and the plaintiff came to Court as if Lachman's name had been entered in the village record on the death of his cousins and *Musammat* Mankoras's name on the death of Lachman. The plaintiff came to Court on a concealment of facts. My attention was drawn to the replication but when the times comes for replication the advice of a Pleader is obtained, and without any intention of making a reflection, it may be stated that at such a time the statement of a party is not what he honestly believes but what would be useful for the purposes of his case. The learned Counsel referred me to a Bench decision of this Court reported as *Bisheshar Diyal* v. *Hira Lal* (1). In that case however the observations were made by the Bench to repel an unusual presumption of the Trial Court that a certain Hindu lady was placed in possession of her husband's property with the status of a Hindu widow of a separated member of a family, though the family was admittedly joint. When the Trial Court had drawn such a presumption the Bench pointed out that the more natural presumption would be that she was placed in such possession in lieu of maintenance. There was no question, therefore, to any claim by right of adverse possession. The other ruling quoted by the learned Counsel in the case of *Parbati* v. *Mohammad Hadi* (2) is not to the point. There are pronouncements of their Lordships of the Privy Council as to how possession of a

(1) 36 Ind. Cas. 941; 4 O. L. J. 49; 19 O. C. 221.
(2) 68 Ind. Cas. 534; 9 O. L. J. 304; (1923) A. I. R. (O.) 31.

Hindu widow not entitled to such possession is to be viewed. In *Sham Koer* v. *Deh Koer* (3) their Lordships were of opinion that where widows were entitled only to maintenance out of the estate their possession could be considered adverse unless the plaintiff proved that it was the result of some arrangement between them and the rightful owner. Similar views were expressed in the case of *Satgur Prasad* v. *Raj Kishore Lal* (4) by their Lordships, this time in conflict with the opinion of both the High Court and the Trial Court. They were of opinion that where the question as to the nature and effect of possession, of property by a Hindu widow, *i. e.*, whether possession is only in lieu of maintenance and not adverse possesion, is one decided by legal inferences drawn from documents, opinions of Courts, though concurrent, are not findings of fact, and where wrong conclusions from such inferences have been formed they are open to be reversed by their Lordships on appeal.

As I have already pointed out, in this case there was no allegation of an arrangement between Lachman and *Musammat* Basni and the plaintiff's own witnesses stated that *Musammat* Basni took possession on the death of Sita Ram and never alleged that this possession originated from an agreement between her and Lachman that she should hold such property in lieu of maintenance. By the lower Appellate Court's own showing there would be no necessity to make separate provision for maintenance when *Musammat* Basni was living in the same house which was occupied by Lachman. I hold that *Musammat* Basni's possession was adverse, so the plaintiff's suit as regards the property in possession of Bhagwan Din is time-barred.

In the result I dismiss the plaintiff's suit against Bhagwan Din with costs of all the Courts and dismiss this appeal, with costs as regards *Musammat* Basanta and *Musammat* Murta. So far as Bhagwan Din is concerned his appeal is allowed with costs.

Z. K. *Appeal dismissed.*

(3) 29 C. 664; 29 I. A. 132; 6 C. W. N. 657; 4 Bom. L. R. 547; 8 Sar. P. C. J. 280 (P. C.).

(4) 55 Ind, Cas. 486; 42 A. 152; 22 Bom. L. R. 451; 2 U. P. L. R. (P. C.) 55; (1920) M. W. N. 3; 24 C. W. N. 394; 38 M. L. J. 259; 18 A. L. J. 235; 11 L. W. 384; 46 I. A. 197; 27 M. L. T. 200 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 75-B OF 1924.

February 10, 1925.

Present:—Mr. Baker, J. C.

SINGUAJI—PLAINTIFF—APPELLANT

versus

GAMBHIRJI—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144, scope of—Suit for possession after dispossession—Limitation—Burden of proof.

Every suit for possession of immoveable property in which the plaintiff alleges that he has had possession must fall under Art. 142 of Sch. I to the Limitation Act. It is only where the plaintiff does not allege that he has ever been in possession, that the case will fall under Art. 144. Where the plaintiff while in possession has been dispossessed and is out of possession, the onus is upon him to prove that he was in possession and was dispossessed within twelve years of the suit. [p. 1024, col. 1.]

Jai Chand v. *Girwar Singh*, 52 Ind. Cas. 366; 41 A. 669; 17 A. L. J. 814 and *Dharm Singh* v. *Hur Pershad Singh*, 12 C. 38; 6 Ind. Dec. (N. S.) 26, distinguished.

Subappa v. *Venkappa*, 28 Ind. Cas. 24; 39 B. 335; 17 Bom. L. R. 141, *Ganno* v. *Beni*, 43 Ind. Cas. 943; 14 N. L. R. 82 at pp. 94, 95 and *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*, 16 C. 473; 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312 (P. C.), relied on.

Appeal against a decree of the Additional District Judge, Yeotmal, dated the 20th November 1913, in Civil Appeal No. 43 of 1923.

Mr. *W. R. Pandit*, for the Appellant.

Mr. *S. R. Mangalmurti*, for the Respondent.

JUDGMENT.—The only question that arises in this appeal is as to the Article of the Limitation Act applicable.

The plaintiff sued the defendant for possession of a plot of land of which he had been dispossessed by defendant in 1920.

The First Court found that the plot formed part of defendant's land and plaintiff was not in possession of it within 12 years previous to the suit and dismissed his suit.

On appeal the Additional District Judge, Yeotmal, found plaintiff's title proved but dismissed the appeal on the ground that plaintiff had failed to prove his possession within 12 years previous to the suit under Art. 142, Limitation Act, which is the Article applicable.

The plaintiff appeals on the ground that Art. 144 applies and it was for the defendant to prove his adverse possession.

The learned Counsel for plaintiff relies on *Jai Chand* v. *Girwar Singh* (1) and *Dharm Singh* v. *Hur Pershad Singh* (2). In the first

(1) 52 Ind. Cas 366; 41 A. 669; 17 A. L. J. 814.
(2) 12 C. 38; 6 Ind. Dec. (N. S.) 26.

of these cases defendant pleaded adverse possession and failed to prove it. The latter of these cases is one in which the evidence as to possession was conflicting and it was held that the presumption that the possession goes with title must prevail.

The plaintiff's case is that he was in possession and was dispossessed and, therefore, the Art. 142 of the Limitation Act, which expressly applies to such a case, will govern the case. This has been clearly laid down in *Subappa* v. *Venkappa* (3), where it is stated that every suit for possession of immoveable property, in which the plaintiff alleges that he has had possession, must fall under Art. 142. It is only where the plaintiff does not allege that he has ever been in possession, that the case will fall under Art. 144. The same view has been taken by this Court in *Ganno* v. *Beni* (4) and by the Privy Council in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (5).

So also in *Rakhal Chandra Ghose* v. *Durga Das Samanta* (6), it was held that where the plaintiff while in possession has been dispossessed and is out of possession, the onus is upon him to prove that he was in possession and was dispossessed within 12 years of the suit.

The view of the lower Appellate Court is, therefore, correct and the appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(3) 28 Ind. Cas. 24; 39 B. 335; 17 Bom. L. R. 141.
(4) 43 Ind. Cas. 943; 14 N. L. R. 82 at pp. 94, 95.
(5) 16 C. 473; 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312 (P. C.)
(6) 67 Ind. Cas. 673; 26 C. W. N. 724; (1922) A. I. R. (C.) 557.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST MISCELLANEOUS APPEAL No. 11 OF 1925.

February 26, 1925.

Present :—Mr. Wazir Hasan, A. J. C.

AHMAD AGHA *alias* CHHOTEY SAHEB—APPLICANT—APPELLANT

versus

THE PERSON OF *Musammat* ZOHRA BEGAM AND ANOTHER—OPPOSITE PARTY—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 19, 25—Father, whether can be appointed guardian—Custody of children, application for, whether maintainable.

By virtue of the provisions contained in s. 19 of the Guardians and Wards Act, a father cannot be appointed the guardian of his minor children, but as their natural guardian he can take proceedings under s. 25 of the Act.

Chandra Kuar v. *Chhotey Lal*, 80 Ind. Cas. 330; 9 O. & A. L. R. 913; (1925) A. I. R. (O.) 282, *Achratlal Jekisendas* v. *Chimanlal Parbhudas*, 37 Ind. Cas. 215; 40 B. 600; 18 Bom. L. R. 582, and *Chhote Lal* v. *Chandra Kunwar*, 80 Ind. Cas. 71; 11 O. L. J. 537; 10 O. & A. L. R. 758; (1925) A. I. R. (O.) 257; 1 O. W. N. 330, referred to.

Appeal against an order of the District Judge, Lucknow, dated the 7th November 1924.

Messrs. *Haider Husain* and *Mojiz Hasan*, for the Appellant.

Mr. *Radha Krishana*, for the Respondents.

JUDGMENT.—This is an appeal from the order of the District Judge of Lucknow, dated the 7th November 1924, in proceeding under the Guardians and Wards Act, 1890. The appellant is the father of the minor child, *Musammat* Zohra Begam. The other party to the proceedings is the mother of *Musammat* Zohra Begam. The appellant applied under ss. 10 and 25 of the Guardians and Wards Act, 1890, to the District Judge of Lucknow for an order of appointment as the guardian of the person of the child. As a consequential relief he also prayed that the child be entrusted to him. His application has been dismissed on the technical ground that "the father cannot use the Guardians and Wards Act at all." In support of that view the learned Judge has quoted a decision of this Court in the case of *Chandra Kuar* v. *Chhotey Lal* (1) and also a decision of the High Court at Bombay in *Achratlal Jekisendas* v. *Chimanlal Parbhudas* (2).

So far as the above rulings lay down the proposition that a father cannot be appointed guardian by proceedings under the Guardians and Wards Act, I am entirely at one with them but that as a natural guardian he can take proceedings under s. 25 of the Act is clear to my mind. That view I expressed in the case of *Chhote Lal* v. *Chandra Kunwar* (3) and in that decision I referred to an earlier decision in the case of *Mushaf Husain* v. *Muhammad Jawad* (4) decided by Mr. Lindsay.

(1) 80 Ind. Cas. 330; 9 O. & A. L. R. 913; (1925) A. I. R. (O.) 282.
(2) 37 Ind. Cas. 215; 40 B. 600; 18 Bom. L. R. 582.
(3) 80 Ind. Cas. 71; 11 O. L. J. 537; 10 O. & A. L. R. 758; (1925) A. I. R. (O.) 257; 1 O. W. N. 330.
(4) 48 Ind. Cas. 60; 21 O. C. 194; 5 O. L. J. 616.

The application now under consideration was mainly made for the purpose of obtaining an order of appointment as a guardian. The application was clearly not maintainable in view of the provisions of s. 19 of the Guardians and Wards Act and was, therefore, rightly rejected by the learned Judge. It is open to the appellant to take other proceedings which he my be advised to do according to law.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 389 OF 1923.

February 24, 1925.

Present:—Mr. Baker, J. C.

ALI MAHAMMAD—DEFENDANT—APPELLANT

versus

MAHAMMAD NOOR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 73, O. XXI, rr. 11, 30—Rateable distribution, when can be ordered—Application for rateable distribution—Application for execution, absence of, effect of—"Otherwise as the nature of the relief granted may require", scope of.

Before a person is entitled to rateable distribution under s. 73 of the C. P. C., a formal and regular application for execution must be made. Rateable distribution cannot be ordered where there is only a prayer for rateable distribution of the assets, but there is no regular application for execution.

Under O. XXI, r. 11, sub-r. (2), cl. (*j*) of the C. P. C., an application for execution must specify the mode in which the assistance of the Court is required, the modes of execution of a money-decree being given in r. 30 of the Order. Rateable distribution is not one of the modes of execution of a money-decree, and an application which merely contains a prayer for rateable distribution cannot, therefore, be treated as an application for execution.

The words "otherwise as the nature of the relief granted may require" in cls. (*j*) (*v*) of r. 11 (2) of O. XXI of the C. P. C. refer to the nature of the relief granted by the decree and have no reference to the mode in which the assistance of the Court is required.

Appeal against the decree of the District Judge, Nagpur, dated the 26th July 1923, in Civil Appeal No. 95 of 1923.

Mr. *D. P. Tiwari*, for the Appellant.

Mr. *W. H. Dhabe*, for the Respondent.

JUDGMENT.—The point in this appeal is the same as in Second Appeals Nos. 111 and 156 of 1924. This judgment will govern those appeals also.

The facts are simple. Four persons obtained decrees against the same judgment-debtor. One of them, Mahammad Noor, who is the respondent in all these appeals, attached the house of the judgment-debtor and applied for sale. Before the sale took place, the other three decree-holders, who are the appellants in these three appeals, applied for rateable distribution, which was ordered. Mahammad Noor, however, raised an objection that rateable distribution should not be allowed. This objection was overruled, so he filed three regular suits for declarations that the other decree-holders were not entitled to rateable distribution. The first of these suits was dismissed by the Munsif, but on appeal the District Judge of Nagpur held that rateable distribution could not be ordered because the applications were not in proper form, and the other two suits were decided accordingly. The appellants make these three appeals, urging that rateable distribution should have been allowed.

There is very little to be said in this appeal. The learned District Judge has correctly stated the law on the point. Before a person is entitled to rateable distribution under s. 73 of the C. P. C., an application for execution must be made. In the present cases no regular applications for execution have been made, as the prayer is only for rateable distribution of the assets.

Under O. XXI, r. 11, sub-s. (2), cl. (*j*), C. P. C., an application for execution must specify the mode in which the assistance of the Court is required. Under O. XXI, r. 30, the modes of execution of a money-decree are given and rateable distribution is not one of them. It has been held by this Court in *Seth Maganmal* v. *Raja Raghunathrao* (1) that proceedings for rateable distribution are of a non-judicial character. The present case is governed, as the learned District Judge has pointed out, by *Dwarkadas* v. *Ghasi Ram* (2). I entirely agree with the reasons given by the learned District Judge.

The learned Pleader for the applicant has relied on O. XXI, r. 11 (2), cls. (*j*) (*v*), which says "otherwise, as the nature of the relief granted may require." That, however, applies to the nature of the relief granted by the decree, *e. g.*, in a case

(1) 75 Ind. Cas. 749; 19 N. L. R. 172; (1924) A. I. R. (N.) 39.

(2) 64 Ind. Cas. 53; 17 N. L. R. 143

of a decree for restitution of conjugal rights, and does not affect the present case. It is not a mere irregularity, as there was no application for execution to the Court, as required by s. 73, C. P. C.

I see no reason for interference and dismiss the appeal with costs. The other two appeals will follow the result of this appeal.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 3641. OF 1921.

July 28, 1924.

Present:—Mr. Justice Taraporewala.

KEDARNATH TULSHIDAS AND OTHERS—PLAINTIFFS

versus

BIHARILAL JAGAMAL AND OTHERS—DEFENDANTS.

Civil Procedure Code (Act V of 1908), s. 95, O. XXXVIII, r. 5—Attachment before judgment, order for—Attachment not actually levied—Damages, suit for, whether maintainable.

Section 95 of the C. P. C. which provides for compensation in the case of wrongful attachment of the goods of a party is applicable only where the attachment is in fact effected, and does not apply to a case where the attachment is applied for but is not in fact levied. Where the aggrieved party claims a larger compensation than Rs. 1,000 the remedy by way of a suit is allowed, but that does not make the basis of the suit in any way different from the basis on which compensation is allowed in the suit itself where the process has been wrongly put into effect, except that in a suit something more is required than under s. 95, that is to say, that under s. 95 it is sufficient to prove that the attachment was applied for on insufficient grounds while in a suit the plaintiff has to show not merely that it was applied for on insufficient grounds but that it was so done maliciously and without reasonable and probable cause. In both cases it must be proved that the attachment was actually levied. [p. 1028, cols. 1 & 2.]

It is an essential part of the cause of action in a suit to recover damages for wrongful attachment that the plaintiff must show that the order under which the process was enforced to his detriment was set aside in the original suit. [p. 1028, col. 2.]

Where an attachment before judgment is ordered but the actual levy of the attachment is avoided by payment of the amount required as security for the decree, the person against whom the order for attachment was made can have no cause of action for a suit to recover damages for wrongful attachment. [p. 1028, col. 2; p. 1029, col. 1.]

Mr. *M. J. Mehta* (with him Mr. *Vasvada*), for the Plaintiffs.

Mr. *Munshi* (with him Messrs. *Jinnah* and *Kania*), for the Defendants.

JUDGMENT.—This suit has been filed by the plaintiffs to recover a sum of Rs. 1,05,000 by way of damages on the ground that an attachment before judgment and injunction were applied for by the defendants in this suit in Suit No. 2145 of 1921 filed by the defendants against the plaintiffs on insufficient ground, that such application was made by the defendants wrongfully and maliciously and without reasonable and probable cause, and that by reason of such wrongful application the plaintiffs suffered damage in their credit and reputation and have been put to trouble and inconvenience and expenses.

Various issues were raised by Mr. Munshi for the defendants. The first issue is whether the plaint discloses any cause of action. Mr. Munshi has asked the Court to try this issue as a preliminary issue in order to save the costs and expenses of inquiring into the merits if the first issue is decided in the defendants' favour. Mr. Munshi has contended that the plaint does not disclose any cause of action on two grounds: first, that no attachment was, in fact, levied and that mere procuring of an order for attachment, before judgment does not of itself afford a cause of action for damages, and secondly, that the order of attachment in the original suit was confirmed and a summons to vacate the said order was discharged by the learned Chamber Judge who heard it; that it is an essential part of the cause of action in a suit for damages for the abuse of civil proceedings that the proceeding in which the process complained of is taken out should have terminated in favour of the plaintiff or that the particular procees complained of has been superceded or discharged.

In my opinion the defendants are right in both of their contentions on this point. As to the first point, it is admitted by the plaintiffs that no attachment was in fact levied but the plaintiffs' Counsel contends although the cause of action is not so stated in the plaint,—that the very fact of the Court's bailiff going to the shop of the plaintiffs with a view to enforce the warrant of attachment was sufficient to cause damage to the credit of the plaintiffs and that the fact of the biliff's going in execution of the order, which, the plaintiffs say, was obtained maliciously and without probable and sufficient cause, was an abuse of the process of the Court, and that the plaintiffs need not allege anything further to entitle them

to damages for the said act. In paras. 12, 13 and 14 of the plaint the plaintiffs contend that they had suffered damage by reason of the wrongful application made by the defendants for attachment before judgment. Even assuming that the plaintiffs are now entitled to prove that the bailiff went to the shop to enforce the warrant of attachment and that to prevent such attachment moneys were paid by a relative of the plaintiffs, as stated in the plaint, the said act of the bailiff does not give any cause of action to the plaintiffs. In *Rama Aiyer* v. *Govinda Pillai* (1), attachment was not in fact levied on the plaintiff's moveables, but the reason why it was not levied is not stated in the facts of the case. Probably, there also the plaintiff paid the security, which is always mentioned in every warrant of attachment of goods, and for that reason the attachment was not levied. From the judgment of Mr. Justice Napier it appears that the bailiff did go to attach the moveables in pursuance of the warrant of attachment in that case. The only reason, therefore, to my mind, why the goods were not attached must have been that the plaintiff there gave security. But even if that was not the case the plaintiff in that suit did put his cause of action on the ground of the defendant's action in applying for attachment before judgment and "coming to attach his moveables", and the Court there held that procuring an order for attachment before judgment, however, maliciously did not of itself afford a cause of action for damages. In the present case also what happened, according to the plaintiff, was that the bailiff went to the shop of the plaintiffs to attach and that in fact no attachment was levied as a relative of the plaintiffs paid the amount mentioned in the warrant as being payable by the plaintiffs as security on his failing to show cause to the contrary. The warrant of attachment here does not order the plaintiffs to pay security and in default of such payment order attachment of the goods of the plaintiffs. As pointed out in *Lotlikar* v. *Lotlikar* (2), where a similar provision in the old C. P. C. was considered by the Appeal Court, the construction of the usual order of attachment before judgment is this. The defendants are called upon to furnish security for the fulfilment of any decree that the plaintiffs might obtain against them or to show cause on any day fixed in the order why security should not be furnished and to this direction is appended an order for provisional attachment as provided in the form at the end of the C. P. C. Mr. Justice West, in his judgment at page 644*, says that an order made under s. 484, which is similar to the provision for attachment before judgment in the C. P. C., 1908, might mean "an attachment to be made conditionally on the security not being furnished or cause shown by the prescribed day, or it might mean an immediate attachment of a provisional kind conditioned to become plenary if security should not be furnished, or cause shown according to the terms of the order." Mr. Justice West held that the form showed that the latter was the intention of the Legislature, and he goes on further to hold that if the attachment had been actually made it would in the first instance have been only a temporary one and the defendants showing cause on the day fixed in the order would have had it set aside, and that to prevent the discredit and inconvenience that would arise from the attachment they took the only step open to them, namely, to pay the amount of security mentioned in the order. As Mr. Justice West observes (page 644)*: "The order for attachment was supplementary to that for furnishing security, and the order for furnishing security was itself, if the defendants chose, dependent on their failing to show cause on [the day fixed]. Primarily, therefore, they had till that date to perpare their reasons, and the additional order for intermediate attachment could not deprive them of that right. Neither, therefore, should the giving of security to avoid the pressure of that order." These observations of Mr. Justice West clearly show that the giving of the security before showing cause as to whether security should be given or not is entirely optional with the plaintiff and that if he does give it, it is merely to avoid the discredit and incovenience that might arise from the attachment.

The plaintiffs here have based their cause of action on the ground that there was discredit and inconvenience by the mere fact of the bailiff going to their shop, not by reason of the giving of the security. The giving of the security in fact saved the discredit and the inconvenience. "The

(1) 32 Ind. Cas 448; 32 M. 952; 3 L. W. 82; 30 M. L. J. 180; (1916) 1 M. W. N. 156.
(2) 5 B. 643; 3 Ind. Dec. (N. S.) 424.

*Page of 5 B.—[*Ed.*]

plaintiffs, therefore, cannot contend that the very act which was done to save discredit and inconvenience resulted, notwithstanding its object, in discredit and inconvenience. To my mind this is a contradiction in terms, and, as observed in *Rama Ayyar* v. *Govinda Pillai* (1), there cannot be alleged any possible inconvenience or discredit by reason of the giving of the security, which would form the basis for a claim for damages for abuse of the process of the Court. Mr. Mehta contended that procuring an order for attachment with the object of getting speedy payment of the amount claimed in a suit was an abuse of the process of the Court sufficient to give the plaintiffs a cause for action for damages. In *Grainger* v. *Hill* (3), it was held that where the process of the law had been abused to effect an object not within the scope of the process, it was immaterial whether the suit which that process commenced had been determined or not or whether or not it was founded on reasonable and probable cause. Even in *Grainger* v. *Hill* (3), the process was enforced and the plaintiff was arrested. The principles of that case are applicable only where the process is employed to compel the aggrieved party to do something which he is not legally bound to do under the process, and not in a case like this which is analogous to an action for a malicious arrest or malicious prosecution. I need not refer to the various cases cited and discussed in *Rama Ayyar* v. *Govinda Pillai* (1). I express my entire agreement with the reasoning in the judgment of Mr. Justice Napier in that case.

Section 95 of the C. P. C., which provides for compensation in the case of wrongful attachment of the goods of a party, clearly shows that it is applicable only where the attachment is in fact effected and does not apply to a case where the attachment is applied for and has not in fact been levied. The remedy by way of a suit is allowed where the aggrieved party claims a larger compensation than Rs. 1,000. But that does not make the basis of the suit any way different from the basis on which compensation is allowed in the suit itself where the process has been wrongly put into effect, excepting that in a suit something more is required than under s. 95 and not that something less is required, namely, that under s. 95 it is sufficient to prove that the attachment was applied for on insufficient grounds, while in a suit the plaintiff has to show not merely that it was applied for on insufficient grounds but that it was so done maliciously and without reasonable and probable cause.

On these grounds, therefore, I hold that the fact that attachment was not levied is quite sufficient to put the plaintiffs out of Court and that the plaint does not disclose any cause of action for damages.

Coming to the second ground, in my opinion, it is an essential part of the cause of action in a suit like this that the plaintiff must show that the order under which he says, the process was enforced to his detriment whether by way of attachment or by way of arrest was set aside in the original suit. Halsbury's Laws of England, Vol. XIX, at page 692, gives the exceptions to the rule that the termination of the proceedings in favour of the plaintiff or discharge of the process complained of must be proved to give a cause of action to the plaintiff; but the exceptions, to my mind, refer to cases of quite a different nature than a case under an order for attachment or arrest under the C. P. C. Under the C. P. C. an order for attachment is not confirmed until the party against whom it is made fails to show cause against the order on the day fixed for the purpose. If by reason of the party's absence on the day so fixed the order is confirmed *ex parte* the party may take out a summons for having the order vacated, and if he succeeds in satisfying the Court that he was unable to appear for a sufficient cause and that the order was not justified on the facts the order would be vacated by the Court. The order for attachment complained of in this suit was confirmed *ex parte* and the plaintiffs took out a summons for vacating the same, but unfortunately for them, although the learned Chamber Judge was of opinion that there was sufficient cause for the plaintiffs' absence and that the order was not justified on the facts, he dismissed the summons and did not vacate the order on the ground that the point was academic, inasmuch as a decree had been passed against the plaintiffs for the amount which they had deposited for security and the plaintiffs had agreed that the amount so deposited by the plaintiffs should be withdrawn by the other party in satisfaction of the decree. The question, however, could not be treated as academic if the plaintiffs were going to

(3) (1898) 4 Bing. N. C. 212; 5 Scott 561; 7 L. J. C. 85; 132 E. R. 769.

claim heavy damages as they have done in this suit. The question was very important from that point of view. The plaintiffs' Counsel ought to have brought that aspect of the order to the notice of the Chamber Judge. It does not appear from the notes of the Judge's clerk that this point was put before the Chamber Judge. It may be that the point was not then present to the mind of the plaintiffs, or that Counsel may have thought that even if the order was set aside, as no attachment had been levied, the result would be merely academic. If it had been present to the mind of Counsel that a big claim for damages was going to be made because of the wrongful attachment, he would have asked the Court to vacate the order on the ground. Whatever may be the reason, I must say that I cannot go by the opinion given by the learned Chamber Judge. I am bound by the fact that the original order for attachment was confirmed and still subsits. I cannot in this suit go into the merits of that order and hold that the order was wrongly made and treat the order as discharged or vacated. On the second ground also, therefore, I hold that the plaint discloses no cause of action inasmuch as it does not show that the original order of attachment was vacated.

On this finding I do not think that the time of the Court or moneys of the parties should be further wasted in going into the merits of the case. I must say here that there is not a word in the plaint as to there being any damage by reason of the payment of the moneys by way of security. As to the damage by reason of the bailiff going in the shop, as held in *Rama Ayyar* v. *Govinda Pillai* (1), no such damage can be possibly proved, and to my mind, therefore, even on the merits it would be futile to allow the plaintiffs to adduce evidence to show that in fact there was damage. There could not possibly have been any damage.

I hold that it is not necessary to go into the other issues in the case, and that the suit must, therefore, be dismissed with costs.

Z. K. *Suit dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE No. 66-B OF 1924.

January 14, 1925.

Present:—Mr. Baker, J. C.

ATMARAM—RESPONDENT No. 1—APPLICANT

versus

PUNJABRAO AND OTHERS—RESPONDENT No. 2—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1 (1)—Review—Mistake of law—Decision wrong on merits—Authoritative precedent, whether discovery of new and important evidence—Ground for review—Practice—Reference to Full Bench—Decided case, whether can be referred.

A case already decided cannot be referred to a Full Bench. [p. 1030, col. 1.]

A judgment cannot be reviewed under O. XLVII, r. 1 (1) of the C. P. C., on account of some mistake or error apparent on the face of the record, where the alleged mistake or error is a wrong exposition of law, for instance, where the judgment is based on a precedent which has been modified by a subsequent decision. [*ibid.*]

Even assuming that the discovery of an authoritative precedent by which a precedent relied on in the judgment has been modified amounts to the discovery of new and important evidence within the meaning of O. XLVII, r. 1 (1) of the C. P. C., such a discovery is not a ground for review without strict proof that the subsequently relied on authority was not within the knowledge of the applicant or could not be produced by him when the decree or order was passed or made. [*ibid.*]

A review which is really an attempt to re-argue the appeal cannot be ordered on the ground that the decision was wrong on the merits. [*ibid.*]

Case-law referred to.

Application for review of the decree of the Judicial Commissioner, in Second Appeal No. 282-B of 1923, dated the 4th September 1924, printed as 87 Ind. Cas. 1018.

Sir Dr. *H. S. Gour*, for the Applicant.

ORDER.—This is an application for review of the judgment of this Court in Second Appeal No. 282-B of 1924 on the ground that the judgment is not in consonance with the views of this Court as explained in certain cases referred to, including one published judgment, *Jago* v. *Oodal* (1) and that the principle laid down in that case is recognized in *Vithu* v. *Devidas* (2), referred to in the judgment of which review is sought, and that the effect of the judgment which deals with the validity of alienations made by the *de facto* guardian of a Hindu minor will affect a number of people and that the point may be referred to a Full Bench.

(1) 4 N. L. R. 20.
(2) 51 Ind. Cas. 943; 15 N. L. R. 55.

As regards the last point I am of opinion that a case already decided cannot be referred to a Full Bench. The application is really based on the judgment being wrong in law, and as such it is covered by the recent ruling of the Patna High Court in *Srimati Garabini Kamarin* v. *Surja Narain Singh* (3) which lays down that a judgment cannot be reviewed under O. XLVII, r. 1 (1), on account of some mistake or an error apparent on the face of the record when the alleged mistake or error is a wrong exposition of the law, as, for instance, when the judgment is based on a precedent which has been modified by a subsequent decision.

It was further held that even assuming that the discovery of an authoritative precedent, by which a precedent relied on in the judgment has been modified amounts to the discovery of new and important evidence within the meaning of O. XLVII, r. 1 (1), such a discovery is not a ground for review without strict proof that the subsequent authority was not within the knowledge of the applicant, or would not be produced by him when the decree or order was passed or made.

The judgments quoted in the application are all long prior to the present case and could have been quoted at the hearing, when both sides were represented by Counsel and the case was argued at length. As a matter of fact my notes show that Second Appeal No. 316-B of 1914, referred to in the application was quoted. The review is really an attempt to re-argue the appeal which cannot be allowed.

The Patna case is based on the Privy Council decision in *Chhajju Ram* v. *Neki* (4) in which it was held that a review cannot be ordered on the ground that the decision was wrong on the merits. Assuming, therefore, that my judgment is wrong in law, which the other side would presumably not admit, that is no ground for a review.

If, as is stated, there are conflicting decisions of this Court on the question of the validity of alienations made by the *de facto* guardian of a Hindu minor, the next appeal in which this question occurs might properly be referred to a Full Bench, unless the Privy Council decides the question in ths meanwhile.

In the present case as the plaintiff has been ordered to re-pay to the purchasers the amounts they had paid to the *de facto* guardian no injustice has been done to them, and as to the alleged injury which is likely to be done to the estates of orphans the Guardians and Wards Act was passed in order to legalise the position of guardians and can always be availed of.

I accordingly reject the application without issuing notice to the other side.

G. R. D.

Z. K. *Application rejected.*

(3) 75 Ind. Cas. 177; 3 Pat. 134; (1923) Pat. 361; 5 P. L. T. 52; (1924) A. I. R. (Pat.) 250.

(4) 72 Ind. Cas. 566; 3 L. 127; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. (P. C.) 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459; 49 I. A. 144 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 199 OF 1924.

February 26, 1925.

Present:—Mr. Daniels, J. C.

PRATAB BALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Mahant SURESH DUTT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 115—Transfer of non-transferable holding—Plea of non-transferability, whether can be taken by transferor—Estoppel.

Where the Legislature has declared an occupancy holding to be non-transferable, a tenant who has effected a transfer of such a holding is not estopped from setting up the plea of non-transferability of the holding as against his transferee. [p. 1031, col. 2.]

Beni Madho v. *Kali Pershad Singh*, 6 O. C. 331, followed.

Appeal against a decree of the Subordinate Judge, Fyzabad, dated the 8th February 1924, reversing that of the Munsif, Fyzabad, dated the 24th November 1923.

Mr. *H. Husain*, for the Appellants.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This is an appeal by the defendants in a suit for possession on the basis of a deed of gift. The property in suit is situated in several villages but the appeal relates only to the property in village Kanakpur. The suit was decided in the Court below mainly on the question whether the deed of gift relied on by the plaintiffs was procured by fraud. On this question the lower Appellate Court, differing from the Trial Court, found in favour of the plaintiff, and though a plea attacking

this finding was taken in the grounds of appeal it has not been pressed. The only plea pressed is that the Kanakpur property was an occupancy holding in which the plaintiffs' predecessor had by virtue of s. 5 of the Oudh Rent Act no transferable interest. The point is not discussed in the judgment of the Court below. The learned Munsif found in favour of the plaintiffs that the property was transferable. The property was acquired under a settlement decree giving *kabzadari* rights and the Munsif appears to have found that in this instance *kabzadari* meant under-proprietary rights. A reference to the decree shows clearly that this finding was wrong. The decree refers specifically to Ch. II, s. 5 of the Oudh Rent Act of 1868, which was then in force. This is the section which deals with occupancy rights. It was also objected by the Munsif that the decree does not give the numbers of the plots but a perusal of the decree with the settlement entries in which the decree is referred to shows clearly that the plots were those in suit.

The case was argued by the respondents on two grounds: First, that this plea must be taken to have been abandoned in the Court below, and secondly, that the plaintiffs are estopped from asserting it. As to the first point there is nothing in the judgment of the Court below to show definitely that it was abandoned. In that Court the plaintiff and not the defendant was the appellant. The learned Subordinate Judge refers to this question as one of the defences to the suit taken by the defendants. He then says nothing more about it but proceeds to deal with the pleas taken by the plaintiff in his appeal. At the hearing in this Court it was stated by the Vakil who appeared in the Court below that the point was argued. It is not clear from the judgment of the Court below that the point was abandoned and I hold, therefore, that the defendants are not precluded from raising it. The second plea is based on the fact that the first appellant Pratab Bali is the man who made the gift and it is said that he cannot deny the validity of his own gift. The second and third defendants are holding under a transfer from the same person and if the holding is untransferable, their title is also bad. On the other hand they are in possession of the property and it has been held by a Bench of this Court in *Beni Madho* v. *Kali Pershad Singh* (1) that in the case of occupancy holdings, which the Legislature has declared to be untransferable, there is no estoppel. Following that ruling I hold that the defendants are not debarred from setting up this defence. The result is that the appeal must be and hereby is allowed so far as the Kanakpur property is concerned, and the decree of the Trial Court is restored with reference to this property. As the appeal has partly succeeded and partly failed, the parties will bear their own costs throughout.

Z. K. *Appeal allowed.*

(1) 6 O. C. 331.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 59 OF 1924.

November 22, 1924.

Present:—Mr. Baker, J. C.

THE MADRAS AND SOUTHERN MARATHA RY. CO.—DEFENDANT No. 2 —APPELLANT

versus

Seth RAMNATH—PLAINTIFF—RESPONDENT.

Carriage of goods—Risk Note Form "A," execution of—Burden of proof—Liability of Railway Company —Company when can insist on Risk Note being executed.

Risk Note Form "A" is to be used when articles intended for carriage are either already in a bad condition or so defectively packed that they are liable to damage, leakage or wastage in transit. When goods are carried under this Risk Note, the obligation of the carrier is simply to deliver them to the consignee at destination; he is not responsible for the condition in which the goods are delivered. [p. 1033, col. 1.]

If a consignor consents to execute a Risk Note in Form "A" he must be bound by it unless he shows that he was compelled to execute it by fraud or mis-representation. [p. 1034, col. 1.]

In a suit to recover damages in respect of goods consigned to a Railway Company for carriage under Risk Note Form "A" the burden is on the plaintiff to show that the consignor was compelled by force, fraud or mis-representation to execute the Risk Note, when, as a matter of fact, the goods were properly packed and not damaged. [*ibid.*]

It is open to a Railway Company to require that perishable articles consigned to it for carriage should be packed securely. [*ibid.*]

Tobacco is a perishable article and as single bagging is not sufficient to keep out rain when a consignment of tobacco in single bagging is made over to Railway Company for carriage, the Company is entitled to require the consignor to execute a Risk Note in Form "A." [*ibid.*]

Appeal against the decree of the Subordinate Judge, First Class, Bhandara, dated the 7th April 1924, in Civil Suit No. 92 of 1922.

Messrs. *V. M. Jakatdar* and *P. Lobo*, for the Appellant.

Messrs. *G. L. Subhedar* and *Erachshah*, for the Respondent.

JUDGMENT.—This is an appeal from a decree of the First Class Subordinate Judge, Bhandara, awarding the plaintiff Rs. 5,340 as damages against the Railway Company.

The facts are briefiy that a large consignment of tobacco was sent from Kolhapur on the M. S. M., Railway, Co. consigned in three lots to the plaintiff, at Kamptee, Tirora and Tumsar stations on the B. N. Railway on 24th April 1922, by the plaintiff's agent Bhise. Of these the Kamptee consignment and 133 bags out of the Tirora consignment, which consisted of 196 bags, were received in good condition, but the remaining 63 bags of the Tirora consignment and the whole of the Tumsar consignment (112 bags) were not received till the month of June and half the tobacco was rotten and useless. The plaintiff, therefore, sued M. S. M. Railway Company, the G. I. P. and B. N. Railway Companies over whose lines the consignment travelled, being also added as defendants, as agents of the Company to whom the goods were consigned. The suit as against G. I. P. and B. N. Railway Companies was dismissed, and a decree was passed against the M. S. M. Railway Company, holding that there had been wilful negligence by their agent, the G. I. P. Railway Company. The M. S. M. Railway Company appeal.

The case raises some important questions of law, and as there is little dispute as to the actual facts it would be as well to give the facts in detail. The tobacco was brought in 29 carts from Nipani by road to Kolhapur where it arrived on Sunday, the 23rd of April 1922. It is stated that it was kept in a godown that night and a receipt is produced for the rent of the godown. It appears to have been taken to the Railway Station on Monday, the 24th April, as an octroi receipt bearing that date is produced. It was consigned that day under Risk-Notes Forms A and B in three lots. The Risk Note Form A bears the remark "single bagging and bags partly wet by rain." The goods were sent from Kolhapur to Poona by the metre guage line of the M. S. M. Railway, Co., where they were transhipped to a broad gauge waggon and arrived at Dhond (G. I. P. Railway) on 28th April 1922. It was there found that the roof of the waggon, in which a portion of the cosignment was placed, had been almost entirely blown off. The waggon was marked sick and detained, as it was, at Dhond for more than a month till 29th May 1922, when the contents were unloaded and re-loaded in another waggon which left Dhond on 3rd June 1922, and arrived at Tumsar and Tirora on 11th June 1922. The consignment being in a damaged condition the consignee refused to take delivery and the bags were placed in the goods-sheds at these two stations and were surveyed by the Railway Company, delivery being ultimately given in August and December respectively.

There is evidence that about half the consignment was valueless. During the period when the consignment lay at Dhond in a waggon without a roof, there was rain on two occasions (as is proved by rainfall returns), the amount on one occasion being half an inch. It is contended, and is found by the lower Court that the damage to the tobacco was done while it was at Dhond, and this constitutes wilful neglect.

I do not feel it necessary to deal in any detail with this part of the case, because it is quite clear from the evidence of the servants of the G. I. P. Railway Company at Dhond, which has been referred to at length by the Subordinate Judge, that no steps whatever, in spite of several reminders by the Waggon-Examiner to the Station Master, were taken to protect the consignment from the effects of the weather by transhipping it to some other waggon, or by effecting any repairs to the roof of the waggon, which was comparatively a simple matter as it only meant replacing the corrugated sheets which had been blown off. I agree with the view of the lower Court that this constitutes wilful neglect on the part of the servants of the Railway Company, and the learned Counsel for the Railway Company has been unable to put forward any argument justifying the conduct of the Railway Company in thus leaving a valuable consignment unprotected from the weather for a period of nearly five weeks.

The case, however, does not end here, for it is necessary to consider the provisions of the Risk Notes, under which the goods were despatched from Kolhapur, that is Risk Notes Form A and B, and in particular the former.

The terms of the Risk Note Form A are that "Whereas the consignment. . . . . is in bad condition and liable to damage, leakage and wastage in transit as follows:—single bagging and bags partly wet by rain, I the undersigned do hereby agree and undertake to hold the said Railway Administration and all other Railway Administrations working in connection therewith, and also all other transport agents, etc., harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same."

There are two Risk Notes, in Forms A and B, in this case. Both of them are admittedly signed by Bhise, the plaintiff's agent at Kolhapur, and he admits that the remark on one of them "single bagging and bags partly wet by rain" is in his hand. The similar remark on the other Risk Note, he says, is not in his handwriting, and the lower Court has, therefore, held that he is not bound by it. As he has executed the Risk Notes in both cases he is bound by the statements therein, which he admits he understood, and the lower Court is, therefore, incorrect in thinking otherwise.

There are very few rulings on Risk Note Form A. In Lahiri's Law of Carriers in British India of 1923, page 101, it is said that "this form is to be used when articles tendered for carriage are either already in bad condition or so defectively packed that they are liable to damage, leakage or wastage in transit. When goods are carried under Risk Note Form A, the obligation of the carrier is simply to deliver them to the consignee at destination, but the carrier is not at all responsible for the condition in which the goods are delivered." Then there is a quotation from "Disney on Carriage by Railway" stating: "There is a clear admission that the goods are not packed as the Company have a right to require that they should be packed, and it seems only reasonable that if they waive this right, and accept the goods, they should in return be protected from liability for negligence and from vexatious enquiries as to whether damage caused was due to imperfect packing or otherwise. . . . . It will be noticed that this contract does not attempt to protect the Company from liability for delay or mis-delivery."

The present is not a case in which damages were caused by delay or claimed for delay, and no case of mis-delivery arises, the whole consignment having been delivered to the plaintiff although part of it was damaged and valueless. The principal question in this case, therefore, is whether the Railway Company are protected by this Risk Note. The view of the learned Judge of the lower Court on this point commences from para. 11 of his judgment. He states that in spite of the remark "single bagging and bags partly wet by rain." D. W. No. 6 Bishe deposed that, as a matter of fact, the bags were not wet but only some 25 bags were slightly wet by rain. That Bhise is only responsible for the remark on one Risk Note; and that the remark on the other Risk Note is in the handwriting of the Goods Clerk and, therefore, not binding on him. Moreover it appears that the Railway Company will not book consignments of tobacco unless the Risk Note Form A is executed, irrespective of the condition of the goods. That the remark in the Risk Note Form A did not, therefore, represent the true condition; that if there were patches of wet on the bags it was no indication that the goods were damaged; and that such patches of wet on a few bags could not have played such havoc as to ruin the consignment and that the same remark applied to the whole consignment, yet the whole of the Kamptee consignment and the majority of the Tirora consignment arrived in good condition and, therefore, the damage could not have been caused before the goods were consigned but must have been caused on the way, and the conclusion is that the Risk Note Form A was taken as a matter of formality or for safeguarding the Company from any possible damage to the goods after they were consigned without reference to the actual condition of goods, and is, therefore, not binding, and the goods were not damaged before they were consigned.

I am unable to agree with this reasoning. I have already pointed out that Bhise admits execution and must, therefore, be held to be bound by the remark in the Risk Note and he has also admitted in his

deposition as D. W. No. 5 at page 60 that the remark made was correct. He has further admitted that the remark on Form A accompanying the consignment note No. 84 is in his handwriting. Bhise is in the habit of consigning goods, being a commission agent, and it is difficult to believe that he would have written that the bags were wet if they were not. He has admitted that it rained the previous day, though no evidence has been led as to the amount of the rain which fell.

P. W. No. 18, the Goods Clerk at Kolhapur, does not say that in all cases goods of this nature must be despatched under Risk Notes Forms A and B. He says "when goods are despatched at the owner's risk then I have to ask the consignor to sign the Risk Notes Forms A and B as the case may be." The burden is on the plaintiff to show that the consignor was compelled by force, fraud or misrepresentation to enter into Risk Note Form A when, as a matter of fact, the goods were properly packed and not damaged. There is no allegation of this kind in the plaint and the evidence is insufficient to prove it.

There is another aspect of the case. Apart from any damage by rain before the goods were consigned, it is not disputed that the tobacco was packed in single bagging only and was not, therefore, liable to such damage. It is, I think, open to the Railway Company to require that perishable articles should be packed securely and as tobacco is a perishable article single bagging is not sufficient to keep out rain and they are entitled to require the consignor to execute a Risk Note in Form A. In any case if the consignor consents to execute a Risk Note in Form A, he must be bound by it unless he shows that he was compelled to execute it by fraud or misrepresentation.

The Subordinate Judge has pointed out, and I think with force, that although the remark in Form A applied to the whole of the consignment the greater part of it, *i. e.*, the Kamptee consignment and the bulk of the Tirora consignment, arrived in good condition in spite of the alleged damage before despatch, and that only those bags which were in the waggon which had no roof which were delayed at Dhond and damaged. I have no doubt in my mind that although some of the bags must, in view of the Risk Note and of the admission of Bhise himself, have been wet with rain before they were despatched, the bulk of the damage must have taken place while they were lying at Dhond, and the question is whether the Railway Company are protected by the Risk Note.

I am of opinion that they are protected. The terms of the Risk Note, which have already been given, free them from all responsibility for the contention in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same. The case is not based on delay but on damage to the goods, and the cases quoted by the learned Counsel for the respondent are cases of delay, in which the prices of goods fell during the period in which they were in transit. It cannot be said how much damage had been done to the consignment by the rain at Kolhapur, and in view of the fact that part of the consignment reached its destination in good condition, I think it may fairly be inferred that had the bags now in suit not been exposed to the weather at Dhond for more than a month, they would have arrived in equally good condition. But although it may seem that this is a hard case, I do not see how the plaintiff can recover in the face of the Risk Note in Form A which has been executed by his agent who has admitted the remark as to the "single bagging and bags partly wet by rain" to be correct. Unless, therefore, the plaintiff can get out of the effect of this, he cannot recover anything from the Railway Company.

In these circumstances I do not think it is necessary to go into the question of the Risk Note in Form B which was also executed by the consignor. That involves a further point of law as to the meaning of "loss of a complete consignment or of one or more complete packages." I would follow the view of the Madras High Court that the word "loss" means loss to the owner, but there is a further question in this case as to whether this can be considered to be a "loss of a complete consignment or of one or more complete packages," and it has been argued that as only a portion of the consignment was damaged there was no such loss. The question of the meaning of "loss of a complete consignment," on which there are conflicting rulings of the various High Courts, is at present pending before a Bench of this Court on a reference from myself, and were it necessary to decide this point in the present case I should

have felt obliged to adjourn the case until the opinion of the Bench had been delivered. I am, however, of opinion that in this case the Risk Note in Form A is a sufficient answer to the plaintiff's claim and I cannot see how this can be avoided. The obligation of the Railway Company was simply to deliver the goods to the consignee at destination without responsibility for the condition in which they were delivered on the ground that they were not properly packed and that they were wet by rain. In my opinion the present is a very clear case of the kind which Risk Note Form A is intended to cover. I rely on the remarks from Disney quoted at page 4 of this judgment.

I regret that I have been forced to come to this conclusion as I am of opinion that there was wilful neglect on the part of the Railway Company in leaving the goods exposed in a roofless waggon at Dhond, and I have no doubt that the bulk of the damage was caused there; but the plaintiff cannot recover damages in face of the Risk Note signed by his agent, more especially when the agent has admitted that the remark in the Risk Note as to the condition of the goods and packing is correct.

I need not refer at length to the argument that the goods were damaged by the consignee not taking delivery forthwith after their arrival at their destination as the damage must have been done before their arrival, and as it was hot weather and the goods had a long journey from Dhond to Tumsar, the tobacco must have dried very quickly. It was kept in the goods-sheds and was not further damaged. However, this is not material in view of my finding that the Railway Company are protected by the Risk Note in Form A.

The decree of the lower Court must be set aside and the plaintiff's suit dismissed with costs in both Courts.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 52 OF 1924.

February 2, 1925.

Present:—Mr. Daniels, J. C.

SAGAR SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MATHURA PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Mortgage by manager—Interest, high rate of—Necessity—Burden of proof—Appeal, second—Finding of fact.

Where money is borrowed by the manager of a joint Hindu family on the security of family property at an unusually high rate of interest, the burden lies on the mortgagee to prove that there was necessity to borrow at so high a rate.

Where in such a case the lower Appellate Court having rightly appreciated the question of the burden of proof arrives at the finding that the necessity was sufficiently urgent to account for the rate of interest charged, the finding cannot be interfered with in second appeal.

Appeal against a decree of the Subordinate Judge, Sultanpur, dated the 31st October 1923, confirming that of the Munsif, Sultanpur, dated the 21st November 1922.

Mr. *S. N. Roy*, for the Appellants.

Mr. *Radha Krishna* for Mr. *G. N. Misra*, for the Respondents.

JUDGMENT.—The only issue in this case is whether the mortgage in suit was supported by legal necessity. The mortgage was made by two persons Hanuman and Udhai Bir as managers of the joint family. The defendants-appellants are collateral members of the family and are not bound by the mortgage unless it was for legal necessity. The issue falls into two parts. The first is legal necessity for the actual loan and the second legal necessity for the rate of interest charged which was 36 per cent. On the first point there is really no room for controversy. The whole of the money borrowed was borrowed for payment of land revenue and the demand for land revenue was so pressing that the moveable property was actually under attachment on the date when the mortgage was executed. In regard to a part of this money it was paid in on the same day on which the mortgage was executed.

Another portion had been borrowed from one Gayadin a few days before and was re-paid by the execution of the mortgage in suit. The fact that the mortgagors had succeeded in obtaining the money temporarily pending execution of the mortgage does not in any way affect the question of legal necessity.

On the question of interest the appellants' learned Counsel rightly contends that where the rate of interest is unusually high the burden lies on the mortgagee to prove that there was necessity to borrow at so high a rate. This was fully recognized by the learned Subordinate Judge who decided the appeal. He found, however, that, as property belonging to the family was actually attached on the date of execution, the necessity for obtaining money to pay this amount was very urgent and sufficiently accounts for the high rate of interest charged. As has already been pointed out the money was paid into the Tahsil on the very day that the mortgage was executed. The Court below having rightly appreciated the question of the burden of proof there is no legal ground for interfering with his finding that the necessity was sufficiently urgent to account for the rate of interest charged. The appeal, therefore, fails and it is hereby dismissed with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 62-B OF 1924.

February 14, 1925.

Present :—Mr. Baker, J. C.

JANKUBAI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PARVATI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law, applicability of—Gonds—Raj-Gonds, *whether governed by Hindu Law—Succession—Widow, estate taken by—Custom, proof of—Berar Waste Lands Rules of 1865—Lease of village—Proprietary or* patelki *rights, acquisition of, mode of—Surrender by widow, whether can be challenged.*

Gonds are not Hindus and as such are not governed by the Hindu Law. [p. 1037, col. 2.]

Vithoba v. *Lalsingh*, 76 Ind. Cas. 980; 19 N. L. R. 104; (1923) A. I. R. (N.) 317 and *Ujiyara* v. *Tilochan Gond*, 44 Ind. Cas. 435; 2 N. L. J. 129, followed.

Raj-Gonds are not the offspring of inter-marriages between *Gonds* and *Rajputs*, and though they have adopted the manners, customs and dress of the Hindus and worship Hindu deities, they are not governed by the Hindu Law. [p. 1038, col. 1.]

On the death of a *Raj-Gond* his widow succeeds to his property as a full owner. [p. 1039, col. 2.]

In order to establish a custom it must be shown to be ancient, certain and invariable. [p. 1038, cols. 1 & 2.]

It is open to a lessee of a village under the Berar Waste Lands Rules of 1865, to accept the proprietary or *patelki* rights under certain conditions, either during the continuance or at the expiry of the lease or to transfer the lease with the permission of the Deputy Commissioner. To constitute proprietary rights it is necessary that there should be an election by the lessee followed by an application and an agreement to abide by the conditions and the grant of a *sanad* conferring proprietary rights. The mere fact that on the expiry of a lease the assessment is raised and the lessee pays the enhanced assessment for some time is not enough to confer such rights on him. [p. 1040, cols. 1 & 2.]

An alienation by a widow can be challenged by her heirs only when it is an alienation of family property. [p. 1040, col. 2.]

Where the widow of the lessee of a village under the Berar Waste Lands Rules elects not to apply for proprietary rights, but surrenders the lease for a consideration, that is not such an alienation as can be challenged by her heirs. [*ibid.*]

Appeal against a decree of the Subordinate Judge, First Class, Yeotmal, dated the 16th June 1924, in Civil Suit No. 39 of 1922.

Mr. *N. R. Alekar*, for the Appellants.

Mr. *M. Gupta*, for the Respondents.

JUDGMENT.—The plaintiff No. 1, Jankubai, who is the widow of one Nilkanthrao, and plaintiff No. 2, Gunwantrao, who is alleged to have been adopted by plaintiff No. 1 to her husband, sued to recover possession of the property in suit, the *izara* village of Chikhaldoha in the Wani Taluka of the Yeotmal District, from the defendants who are the representatives-in-interest of one Tanabai, to whom the village was sold by Jankubai's co-widow Ambabai.

The plaintiffs' case is that as *Raj-Gonds* they are governed by the Hindu Law, that the co-widows Ambabai and Jankubai inherited the estate from their husband Nilkanthrao, Ambabai being the managing widow, in whose name the village was entered. Ambabai sold the said village to Tanabai for Rs. 400 in 1898, without any legal necessity and without the consent and knowledge of the plaintiff No. 1 by a *razinama* and *kabuliyat*. Tanabai used to give the plaintiff Jankubai the profits of her half share. Ambabai died in April 1920 and the plaintiff No. 1 became the owner of the whole village by survivorship and she sued to recover possession of the village from defendants, the date of the cause of action being the death of Ambabai, in April 1920. After the death of Ambabai, plaintiff No. 1 adopted plaintiff No. 2, who consequently became the owner of the village. Tanabai died after the suit was filed and her heirs were added.

There is some dispute between the defendants as to who is the heir of Tanabai with which we are not concerned.

The defendants contended that Nilkanthrao was a *Gond* and hence his widow Ambabai became the absolute owner of the village and had a right to alienate it. Jankubai's status as a widow was denied as she was admittedly married by *pat* and it was contended that no such custom existed amongst the *Gonds*. Hence Jankubai had no interest in Nilkanthrao's property and no right to adopt a son to him, as in any case the custom of adoption did not prevail among *Gonds*. The fact of the adoption was also denied. They further pleaded that no share of profits was ever paid to Jankubai out of the village after the sale and, therefore, her claim was barred by adverse possession, and they also pleaded that the sale of the village was for legal necessity and was made with the consent of Jankubai, as the widows were in straitened circumstances and unable to maintain themselves, and lastly it was pleaded that as soon as the *izara* lease had expired and Tanabai was given proprietary rights by the Government and a *sanad* was issued in her name, all rights of the former owner in the village were extinguished.

In reply the plaintiffs stated that the *Raj Gonds* had adopted Hindu customs and that Hindu Law applied to them. They denied the legal necessity and the consent to the sale by Jankubai. They pleaded that by custom all the principles of Hindu Law regarding widows applied to *Raj Gonds*, and in particular the family of the deceased Nilkanthrao had adopted Hindu customs.

The Subordinate Judge, First Class, Yeotmel, held that it was not proved that *Raj Gonds* had adopted Hindu customs in matters of adoption, inheritance and limited interest of widows, and survivorship amongst co-widows, nor was it proved that the family of Nilkanthrao had adopted the above Hindu Law and customs. He further held that plaintiff No. 2 was adopted by plaintiff No. 1, but that the adoption was not valid as there was no custom of adoption amongst the *Gonds*. He held that Jankubai was a lawful wife by *pat* of Nilkanthrao and could inherit his property, but her suit was barred by limitation. He further held that there were no rights left in the plaintiffs after the conferral of the *sanad* on Tanabai by Government in 1898, and further held that the sale was for legal necessity and was justified and is binding on the plaintiffs and the suit must be held also to be barred by adverse possession. He, therefore, dismissed the plaintiffs' suit.

The plaintiffs appeal on the grounds as set forth in the memorandum of appeal.

The most important question in this case is whether the plaintiffs are governed by Hindu Law, in which case the questions of the limited interest of Ambabai, inheritance or survivorship between her and her co-widow Jankubai, the validity of the adoption of plaintiff No. 2 by plaintiff No. 1 and the right of the adopted son to challenge the alienations prior to his adoption will be important points in the case. It has been held by this Court in clear terms that *Gonds* are not Hindus. This will be found in *Vithoba* v. *Lalsingh* (1) and also in *Ujiyara* v. *Tilochan Gond* (2).

The first point that arises in this case is whether any distinction is to be drawn between *Raj-Gonds* and *Gonds*. The learned Pleader for the appellants has referred to several authorities. In the Gazetteer of the Central Provinces of 1870, 2nd Edition, Introduction page cx., there is a reference to *Raj-Gonds*, claiming "Rajput ancestry." In the Imperial Gazetteer of India, Central Provinces Volume, page 160, it is stated: "The *Raj-Gonds*.....may roughly be taken to be the descendants of *Gond* landed proprietors who have been formed into a separate sub-division and admitted to Hinduism with the status of a cultivating caste, *Brahmans* taking water from them. The elevation is justified by the theory that they have inter-married with *Rajputs*, but this has probably occurred only in a few isolated instances. Some *Raj Gonds* wear the sacred thread, and outdo *Brahmans* in their purificatory observances .....But many of them are obliged once in four or five years to visit their god Bura Deo and to place cow's flesh to their lips wrapped in a cloth, lest evil should befall their house." In Sherring's Hindu Tribes and Castes, Volume II, page 138, it is stated that the *Raj-Gonds* "are the highest rank of *Gonds*; and the title is borne by most of the noble and governing houses." There is a reference to inter-marriages between the

(1) 76 Ind. Cas. 980; 19 N. L. R. 104; (1923) A. I. R (N.) 317.
(2) 44 Ind. Cas. 435; 2 N. L. J. 129.

worshippers of seven deities and those who worship a less number. I mention this point because it is referred to in evidence. Sherring states that the *Raj-Gonds* imitate closely the highest castes of Hindus. He states: "Notwithstanding their adherence to Hindu usages, they are obliged occasionally to visit their own deities, and even to put cow's flesh to their lips folded in cloth, to ward off evil from their houses." In Russell's Tribes and Castes of the Central Provinces, Volume III, page 63, it is stated: "According to Forsyth the *Raj-Gonds* are in many cases the descendants of alliances between *Rajput* adventurers and *Gonds*. But the term practically comprises the land-holding sub-division of the *Gonds*, and any proprietor who was willing to pay for the privilege could probably get his family admitted into the *Raj-Gond* group. The *Raj-Gonds* rank with the Hindu cultivating castes, and *Brahmans* will take water from them. They sometimes wear the sacred thread." In the Imperial Gazeteer of India, Volume VII, under the heading Berar, page 380, it is mentioned: "The *Gonds* and *Korkus*, though still *Animists*, are tinged with Hinduism and worship Mahadeo as well as other Hindu gods." In the Yeotmal District Gazetteer, at page 70, it is stated that the Gonds have adopted Hindu dress and customs to a larger extent than in the Central Provinces.

It is contended that these references and the evidence given in this case will show that *Raj-Gonds* have become Hindus, that they have Hindu names like the parties to this case, that they worship Hindu deities and perform Hindu ceremonies, that they observe *shraddhs* as Hindu do, perform marriages like Hindus, respect the cow and do not eat beef, that *Brahmans* attend their ceremonies, that they go on pilgrimage to holy places, and that they wear Marhatta dress and burn their dead.

The references quoted by the learned Pleader for the appellants show that the *Raj-Gonds* claim to be of *Rajput* origin but this is not established. The effect of all these authorities is only to show that the *Raj-Gonds* have arisen in the social scale and have been treated as Hindus of the cultivating classes; but more than this is required to be shown, *viz*, that they are governed by Hindu Law in matters of adoption and inheritance. In order to establish custom it must be shown to be ancient, certain and invariable. In the present case it has to be shown that either the *Raj-Gonds* as a class or the plaintiffs' family are strictly governed by Hindu Law, that a widow inherits only a limited interest and cannot alienate except for legal necessity, that co-widows inherit with right of survivorship, that a widow can adopt, that she can do so without husband's authority, and that the adoption relates back to the death of the widow's husband, so that the adopted son can challenge alienations prior to his adoption.

The evidence for the plaintiffs, in my opinion, falls far short of proof of this. Although *Raj-Gonds* may be performing certain Hindu ceremonies it does not follow that they are governed by Hindu Law, and it would have to be shown that the above mentioned principles of the Hindu Law have been applied to specific cases of widow's estate, inheritance and adoption. The learned Pleader for the appellants has relied on certain remarks in Gour's Hindu Code, page 208, where the learned author says that "*Gonds* and *Bhils*, though aborigines, are now universally classed as Hindus. They retain their old customs to a certain extent, but they equally acknowledge the supremacy of the *Brahmans*, worship some of their gods and have commenced to observe some of their caste conventions. Some of them have intermarried with Hindus, thereby originating distinct castes. So the alliance of *Rajputs* with *Gond* women has produced the caste of *Raj-Gonds*....All such and similar castes admit allegiance to the *Shastras* by which they profess to be bound."

I am not aware on what evidence these remarks are based. I am unable to accept the view that the *Raj-Gonds* are the offspring of the inter-marriages of *Gonds* and *Bajputs* or that *Gonds* who retained their old customs to a certain extent could be called *Aryans*. The evidence in this case has been read out. P. W. No. 1 is a *Brahman*, who officiated at the adoption of plaintiff No. 2 by plaintiff No. 1. P. W. No. 2, a Komti who was present at the adoption, states that certain Hindu ceremonies were performed at the plaintiffs' house. P.Ws. Nos. 3, 6, 7, 8, 9, 10, 11 and 12 are *Raj-Gonds*, who depose to their observance of Hindu customs, and P. W. No. 5 is a *Brahman* who speaks to the same effect. But on examining the evidence of these witnesses it will be found that there is practically no

evidence regarding instances of adoption and limited interest of widows sufficient to prove the custom pleaded by the appellants.

P. W. No. 1 who officiated at the adoption of plaintiff No. 2 by plaintiff No. 1 admits that this was the only occasion on which he attended an adoption of *Gonds*. P. W. No. 3, a *Raj-Gond*, who deposed that the Hindu customs and adoption were prevalent amongst *Raj-Gond*, has no personal knowledge of such adoption and only speaks by hearsay of an adoption by Godabai of Kayer. That adoption was held not proved in a suit. He refers to widows having only rights of maintenance amongst them, and admits that his family is called "Sat Deva" and the plaintiffs are called "Six Deva": *cf.*, the quotations above in Sherring as to the worshippers of six and seven gods.

P. W. No. 5 refers to certain adoptions, but admits that he has not attended any. This witness was not summoned. He is a *Brahman* and has not attended any feasts given in any *Gond's* house. He does not know what sort of obsequies are performed by the *Raj-Gonds* of Chanda. He was formerly in the service of the *zemindar* of Ambagarh Chowki, who is of the same caste as the Raja of Chanda. He admits in cross-examination that the *zemindar* worshipped a god called Baradeo on the *Dasahra* day.

The next witness P. W. No. 6, also a *Raj-Gond*, gives a long list of Hindu customs observed by his caste and says that the custom of adoption of sons and the limited interest of widows prevail in his caste. The only adoption of which he has personal knowledge is that by Godabai of Kayer, already referred to, which was held not proved by the Court. He also admits that he does not know of any alienation by a *Gond* widow which was set aside. He is a "Sahadev".

P. W. No. 7 Maniram also states that there is a custom of adoption in his caste, but admits in cross-examination that he has never attended any adoption in his caste and does not know of any instance where the *Gond* widow's alienations have been set aside.

P. W. No. 8 has also heard of the adoption at Kayer and admits that Deokaran ceremony is performed amongst them.

P. W. No. 9 is a "Sahadev" *Gond*. He has not attended any adoption, though he says that an adoption took place in his caste. He says that the widow inherits the husband's property, but she cannot sell the husband's property. This he has read in a book and he does not know of any case in his caste.

The next witness P. W. No. 10 can only refer ta Godabai's adoption. He is a "Chardev" *Gond*. So also the next witness P. W. No. 11 has no personal knowledge of any adoption except that by Godabai, and has not been able to give any instance of the sale by a *Gond* widow being declared void. The next witness P. W. No. 13 is Jankubai's *mukhtiar*. He deposes to the observance of Hindu customs in his caste, to the custom of adoption and of *pat* marriages. He says that a widow has a right only to maintenance and cannot sell, but does not give any instance.

The last witness for the ptaintiffs is a priest from Nasik called to prove that the family of Nilkanthrao had gone on pilgrimage to Nasik.

The evidence of these witnesses does not show anything more than that the *Raj-Gonds* have adopted a certain number of Hindu customs and the worship of Hindu gods, as the books of reference say; but while the witnesses speak generally of the limited interest of widows and the validity of the adoption, they are unable to give a single instance of alienation by a widow being set aside, or of an adoption. The only adoption, they refer to, is that by Godabai, who is a member of the family of the plaintiffs and that adoption was held not proved in a suit.

On behalf of defendants D. W. No. 15 who is a cousin of Nilkanthrao, and D. W. No. 17 have been examined to prove that *Raj-Gonds* are not Hindus.

In these circumstances I agree with the lower Court in holding that the plaintiffs have failed to prove that the *Raj-Gonds* as a whole or the family of Nilkanthrao are governed by Hindu Law. This being so, plaintiff No. 2 obtains no rights in the property of Nilkanthrao based on adoption, since the theory of adoption is peculiar to the Hindu Law.

As it is not proved that the plaintiffs are governed by the Hindu Law, the co-widows succeeded to their husband's property as full owners. Ambabai had a right to alienate her half share and it cannot be recovered. As regards Jankubai's share, although it is alleged in the plaint that the alienation was without her knowledge and

consent, it is further alleged that the plaintiff No. 1 for a number of years received her share of the income, that is Rs. 200, from Tanabai. This they have entirely failed to prove and the only witness who deposed to it is Hanmanta (P. W. No. 12), who is the plaintiffs' *mukhtiar*. He says that in 7 or 8 years Rs. 200 were paid, but no receipts were taken. It cannot, therefore, be pleaded that Jankubai has no subsequent knowledge of the alienation, even if it was made without her consent. Her claim would be barred long ago by adverse possession, but in view of the fact that she took no steps for over 20 years to set aside the alienation and on her own case received certain payments from the alienee, I think it may be presumed that she consented to it and that the device of adoption has been resorted to in order to meet the difficulty that she herself has never challenged the alienation. In any case her claim must be barred either by adverse possession or by reason of her having consented.

In this view of the case the question of legal necessity is not of much importance. The evidence shows that Ambabai was in embarrassed circumstances and used to borrow small sums re-payable by Re. 1 or Rs. 2 a month and also grain. Exhibit D-28 shows that the assessment on the village was raised from Rs. 35 to Rs. 126-6-0 in the year 1896, when the lease expired. This probably led her to part with the village. It is true that her application to the Deputy Commissioner does not mention any debt and says that she could not manage it because she resided in another village. I am not, however, prepared to disagree with the view of the lower Court on the question of necessity. There is evidence that the land was not productive and there was little cultivation in the village.

There is another aspect of the case. The village was not the property of Nilkanthrao, but was held under the Berar Waste Lands Rules of 1865, under a 30 years' lease. The rules provided that at the expiry of the lease, or during its continuance, the lessee might exercise the option of accepting proprietary rights under certain conditions, or *patelki* rights under certain conditions, or might transfer the lease with the permssion of the Deputy Commissioner. No application for proprietary rights or *patelki* rights was ever made by Nilkanthrao or Ambabai during the continuance of the lease, and the mere fact that on the expiry of the lease when the assessment was raised Ambabai paid the enhanced assessment for two years, is not enough to constitute the proprietary rights referred to in the rules, which appear to me to contemplate a distinct election by the lessee followed by an application and an agreement between the lessee and Government to abide by the conditions and then the grant of a *sanad* conferring proprietary rights.

It is not alleged that any such *sanad* was granted to Ambabai, the proprietary rights being for the first time conferred upon Tanabai after Ambabai had transferred the village to her by *razinama* and *kabuliyat*.

In this view of the case the village was not really family property at all in the strict sense of the word, and if Ambabai elected not to apply for proprietary rights but surrendered the lease for a consideration that is, in my opinion, not such an alienation as could be challenged by her heirs, even supposing they had a right to challenge any alienation. At the most it can be said that she did not elect to renew her lease or to acquire higher rights than those of a lessee, and I do not think that the person to whom those rights were subsequently granted by the Government could in any circumstances be made to restore them to the heirs of the widow. I am not aware of any case in which the alienations made by a widow, which have been challenged, are other than alienations of family property.

The suit thus fails on all points and was rightly dismissed by the lower Court. The appeal is consequently dismissed with costs.

G. R. D. *Appeal dismissed.*
Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 332 OF 1923.
December 19, 1924.
Present:— Mr. Dalal, J. C.
Musammat MAHRAJA—PLAINTIFF —APPELLANT
versus
BAJRANG BALI AND ANOTHER— DEFENDANTS—RESPONDENTS.

Appeal, second—Finding of fact—Evidence not weighed, effect of—Finding, whether binding.

A finding of fact arrived at by an Appellate Court without correctly appreciating the point for determination and without properly weighing all the evidence on the record, is not binding in second appeal. [p. 1041, col. 2.]

Appeal against a decree of the Subordinate Judge, Fyzabad, dated the 1st October 1923, reversing that of the Probationary Munsif, Sultanpur, dated the 10th April 1923.

Mr. *A. P. Sen*, for the Appellant.

Chaudhury *Niamat Ullah*, for the Respondents.

JUDGMENT.—The judgment of the lower Appellate Court is very unsatisfactory in comparison with the excellent judgment written by the Trial Court. *Musammat* Mahraja, daughter of one *Musammat* Gulaba, sued for the redemption of the property in suit. The original mortgagees were Chauharja and Bajrang Bali. The mortgage was executed on 14th April, 1881, by *Musammat* Gulaba. The present representatives of the mortgagees are defendants Bajrang Bali and *Musammat* RamRaji widow of a grandson of Chauharja. There were various defences entered in the Trial Court and repelled by that Court. I shall discuss only one of them that the plaintiff has no interest in the equity of redemption and is not, therefore, entitled to sue. She was admitted to be the only child of *Musammat* Gulaba, but the plea was that being a female she was excluded from inheritance by custom applying to the family of her father, to the clan to which he belonged and to the whole community of *Kayasths* of a particular denomination. The lower Appellate Court accepted this defence. Instead of decreeing the appeal and dismissing the suit on this ground it has made some scrappy remarks on other grounds of appeal also. I am not satisfied that it has considered the other grounds of appeal properly. So in this second appeal I shall confine myself only to the question whether the plaintiff *Musammat* Mahraja has an interest in the equity of redemption or not.

The argument was put forward by the learned Counsel for the defendants that the finding of the lower Court was one of fact, that the evidence on the record was sufficient to establish the custom of exclusion of daughters. As already pointed out by me the judgment is inefficient and I am not sure that the lower Court has properly weighed all the evidence on the record.

No reference whatsoever is made by it to the difference in the language of the *wajib-ul-araiz* of villages Jalali and Mangraulia The record of the *wajib-ul-arz* of Mangraulia which did not support the conclusion of the lower Court is not touched at all. In a summary sort of way, reference is made to all the *wajib-ul-araiz* in a lump (Exs. A-8 to A-14). Nor is the oral evidence discussed in the able manner in which it has been discussed by the Trial Court. In discussing the weight to be attached to a judgment of this Court (Ex. A-4), the lower Court has given expression to a legal opinion which seems to me amazing in a Judicial Officer of some standing. He appears to be of opinion that when there are several reversioners of the same degree one cannot sue or be sued in a representative character so as to make the judgment binding on the others. One would have thought it to be the very case in which representation may be presumed and given effect.

The learned Judge of the lower Court has entirely misunderstood the very cogent argument of adverse possession contained in the judgment of the Trial Court. He seems to have thought that adverse possession was pleaded against the mortgagee while really what the Trial Court rightly pointed out was that whatever the custom may be the daughter has acquired rights to the property of *Musammat* Gulaba by adverse possession as against the reversioners to *Musammat* Gulaba's husband. What the Trial Court decided was that as, after contest with her father's reversioners, *Musammat* Mahraja had obtained possession after her mother's death of all the property of her mother and had been in possession of that property for over 12 years, she must be presumed to be in adverse possession as against the reversioners (and not as against the mortgagee) of the equity of redemption also. This is a totally different argument from the argument which the lower Court has considered in an exceedingly slipshod manner.

For these reasons I do not consider myself bound by the findings recorded by the lower Appellate Court.

One think may be made clear at the outset because without a proper study of the record I had an impression that no reversioner of *Musammat* Mahraja's father had been proved to be in existence. It is clear that such reversioners do exist and one of them was a witness for the defence Shiam Behari Lal (D. W. No. 8). The records in

the different *wajib-ul-araiz* are of different characters. If the words in the *wajib-ul-arz* of *mouza* Jalali are accepted as the correct record there can be no doubt that *Musammat* Mahraja would be excluded as against her father's reversioners if *Musammat* Gulaba was a life-holder and not an absolute owner. The *wajib-ul-arz* of *Mouza* Mangraulia is not so definite. What it says is that daughters are excluded in the majority of cases (*alalamum*) while widows are excluded if sons are in existence. I adopt here the reading as placed before the Court by the learned Counsel for the defence Mr. Niamat Ullah. This shows that the daughter is not invariably excluded. Out of other *wajib-ul-araiz* some follow the record made in the *wajib-ul-arz* of Jalali while others follow that made in the *wajib-ul-arz* of Mangraulia. We have, therefore, to inquire whether this particular daughter *Musammat* Mahraja should be excluded according to custom or not. To overcome her exclusion she points to the litigation which took place immediately after the death of her mother and says that hers is the case which should escape exclusion. This is a very strong argument. The mutation Courts held in her favour in competition with the reversioners and one litigation came right up to this Court where she sued one Musaheb Rai for redemption. This Musaheb Rai was one of the next reversioners to her father's estate on the death of her mother and he pleaded that she had no right to the equity of redemption. It was held by this Court (judgment Ex. 4) on 3rd January 1906, that she was owner of the equity of redemption.

Mr. Niamat Ullah rightly pointed out to the Court that the plaintiff had not obtained mutation of the equity of redemption. The reason for this will be found in the order of the Assistant Collector dated 25th April, 1922, (Ex. A-23). At the time of the last settlement the mortgagees were entered in the papers as proprietors in virtue of a clause in the mortgage-deed that the mortgage would turn into a sale-deed on the expiry of certain period of time, which time had expired prior to the last settlement. The original mortgagor herself *Musammat* Gulaba had failed to get her name entered in the papers as mortgagor. Naturally, therefore, the daughter had no better success. This was not a claim put forward by a daughter as against the reversioners. What effect these orders may have in support of the defendants' plea of absolute title I am not called upon to decide at present.

It is not necessary in view of my finding above to discuss the question whether in case of *Musammat* Gulaba being a full owner the custom entered in the *wajib-ul-arz* of *Mouza* Jalali would apply to her or not so as to prevent the plaintiff from inheriting her mother's property It appears that the property originally belonged to *Musammat* Gulaba's husband who had died prior to the first regular settlement. The first regular settlement, therefore, was made in favour of the widow. The question would then arise whether *Musammat* Gulaba became a full owner or only a life holder. The defence was that *Musammat* Gulaba had become full owner but, as rightly pointed out by Mr. Niamat Ullah, a Court should not insist on words used by a Pleader for a specific purpose of supporting a particular argument. I shall leave this matter open.

I hold that *Musammat* Mahraja succeeded to all the rights and interests of her father and mother in whatever property they held. She is, therefore, owner of the equity of redemption in the property in suit if one does exist.

This finding is further supported by the plaintiff's adverse title as against the reversioners of her father. This matter has been clearly explained in the judgment of the Trial Court and I agree with that opinion. More than 12 years ago *Musammat* Mahraja took possession of every item of property of which she could take possession on the death of her mother. I, therefore, hold her to have established her title to the property left by her mother by adverse possession.

The other findings of the lower Appellate Court are also set aside.

I set aside the decree of the lower Appellate Court and remit the appeal to it for a a proper decision of the other grounds of appeal. It may be pointed out that I have only decided grounds of appeal Nos. 1 and 2 of those submitted to the lower Appellate Court on behalf of the defendants. All the other grounds will have to be decided whether anew or over again by the lower Appellate Court.

Costs here shall abide the result. Other costs will be disposed of by the lower Appellate Court after trial of the appeal.

Z. K. *Decree set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 443 OF 1924.

February 2, 1925.

Present :—Mr. Baker, J. C.

VITHOBA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

VISHNU—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (I of 1920), ss. 12, 13—Contract Act (IX of 1872), s. 23—Occupancy right, transfer of, whether void or voidable—Surrender—Lease to third person—Loss of possession by lessee—Suit to recover amount paid to landlord, whether maintainable.

A transfer of occupancy or ordinary tenancy rights is not unlawful within the meaning of s. 23 of the Contract Act. Such a transfer is only voidable in the manner and to the extent provided for by the C. P. Tenancy Act; it is not absolutely void.

Shaligram v. *Narain*, 45 Ind. Cas. 669, followed.

Where a tenant surrenders his tenancy right to the landlord and the landlord leases the land to a third person and the latter subsequently loses possession of the land leased to him, he is entitled to recover the sum paid by him to the landlord on the ground of failure of consideration.

Appeal against a decree of the District Judge, Nagpur, dated the 4th August 1924, in Civil Appeal No. 21 of 1924.

Mr. *W. H. Dhabe*, for the Appellants.

Mr. *S. R. Mangrulkar*, for the Respondent.

JUDGMENT.—The facts are fully set out in the judgments of the Courts below.

It has been found by the lower Appellate Court on a full consideration of the evidence that the plaintiff paid Rs. 1,000 to the defendants for the lease, of which Rs. 800 was to go to the tenants and Rs. 200 to the defendants as premium, but it is contended on behalf of the appellants that the plaintiff cannot recover the amount because the whole transaction is illegal. The learned Pleader for the appellants has quoted a number of cases from the Allahabad High Court and one case of this Court, *Bhure* v. *Sheogopal* (Second Appeal No. 530 of 1918), in support of this position, but all these are cases of attempted transfer of the cultivating rights in *sir* lands, without the intervention of the Revenue Authorities, which is expressly forbidden by law. The facts of the present case are different.

The present is a case of a surrender by a tenant to a landlord and a lease by the landlord to a third person, and this is not illegal.

The case is governed by the ruling of this Court, quoted by the District Judge, *Shaligram* v. *Narain* (1) where it was held that the view which has been taken in this Court regarding the prohibition of transfers of occupancy and ordinary tenant rights is that such transfers are voidable in the manner and to the extent provided for by the Act. It has never been held that such transfers are unlawful within the meaning of s. 23 of the Contract Act. The transfers are not absolutely void.

The plaintiff is, therefore, entitled to recover the sum paid on failure of the consideration. The decree of the lower Appellate Court must be confirmed and the appeal dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 45 Ind. Cas. 669.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 1741 OF 1921.

November 27, 1924.

Present :—Mr. Justice Kemp.

JIVANLAL PANALAL AND OTHERS—PLAINTIFFS—

versus

BAI MANCHHA—DEFENDANT.

Bombay High Court Original Side Rules, rr. 529, 530—Practice—Taxation—Warrant to tax—Warrant to review—Procedure—Costs of Counsel attending before Taxing Master, whether can be allowed—Second warrant to review, whether competent—Res judicata.

The procedure on the taxation of a bill in the Taxing Office is that the bill is first taxed roughly by the clerks in the office and then more carefully by the Taxing Master. Thereupon the warrant to tax issues. On that the parties are heard and any party dissatisfied with the Taxing Master's decision can take out a warrant to review under r. 529. The parties are again heard by the Taxing Master and any party dissatisfied with his decision on the review can apply for a certificate. With this certificate the Taxing Master states the grounds for his decision on the points on which a certificate is asked for. The matter then comes before the Chamber Judge for a review of the taxation. [p. 1044, col. 2.]

On the warrant to tax the party taking the taxation must pay the costs of the proceedings of that warrant. But if the Taxing Master is of opinion that the party bringing in the bill has unnecessarily or vexatiously increased the costs he may report accordingly and the Chamber Judge will make such order as to those costs as he thinks fit. The proper procedure in such a case is by summons. [*ibid.*]

The costs of the warrant to review should follow the event on such review, and in a proper case the Taxing Master has power to award costs against the party taking out such a review. [*ibid.*]

It is not, however, the practice to allow costs of Counsel attending before the Taxing Master. [p. 1045, col. 1.]

Where a warrant of review is taken out but is subsequently abandoned, a second warrant of review is not competent as it is not contemplated by rr. 529 and 530 of the Bombay High Court Original Side Rules and would be barred by the application to these proceedings of the principles of *res judicata*. [*ibid.*]

Mr. *B. J. Desai*, (with him Mr. *Coltman*), for the Plaintiffs.

Mr. *Mulla*, for the Defendant.

JUDGMENT.—This is an application to review the Taxing Master's taxation of the defendant's bill of costs.

The suit was for possession of certain immoveable property, and on February 6, 1923 a consent-decree was passed directing the costs of both sides to be taxed between party and party. There was no order as to which side should pay the other party's costs, but it is admitted that there was an agreement by which the plaintiffs agreed to pay the defendant's costs of the suit. An order had been made prior to the decree directing the plaintiffs to pay the costs of a particular day including the fees for the attendance of witnesses on that day. The taxation before the Taxing Master lasted from October 4, 1922, to November 15, 1922. After the latter date there was a further taxation with regard to payments alleged to have been made to the witnesses amounting to Rs. 924 odd. The plaintiffs contended that the moneys had never been paid to the witnesses and, if any such payment had been made, that it had found its way back to the defendant's pocket. After no less than eleven meetings on this point before the Assistant Taxing Master and a large number of exhibits and books of account had been put in, he held on April 9, 1923, that the payments had not been made, or if they had, they were colourable payments and had come back to the hands of the defendant. The Assistant Taxing Master thereupon disallowed all the payments to the witnesses and ordered the defendant to pay the plaintiffs' costs after November 15, 1922. On April 16, 1923, the defendant applied for a review of the taxation. In that application she took no objection to the order against her for payment of costs. On April 27, 1923, the warrant to review the taxation was heard and adjourned to June 23, 1923. Prior to that date, however on June 22, 1923, the defendant's attorneys wrote to the Taxing Master and the plaintiffs saying that they withdrew the application for review. On June 23, 1923, the Assistant Taxing Master noted the withdrawal of the review and adjourned the warrant to review only on the question of costs. On September 13, 1923, the defendant took out a fresh warrant to review the original taxation and objected to the order for payment of costs made by the Taxing Master on April 9, 1923. On September 29, 1923, the Taxing Master heard the second review and considered that the defendant was not entitled to file a second review but nevertheless he held that he had no power to order the defendant to pay costs on April 9, 1923, and he directed the plaintiffs to pay the costs of the second warrant to review. The plaintiffs have come here on the Taxing Master's certificate of October 15, 1923, against that decision. They have also taken out a Chamber summons in respect of the costs disallowed to them on the original taxation of the bill.

Now the procedure on the taxation of a bill in the Taxing office is very simple. The bill is first taxed roughly by the clerks in the office and then more carefully by the Taxing Master. Thereupon a warrant to tax issues. On that the parties are heard and any party dissatisfied with the Taxing Master's decision takes out a warrant to review under r. 529. The parties are again heard by the Taxing Master and any party dissatisfied with his decision on the review applies for a certificate. With this certificate the Taxing Master states the grounds for his decision on the points on which a certificate is asked for. The matter then comes before a Chamber Judge for a review of the taxation.

Generally, it may be laid down that on the warrant to tax the party taking the taxation must pay the costs of the proceedings on that warrant. But if the Taxing Master is of opinion the party bringing in the bill has unnecessarily or vexatiously increased the costs he may report accordingly and the Court, *i. e.*, the Chamber Judge, will make such order as to those costs as he thinks fit. The proper procedure in such a case is by summons.

The costs of the warrant to review should follow the event on such review. I really see no reason why the Taxing Master should not have power, in a proper case, to award costs against the party taking out such a review. It is conceded that he has power to make such a party, if he be the party bringing in the bill pay his

own costs of the review. I see no reason why he should not have no power to make him in addition, in a proper case, pay the other party's costs.

In both cases it is equally an exercise of his discretion. If the party bringing in a bill is entitled to take out a warrant to review as part of the procedure necessary to the final taxation of the bill, then the Taxing Master has no more power to make him pay his own costs than he has on the warrant to tax. Nevertheless, as I have said, it is conceded the practice of the Taxing Office has been that the Taxing Master may make such party pay his own costs.

Applying these principles it is clear that in effect the Assistant Taxing Master has found on the warrant to tax that these alleged payments to witnesses were false. On that finding I see no reason why the defendant, whose bill it was, should not pay the plaintiffs' costs of the investigation on this point. It is only right and proper she should, and I accordingly make the summons absolute with costs except so far as the costs of bringing Counsel on the taxation are concerned. Counsel certified.

With reference to the second warrant to review I am of opinion it was not competent not only because no second warrant to review is contemplated by rr. 529 and 530 but also by the application to these proceedings of the principles of *res judicata*. It was open to the defendant to have applied to the Assistant Taxing Master to have the first warrant to review amended by inserting an objection to the order for costs passed regarding the proceedings on the warrant to tax. She did not do so but withdrew the first warrant to review. She cannot be allowed to harass the plaintiffs by taking out a second review. The Assistant Taxing Master, it appears from his reasons, was also of opinion that the second review was not competent. The order made on that second review including the order as to costs of it will, therefore, be set aside.

The costs of the first warrant to review have not been dealt with. There is no doubt that the defendant having taken out that warrant and abandoned it must pay the costs of it. I make an order accordingly. Costs of this review to be borne by defendant. Counsel not certified.

It is not the usual practice to allow costs of Counsel attending before the Taxing Master and a careful check should be kept on the further accumulation of costs in taxation. I see no reason here to depart from the usual practice and the costs of Counsel will, therefore, be disallowed on all appearances in this matter before the Taxing Master.

This litigation has resulted in a species of vendetta between the parties which accounts for the bitterness with which they have contested every step in the taxation proceedings and before me.

Z. K. *Summons made absolute.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 473 OF 1922.

January 23, 1924.

Present:—Mr. Kinkhede, A. J. C.

FAKIRA AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAMKISAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

C. P. Tenancy Act (XI of 1898), ss. 46, 47—Occupancy holding—Trees, interest in, nature of—Trees, whether transferable—Transfer of holding—Revenue Officer, jurisdiction of, to put next heir in possession, extent of—Order of Revenue Officer, whether can be questioned.

Trees of all kinds standing on an agricultural holding are part and parcel of the holding, at least in those cases where the property in them has not been expressly severed from the property in the soil on which they stand. [p. 1048, col. 1.]

In order that there should be a valid severance of the interest or property in the trees, the trees must become the separate property of a person other than the owner of the soil on which they stand, and the interest in the trees as also in the soil must be of a nature transferable under the law applicable to the land. [p. 1049, cols. 1 & 2.]

Inasmuch as, in trees standing on occupancy holdings the tenants hold analogous rights, and the interest of occupancy tenants in their holdings has by law been made non-transferable, the property in the trees is also non-transferable and is not capable of being validly severed or parted with, apart from the soil of the holding in which the trees stand. [p. 1049, col. 2.]

Section 47 of the C. P. Tenancy Act does not restrict the jurisdiction of the Revenue Officer to the giving of possession to the next heir of only that part of the holding which was sought to be transferred. The very idea of letting in the next heir and putting him in possession of the holding by avoidance of the transfer assumes that the transferring tenant was dead at the date of the transfer. He cannot, consequently, be treated as only partially dead and partially alive. Once the matter is decided under s. 47 of the C. P. Tenancy Act and possession of the holding is

transferred to the claimant, no power is given to any outside authority to revise the decision of the Revenue Officer and to divest the claimant of the right vested in him under the order. [p. 1050, col. 1.]

Case-law discussed.

Appeal against a decree of the Additional District Judge, Khandwa, in Civil Appeal No. 17 of 1922, dated the 13th July 1922.

Mr. *P. C. Dutt*, for the Appellants.

Mr. *W. R. Puranik*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit filed under the following circumstances.

One Ramchand Gujrati was an occupancy tenant of field No. 253 area 3-9 rent Rs. 12 of *Mouza* Adgaon in Burhanpur Tahsil. In that field there are 110 mango trees forming part and parcel of the holding. The tenant died about 18 years ago leaving behind a son Babaji, and a widow by name Rukhminibai and a daughter Kesharbai. His holding together with the trees devolved on his son Babaji but it appears it was recorded not in his name but in the name of his widow Rukhminibai, Babaji became a *Sadhu* and abandoned the world. Therefore, his son plaintiff Ramkisan claimed the succession to the holding. On 11th May 1917 Rukhmini for herself and on behalf of her minor daughter Kesharbai executed two deeds; one purported to be a surrender in respect of the aforesaid land, and the other a sale-deed in respect of the trees standing thereon but exclusive of the land, in favour of defendant No. 1 Fakira and of Sampat the deceased father of defendants No. 2-to 6 co-sharer-*malguzars* of the said *mouza*. Both these deeds were registered on the same day. The transferees took possession of the property covered by the two deeds.

On 15th July 1918 the present plaintiff Ramkisan who is still a minor made an application, Ex. D-7, through his next friend Narottamdas, and along with one Nathudas under ss. 36 and 47 of the C. P. Tenancy Act (XI of 1898) for being placed in possession of the holding on the ground that the same was transferred in the guise of a surrender in contravention of the provision of s. 46 of the said Tenancy Act, to the present defendant No. 1 and deceased father of the defendants Nos. 2 to 6 who were not the sole landlords of the holding but only fractional co-sharers of the village. The Sub-Divisional Officer, Burhanpur, on 3rd October 1919 ordered the plaintiff to be put in possession of the holding. The appeal preferred by the transferees to the Court of the Deputy Commissioner, Nimar, was dismissed on 27th February 1920 as per Ex. P-2. Accordingly the plaintiff was put in possession of the occupancy holding bearing No. 253 area 3-9 and *jama* Rs. 12 of *Mouza* Adgaon on 22nd April 1920, as per Ex. P. 3. The name of plaintiff Ramkisan has been recorded in the *jamabandi* of the holding for *Sambat* 1977, Ex. P-1. He transferred the mango crop of the season 1920-21 but his lessee was obstructed by the defendants in the enjoyment of the crop, and consequently he, on 21st October 1921, filed the present suit for injunction restraining the defendants from disturbing him in the enjoyment of the mango trees standing in the holding. The defendants pleaded that the plaintiff was neither the owner nor the recorded occupancy tenant of the field bearing No. 253. They, however, admitted that the mango trees stood in the holding. They at the same time denied that plaintiff had any right to them. They also denied that the trees were part and parcel of the field No. 253, and urged that the property in them had been expressly severed from the soil on which they stood, by the aforesaid separate deeds of surrender and sale executed by Rukhminibai the same day. They also added that plaintiff was not in possession of the whole of the occupancy holding and urged that he was in possession of the land only and not of the mango trees, and disputed the plaintiff's right to sell or dispose of the mango crop. They alleged that plaintiff had never been in possession of the mango trees and that the claim was barred by limitation.

Their further contention was that Rukhminibai and her daughter Kesharbai were the occupancy tenants and that they were competent to and did surrender only the land by the surrender deed and transfer the trees by a separate sale-deed of the same date, in consideration of Rs. 300. They admitted that the plaintiff claimed as an heir of Rukhminibai and Kesharbai and made an application under s. 36 of the C. P. Tenancy Act alleging that the surrender was in evasion of the law and obtained possession through the Sub-Divisional Officer, and contended that what he thus got was the possession of the land only and not of the trees and that as he made no similar application to the Sub-Divisional Officer under either s. 36 or s. 47 of the C. P. Tenancy Act of 1898, for obtaining possession of the

mango trees his remedy under the C. P. Tenancy Act became barred by limitation. It was further pleaded that the transfer of the trees was valid except for the prohibition contained in s. 47 and could, therefore, be avoided only in the manner and to the extent provided for by ss. 47 and 48 of the said Act and that the Civil Court had no jurisdiction to grant that relief, the remedy given by the Tenancy Act itself not being availed of in time.

In the oral pleadings the plaintiff submitted that the surrender was set aside and he was given possession of the holding, and that, as the trees in question were part and parcel of the holding, the order operated to give him a right to and possession over the trees as well, that the trees could not be transferred apart from the land and their sale was, therefore, invalid, that it was unnecessary for him to apply under the Tenancy Act for setting aside the sale as the person executing it had no right to sell. The defendants also contended that neither Babaji nor the plaintiff ever held possession of the land and thus Rukhminibai, who was step-mother of Babaji, became the occupancy tenant and the title of Babaji and of the plaintiff, if any, was extinguished; and further that as the plaintiff applied for setting aside the surrender claiming to be the heir of Rukhminibai he was estopped from asserting that he was owner of the field and the trees not as heir of Rukhminibai but in his own right as heir of Ramchandra, his grandfather. On these pleadings issues were framed and the Court of first instance decreed the claim after giving the following findings.

That Rukhminibai was the recorded occupancy tenant of the holding in which the trees stood and as she had analogous occupancy rights in the trees as well, she had no transferable right in the field as also in the trees. That the sale was on that ground invalid. That as land included trees standing on it and it was not the case of the defendants that Rukhminibai held the field under one set of conditions and the trees under another, and as they together formed the occupancy holding bearing one No. 253, and as the Revenue Officer adjudged the holding to the plaintiff under s. 47 of the Tenancy Act, that order has the effect of giving not only the field but also the trees to plaintiff even though there was no express mention of the trees throughout the proceedings. The defendants' contention that the property in trees and of the soil was severed by two different documents was not accepted as correct inasmuch as it was held that the severance must be one effected at some antecedent date and not by a contemporaneous act of transfer. It was further found that the intention of Rukhminibai was clearly to give the field as also the trees to the defendants, but that a separate sale-deed of the trees was taken, presumably because, the parties considered, though erroneously that Rukhminibai had no analogous rights in the trees as she had in the land, but owned them as full owner with power to sell the same. That the transfer in question was intended to defeat the policy of the law enacted for prohibiting transfers of the tenant rights. That the registration of the sale-deed was, therefore, invalid and consequently no title passed to the defendants, and that they were not barred by Tenancy Act. That on the basis of the order of the Sub-Divisional Officer the plaintiff was entitled to sue for injunction. A decree was accordingly passed in plaintiff's favour. Against this decision an appeal was preferred to the Court of the Additional District Judge, Khandwa, by the defendants who confirmed the decree of the First Court and dismissed the appeal.

The Additional District Judge's findings were as under.

That the order of sequence as between the sale and the surrender was that the sale-deed was executed first and the surrender thereafter; that the trees could not be sold apart from the land. That the trees being situate in the occupancy holding were not transferable just as the occupancy right itself could not be. That the property in the trees could not even by implication be separated from the land of the holding, much less expressly by a separate sale-deed executed in respect thereof. That as the trees formed part and parcel of the tenancy holding there was no necessity for making a separate application for their possession. That the execution of two separate deeds was a mistake as the object could have been served by taking only one sale-deed. That the transaction amounted to a transfer, and the same having been avoided once for all through the Revenue Court, and the present suit not being one for avoiding it, was not barred by s. 47 of the C. P. Tenancy Act. That the Revenue Officer's order confirmed or recognized the title of

plaintiff as an occupancy tenant as it were by succession, and the latter in that capacity obtained possession of the land which included the trees also through the Revenue Court. That plaintiff being placed in possession of the holding by the order of the Revenue Officer he has entitled to maintain a suit for injunction and the Civil Court had jurisdiction to grant the relief. Against this decision the defendants have now come up in second appeal urging as many as 9 grounds of appeal.

At the very outset I must say that I look upon the transaction evidenced by the surrender deed and the sale-deed as nothing short of a device or arrangement for contravening the policy of the Tenancy Law, and as such it is illegal and void. It can no longer be doubted for a moment that an occupancy tenant has the same analogous rights in the trees as he has in the holding, on which they stand. The law as stated in *Raghunath Prasad* v. *Dhanraj Seth* (1) and *Sukhnandan* v. *Manakchand* (2) is that the trees of all kinds, standing on an agricultural holding are part and parcel of land used for agricultural purposes, at least in those cases where the property in them has not been expressly severed from the property in the soil on which they stand. Here, down to the very day of the transfer, which although effected by two instruments was, in reality one transaction, Rukhminibai was and continued to be the owner or occupant of the trees as also of the soil on which they stood, and she had the same untransferable right in the trees as she had in the land. This necessarily brought both the land as also the trees standing thereon, under the prohibition contained in s. 46, sub-s. 3, of the C. P. Tenancy Act (XI of 1898) which declares that no occupancy tenant shall be entitled to sell or otherwise transfer his right in his holding or in any portion thereof. Sub-section 5 of the said section further prohibits the Registering Officers from admitting to registration any document which purports to transfer the right of an occupancy tenant in his holding or in any portion thereof. Section 47 of the said Act enacts that if an occupancy tenant transfers any portion of his right in any land in contravention of the provisions of the last foregoing section the next heir, who will inherit his right in the holding, may on an application to a Revenue Officer be placed in possession of the holding.

In view of this legal position the appellants cannot, in my opinion, successfully contend that Rukhminibai had a transferable right or interest in the trees, independently of the soil on which they stood, which she could validly alienate for valuable consideration to another. The transfer by her of her right in the mango trees, or to the future enjoyment thereof was clearly a contravention of the provisions of the Tenancy Act, as has been held in *Bhure* v. *Sheogopal* (3) which was a case of simultaneous sale of the *malguzari* share reserving the right of the vendors to occupy the *sir* land, and an agreement to surrender the ex-proprietary occupancy right which accrued to the vendors in the *sir* land of their share by virtue of the sale. The vendee was put in possession of it for some time. The vendors ejected him from the land to which the surrender related. The vendee, therefore, claimed restoration to possession of the land surrendered. The defence was that the surrender amounted to an evasion of the law contained in s. 45 of the Tenancy Act and was, therefore, void. This plea was overruled by the Trial Court on the ground that a surrender of occupancy right was permissible under s. 25 and was not prohibited by s. 45 of the Tenancy Act. The District Judge, however, on authority of the decision of the Privy Council in *Moti Chand* v. *Ikram Ullah Khan* (4) and of the ruling in *Mir Dad Khan* v. *Ramzan Khan* (5) held that the sale and the surrender together constituted a single transaction the object of which was to avoid the necessity of obtaining the sanction prescribed by s. 45 (1), Tenancy Act and was, therefore, illegal and void. On the view, that s. 45 of the C. P. Tenancy Act of 1898 was identical in purport with s. 10 of the N. W. P. Tenancy Act, 1901, Drake-Brockman, J. C., applied the test laid down by Piggott, J., in *Mir Dad Khan* v. *Ramzan Khan* (5) above cited in the following words:—

"If a covenant to relinquish the *sir* lands is part of the transaction of sale or of mortgage, then the agreement to surrender

(1) 7 C. P. L. R. 7.
(2) 10 Ind. Cas. 473; 7 N. L. R. 63.
(3) 54 Ind. Cas. 794.
(4) 39 Ind. Cas. 454; 39 A. 173; 15 A. L. J. 150; 5 L. W. 388; 21 M. L. T. 267; 32 M. L. J. 383; 21 C. W. N. 616; 19 Bom. L. R. 433; 26 C. L. J. 24; (1917) M. W. N. 453; 44 I. A. 54 (P. C.).
(5) 44 Ind. Cas. 988; 40 A. 449; 16 A. L. J. 329.

will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it". He held that in the case before him there was admittedly a design to evade the requirements of sub-s. 1 of s. 45 of the Tenancy Act, the two deeds of even date being executed not as separate transactions but as a part of a single design. He observed in the words of their Lordships of the Privy Council in *Moti Chand* v. *Ikram Ullah Khan* (4) that such a device was in contravention of the policy of the Act and contrary to law and, therefore, illegal and void. He also held that the mere fact that the plaintiff obtained possession did not suffice to separate the surrender from the sale. He, therefore, affirmed the dismissal of the vendee's claim for possession holding that the surrender in question before him was void just like the agreement for relinquishment coupled with the deed of relinquishment dated respectively the 2nd and 5th May 1903, which were considered by the Privy Council in *Moti Chand* v. *Ikram Ullah Khan* (4).

In view of this decision, the mere fact that the sale-deed purporting to deal with the trees apart from the soil was executed first and the surrender of the soil pure and simple, followed it (presumably a few minutes later) as found by the lower Appellate Court, does not prevent the transaction from being any the less a single design or device for contravening the policy of the Tenancy Act. The two deeds could not, therefore, be looked upon as separate transactions but formed part and parcel of one transaction. The argument based on the finding of the lower Appellate Court to the effect that the sale-deed was executed first, that as soon as the sale-deed was executed, there was a severance of interest so far as the trees were concerned, and that the property in the soil was surrendered by means of the surrender deed subsequently executed is of no value in view of the aforesaid decision of this Court in *Bhure* v. *Sheogopal* (3) based as it is upon the judgment of their Lordships of the Privy Council in *Moti Chand* v. *Ikram Ullah Khah* (4). In my opinion in order that there could be a valid severance of interest or property in the trees, the trees must themselves have already become the separate property of a person other than the owner of the soil on which they stand, by an independent transaction, and further the interest in the trees as also in the soil must be of a nature transferable under the law applicable to the land. Inasmuch as, in trees standing on occupancy holdings the tenants hold analogous rights and as the interest of occupancy tenants has by law been made untransferable, it follows that the property in the trees is also untransferable and is not capable of being validly severed or parted with, apart from the soil of the holding in which they stand. I have not been referred to any law or custom or to any entry in the village *wajib-ul-arz* which lays down that an occupancy tenant has a transferable interest in the mango trees standing on his land, although the tenure of the holding is itself untransferable. That even a mortgage of trees standing on occupancy land apart from the soil comes within the prohibition of s. 46 of the Tenancy Act, 1898, has been held by Prideaux, A. J. C., in *Tukaram* v. *Narba* (6). The mortgage was there held to be not validly registered and as such could not operate in respect of any part of the property transferred by it. That this a correct view of the law is clear from the fact that the Legislature has enacted in s. 95 sub-s. 1 of the new C. P. Tenancy Act of 1920, that a tenant other than a sub-tenant shall have, during the period of his tenancy, the same right in trees in the holding as he has in the holding itself, and by s. 97 they have also rendered the attachment and sale in execution of a decree or order of the Civil Court, of trees, standing on the land apart from the land itself impossible. The object of these provisions is to prevent there being different owners of trees and land respectively.

Under these circumstances the property in the trees cannot be considered as having been severed from the property in the soil of the occupancy holding of Rukhminibai, and to have become the separate property of the present appellants. This being the state of things on the date of the transfer, and presumably also on 15th July 1918, when the plaintiff Ramkisan made his application, Ex. D-7, to the Sub-Divisional Officer for being placed in possession of the holding, and also on 22nd April 1920 when as per Ex. P-3 the Revenue Officer put him in possession of the occupancy holding, I do not see any force in the argument of the appellants

(6) 70 Ind. Cas. 34; (1922) A. I R. (N.) 252.

that the property in the trees did not pass to the plaintiff Ramkisan, but that it remained in their hands in spite of the order. Even if, for the sake of argument it be conceded that the transfer of trees only was possible under law, and was in fact effected by the sale-deed, so as to make the appellants owners of the trees, and that the surrender was a surrender of only that portion of the holding which consisted only of the soil, even then, each document purported to be a transfer of a right in the holding or in some portion thereof, and under s. 47 of the Tenancy Act, 1898, each such transfer gave to the next heir a right to be placed in possession of *the holding* meaning the entire holding. The wording of s. 47, C. P. Tenancy Act, 1898, does not militate against this view. Nor does it restrict the jurisdiction of the Revenue Officer to the giving of possession of only that part of the holding which is transferred. The very basic idea of letting in the next heir and putting him in possession of the holding by avoidance of the transfer, is to treat as if the transferring tenant were dead at the date of the transfer. He could not be treated as only partially dead and partially alive. This succession to surrendered holding was creation of the Tenancy Act of 1898. It is a succession by virtue of the act of the Revenue Authority: compare *Ghanya* v. *Ukund Rao* (7). As observed by Bose, A. J. C., in *Jagannath* v. *Khuba* (8) it did not exist under the ordinary law, which is to the effect that on a valid surrender by the tenant the tenant-right entirely disappears (from the surrenderor) and nothing remains which can go to the next heir. In derogation of this ordinary law, the Statute gives the Revenue Officer the power to revive as it were the surrendered right and then give it to a person filling a certain character as therein specified. Once the matter is decided and the possession of the land transferred from the landlord to the claimant, no power is given to any outside authority to revise the decision of the Revenue Officer and divest the claimant of the right vested in him under the order. If the intention had been to preserve the right of any party to the proceedings, to question the scope of the order and re-open all the proceedings of the Revenue Officer that intention would have been expressed in clear terms in the Act itself. These principles very fittingly apply to the case of transfers of occupancy holdings or of portion thereof and, therefore, to the facts of the case before me. I have no hesitation to hold that the matter in dispute in this suit was entirely within the jurisdiction of the Revenue Authorities.

I may even say that under s. 95 of the C. P. Tenancy Act, 1898, the jurisdiction of the Civil Court is clearly barred in respect of the matter on which the appellants seek adjudication and it is no longer open to them to reagitate that question now before any other *forum*. It was their duty if they wanted to have their so-called rights to the trees reserved to themselves as not coming within the scope of the proceedings before the Revenue Officer, to have urged that plea specifically as a defence in those proceedings; this they not having done, the matter is no longer open to treatment in the Civil Court. The jurisdiction conferred on the Revenue Officer being an exclusive jurisdiction neither the order passed in exercise of such jurisdiction, nor the scope of that order or of the proceedings taken for putting the heir into possession of the transferred holding, was in view of the provisions of s. 95, C. P. Tenancy Act, 1898, liable to be overriden by a decision in the Civil Court. To uphold the arguments of the appellants that they are entitled to possession of the trees apart from the land and that the plaintiff is entitled to enjoy the land portion of the holding, is to introduce a radical change in the construction of the tenant-right itself. It is inconceivable how the appellants would be entitled to keep their trees on land which does not belong to them. Even if a partition by metes and bounds were permissible without the landlord's consent and were made, it would be impossible to work it out on any tangible basis as regards the respective interests of plaintiff and the defendants, *inter se*, or in relation to the landlord, as also the apportionment of the rent payable to the latter. The nature of the original tenancy itself would be gone and altogether new tenancy would take its place this could never have been the intention of the Legislature.

The principle which underlies the ruling reported in *Narbadapuri* v. *Bholamath Kasturchand* (9) that if an order for foreclosure is made the mortgagee is entitled to pos-

(7) 4 N. L. R. 9 at p. 13.
(8) 4 Ind. Cas. 795; 5 N. L. R. 176 at p. 178.
(9) 15 C. P. L. R. 141.

session of the crops on the land of the mortgagor which is based on the maxim *Quicquid plantatur solo, solo cedit*, whatever is affixed to the soil becomes in contemplation of law a part of it and is consequently subjected to the same rights of property as the soil itself, applies to cases of this kind. This maxim is amplified under s. 8 of the Transfer of Property Act and I have, therefore, no doubt that when the Revenue Officer ordered the plaintiff to be put and actually put him in possession of the holding, it did and could legally put him in possession of the trees standing upon the holding. That trees go with the land is thus clear even from this point of view a proposition which is established beyond doubt, and it is no longer open to appellants to say that they did not go to the plaintiff in this case.

Under these circumstances I hold that the Courts below were right in decreeing the claim of the plaintiff against the appellants. The appeal is, therefore, dismissed with costs. The costs in Courts below will be paid as already ordered.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 2407 OF 1924.

October 13, 1924.

Present:—Mr. Justice Taraporewala.

GORDHANDAS KALYANJI BHAT —PLAINTIFF

versus

GAUTAMCHAND RUPCHAND— DEFENDANT.

Civil Procedure Code (Act V of 1908), O. XXX, rr. 1, 3—Suit against firm—Service of summonses—Dissolved partnership—Individual liability of partners—Proviso to r. 3, scope of.

Where a suit is, under O. XXX, r. 1, of the C. P. C., properly filed against a partnership firm in the firm's name, service on any one or more of the partners or on the manager must be deemed good service upon the firm. There is no difference at all as to the mode of effecting service whether the firm is going on or has been dissolved at the date of the service of the summons. If the service is effected as provided by r. 3 of O. XXX, the suit can be proceeded with against the firm and the plaintiff is entitled to obtain a decree against the firm. In the case of partnerships, which are going concerns at the date of the institution of the suit, the decree which is obtained against the firm is binding on all the partners in the firm, whether they have been served individually or not. In the case of a firm which has been dissolved to the knowledge of the plaintiff before the institution of the suit, an exception is made as to the liability of the partners in the firm under the decree passed against the firm by the proviso to r. 3 of O. XXX to the effect that in the case of such a firm the plaintiff must serve each and every person whom he wants to make liable personally in respect of the decree passed against the firm, and if he has not done so, he cannot execute the decree against the partner whom he had not served personally. The right to execute the decree against the firm is, however, in no way affected by the proviso. [p. 1052, col. 2.]

Mr. *Jinnah*, for the Plaintiff.

Mr. *B. J. Desai*, for the Defendant.

JUDGMENT.—This is a Rule taken out by one Gautamchand Rupchand, a partner in the defendant firm, calling upon the plaintiff to show cause why the decree passed in this suit on August 19, 1924, should not be set aside. The Rule is taken out on the basis that the said decree was obtained *ex parte*.

The defendant firm, according to the said Gautamchand Rupchand, consisted of two partners, Gautamchand Rupchand and Dwarkadas Premji. The plaintiff is the tenant of a shop in the Mulji Jetha Market. He sub-let a portion of the shop to the defendant firm and filed this suit to recover from the defendant firm the arrears of rent for the said portion of the shop. The summons was served upon the said Dwarkadas Premji. He appeared at the hearing and admitted the plaintiff's claim. A decree was thereupon passed in favour of the plaintiff.

In his affidavit in support of the Rule the said Gautamchand Rupchand alleges that the partnership was dissolved in November 1923, and further that the plaintiff was aware of the said dissolution and with the knowledge of such dissolution he served the summons on the said Dwarkadas Premji, that the said Dwarkadas Premji in collusion with the plaintiff did not inform the said Gautamchand of the filing of the suit and allowed the decree to be passed *ex parte*; and that the said Gautamchand did not come to know of the decree till after the same was passed.

The question as to whether the said Gautamchand is entitled to have the decree set aside turns upon the fact whether there was proper service of the summons on the defendant firm. If there was, then the decree was not passed *ex parte* as Dwarkadas Premji, an admitted partner of the firm, appeared at the hearing and admitted the plaintiff's claim. If the service of

the summons was not proper, then the said Gautamchand would be entitled to have the decree set aside.

Mr. Jinnah, who appeared for the said Gautamchand, argued that under O. XXX, r. 3, in the case of a partnership, which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the service of the summons must be effected upon all the partners in the firm who are resident within British India. Order XXX, r. 3, provides for the service of the summons in cases where suit is filed against a partnership firm in the firm's name. The service may be effected upon any one or more of the partners, or at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there; and it is provided that such service should be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India. Then, there is a proviso that in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to be made liable. The said Rule, to my mind, is quite clear and capable of only one construction, namely, that where a suit is, under O. XXX, r. 1, properly filed against a partnership firm in the firm's name service on any one or more of the partners or on the manager shall be deemed good service upon the firm. There is no difference at all as to the mode of effecting service whether the firm is going on or has been dissolved at the date of the service of the summons. If the service is effected, as provided by r. 3, the suit can be proceeded with against the firm and the plaintiff is entitled to obtain a decree against the firm. In the case of partnerships, which are going concerns at the date of the institution of the suit, the decree which is obtained against the firm is binding on all the partners in the firm, whether they have been served individually or not. In the case of a firm, which has been dissolved to the knowledge of the plaintiff before the institution of the suit, an exception is made as to the liability of the partners in the firm under the decree passed against a firm by the proviso to O. XXX, r. 3, and it is this, that in case of such a firm the plaintiff must serve each and every person whom he wants to hold liable personally in respect of the decree passed against the firm, and if he has not done so he cannot execute the decree against the partner whom he has not served personally. The right to execute the decree against the firm is in no way affected by the proviso.

Mr. Jinnah argued that it would mean great hardship where a partner in a dissolved firm colluded with the plaintiff and allowed the decree to be passed against the firm in case the firm had assets which would be liable under the decree, as the share of the partner, who has not been served, in such assets would be liable for the payment of the decree and would thus be lost to such partner.

In the present case Gautamchand had alleged that he was the financing partner, that Dwarkadas Premji was only a working partner, that all the assets of the partnership belonged to him, Gautamchand, and if the decree was executed against the partnership assets it meant that he, Guatamchand, would be the sufferer and not Dwarkadas Premji. No doubt in cases like the present one, assuming that the allegations of the said Gautamchand are correct, there would be hardship; but in such a case the partner in the position of Gautamchand has a remedy by filing a substantive suit for setting aside the decree on the ground of fraud and collusion between the plaintiff and the partner who accepted service and submitted to the decree. If there is no such collusion, no doubt the capitalist partner would have to bear the whole loss; but that is the necessary consequence of the provisions allowing suits to be filed against partners in firm's name even after the dissolution of partnership provided that the cause of action accrued when the partnership was carried on. The construction which Mr. Jinnah asks me to put upon O. XXX, r. 3, would make the provisions of the whole order nugatory with regard to a firm which has been dissolved to the knowledge of the plaintiff. To my mind, if the object of the Legislature was to omit dissolved firm from the operation of the Order, the rules under the Order would have been differently worded. If further the Legislature intended that in the case of dissolved firms the service should be different from the service in the case of a firm which is being carried

on at the date of the institution of the suit, the Legislature could have very well made a clear provision for such different service. The fact that there is only one provision for service in the case of a suit filed against a partnership firm shows that the intention of the Legislature was that in the case of such suits the service should be in the same way whether the partnership was dissolved or not dissolved at the date of the institution of the suit.

Admittedly here the summons was served on Dwakadas Premji. Therefore, in my opinion, there was good service against the defendant firm under O. XXX, r. 3.

Then Dwarkadas Premji appeared at the hearing, as he was entitled to do, as a partner in the defendant firm. The decree, therefore, passed in the suit was not *ex parte*.

That being the case the said Gautamchand is not entitled to the relief prayed for by him under this rule. The Rule, must, therefore, be charged with costs.

Z. K. *Rule discharged.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 19 OF 1924.

January 27, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

CHANDRA PAL SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BISHAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 120—Partition of mahal*—Tank situated in* mahal *allotted to plaintiffs—Order declaring defendants entitled to use water of tank for irrigation—Injunction, suit for—Jurisdiction of Civil Courts.*

On the partition of a *mahal*, a tank situated within the *mahal* was allotted to the plaintiffs. The plaintiffs represented to the partition Court that the defendants who were co-sharers in the *mahal* before partition had no longer any right to irrigate their fields from the tank which had been allotted to the plaintiffs. The partition officer passed an order that the defendants had right to continue the irrigation from the tank in question as they used to do under the terms of the *wajib-ul-arz* previous to the partition. Plaintiffs thereupon instituted a suit in the Civil Court for an injunction restraining the defendants from irrigating their fields from the water of the tank:

Held, (1) that the tank must be taken to have been originally made for the benefit of the whole *mahal* as it stood prior to the partition and could be availed of for the benefit of those lands by virtue of the provisions of s. 120 of the U. P. Land Revenue Act; [p. 1054, col. 1.]

(2) that the order of the partition officer was covered by the provisions of that section and that the Civil Court had consequently no jurisdiction to entertain the suit. [*ibid.*]

Second appeal from a judgment and decree of the Subordinate Judge, Unao, dated the 8th December 1923, reversing that of the Munsif, South Unao, dated the 28th April 1923.

Mr. *Puttu Lal*, for the Appellants.

Mr. *Raj Narain Shukla*, for the Respondents.

JUDGMENT.—This is the defendants' appeal. The plaintiffs-respondents brought the suit out of which this appeal arises in the Court of the Munsif, South Unao, for the relief that a perpetual injunction be issued against the defendants-appellants restraining them from irrigating their fields from the water of tank No. 52 situate in village Chilaula, *Pargana* Sikandarpur, in the District of Unao. The suit was dismissed by the Court of first instance. The plaintiffs preferred an appeal from the decree of that Court to the Court of the Subordinate Judge of Unao, who reversed the decree of the Court of first instance and decreed the suit.

Within the village mentioned above was a *mahal* called *Mahal* Nanda Khera. This *mahal* comprised several *pattis*. The plaintiffs and the defendants were co-sharers in the *mahal*. Within the *mahal* is situate the tank about the water of which this controversy arose. When the present suit was instituted the village was undergoing a partition at the hands of the Court of Revenue under the provisions of the Land Revenue Act of 1901. *Mahal* Nanda Khera has been sub-divided by the partition just now mentioned and tank No. 52 has been allotted to the lot of the plaintiffs. The plaintiffs on the strength of the title they thus acquired to the tank in dispute represented to the partition Court that the defendants had no longer any right to irrigate their fields from that tank. The partition officer considered the matter at several stages of the proceedings and finally passed an order that the defendants had a right to continue the irrigation from the tank in question as they used to do under the terms of *wajib-ul-arz* previous to the partition. It was added as a rider to this order that

if the plaintiffs thought that they had the sole right to the use of the water of the tank by virtue of their being the proprietors of it under the partition their remedy was to seek a declaration to that effect from the Civil Court. Obviously this rider was of no consequence if the operative part of the order was within the jurisdiction of the partition Court to pass. The learned Subordinate Judge is of opinion that the partition Court had no jurisdiction to pass the order which it did in respect of the use of the water by the defendants. In support of that opinion the learned Judge refers to the provisions of s. 120 of the Land Revenue Act, 1901. In my judgment the decision of the learned Subordinate Judge is erroneous. The first part of the section is as follows:—"Tanks, wells, watercourses, and embankments shall be considered as attached to the land for the benefit of which they were originally made." It is quite clear that the defendants had the right to irrigate their fields from the tank in question previous to the partition under the terms of the *wajib-ul-arz*, the tank being in the *mahal* in which the parties were co-sharers. It follows that the tank must be taken to have been originally made for the benefit of the whole *mahal* as it stood prior to the partition and it should continue to benefit the same lands by force of the provisions of s. 120, which I have already quoted. The order of the partition Court was, therefore, wholly covered by that provision. The Civil Court consequently had no jurisdiction to interfere with that order.

The appeal is allowed, the decree of the lower Appellate Court is set aside and that of the Court of first instance restored with costs throughout.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 230 OF 1923.

October 23, 1924.

Present:—Mr. Prideaux, A. J. C.

MADHORAO—PLAINTIFF—APPELLANT

versus

LAXMANRAO—DEFENDANT—RESPONDENT.

C. P. Land Revenue Act (II of 1917), ss. 78, 80, 106—Order of Deputy Commissioner declaring customary rights of tenants—Declaration, suit for, by Malguzar, *maintainability of—Jurisdiction of Civil Courts.*

Defendants, who were the tenants of the plaintiff *malguzar*, complained to the Deputy Commissioner that the plaintiff was interfering with their rights and the Deputy Commissioner passed an order declaring that the tenants had the right to take water from the village tank for building purposes and to remove earth and that they could take fuel and timber from the *malguzari* jungle and were entitled to graze a number of cattle therein. He also ordered that the excess grazing dues recovered by the plaintiff should be refunded to the defendants and warned the plaintiff against molesting the defendants in the exercise of their rights. Plaintiff, thereupon, brought a suit for a declaration that the order of the Deputy Commissioner was erroneous and for a declaration of the proper rights of the defendants and for an injunction against them:

Held, that the order of the Deputy Commissioner fell within the purview of s. 78 of the C. P. Land Revenue Act, and that the plaintiff's suit was, therefore, maintainable under s. 80 of the Act. [p. 1055, col. 2.]

Appeal against a decree of the District Judge, Wardha, dated the 29th March 1923, in Civil Appeal No. 70 of 1922.

Mr. *D. T. Mangalmurti*, for the Appellant.

Mr. *J. C. Ghosh*, for the Respondent.

JUDGMENT.—This judgment also disposes of Second Appeal No. 239 of 1923. Both appeals arise out of the same case.

The dispute is as regards village customs and was brought by the *malguzar* of *Mauza* Keljar against 13 tenants. These tenants had complained to the Deputy Commissioner that the plaintiff was interfering with their rights; that they were entitled to bring fuel from the *malguzari* jungle; that they were entitled to take stones for *bhandis* and take water from the village tank for building purposes; and that they were entitled to take wood and also take earth for building purposes. It is stated that the Deputy Commissioner passed an order declaring that the tenants had the right to take water and earth free, and that they could take fuel and timber and also that they were entitled to graze a number of cattle. The Deputy Commissioner also ordered that the excess grazing dues taken by the plaintiff should be refunded to the defendants. Plaintiff asks for a declaration that the order complained of is erroneous and for a declaration of the proper rights of the defendants and for an injunction against them.

One of the contentions raised was that the Deputy Commissioner's order was

passed under s. 201 of the Land Revenue Act and a civil suit could be brought to have that order set aside, but the lower Appellate Court writes:—

"Now s. 201 simply says that any person bound by a rule or custom entered in the village administration papers who contravenes or fails to observe such rule or custom shall be liable to a fine, and a civil suit can be brought so as to have that order (of fine) set aside on the ground that no rule or custom was contravened. Now strictly speaking the plaintiff has not been fined at all, but he has been ordered to refund grazing dues, which has the same effect as if he had been fined, the fine given as a compensation. But this is with reference to the right of grazing only, and it is only in that respect that I can hold that the Deputy Commissioner's order is passed under this section. With regard to the other matters the Deputy Commissioner's order is simply: 'He should further be strictly warned against molesting the *raiyots* in the different ways he does. Should he violate the terms again, he should be strictly dealt with.' This order of warning is not one which can be set aside by a Civil Court under this section."

The Court further thinks that the Deputy Commissioner was acting under s. 106 (*h*) of the Act, and that the jurisdiction of the Civil Court to question the decision of the Deputy Commissioner is barred by s. 220 (*e*) of the Land Revenue Act. The lower Appellate Court proceeded to determine the only part of the case which it considered maintainable, *viz.*, free grazing.

The First Court's finding on this point was that the tenants were entitled to graze two bullocks, one cow, one calf and one she-buffalo per 20 acres, and this finding was confirmed in the lower Appellate Court. I may say at once that I do not think this number of animals excessive. Two bullocks are certainly required for agricultural purposes, one cow for the breeding of future bullocks, one calf which represents the coming bullock or a cow, and a she-buffalo which the tenants want for milk and manure. I confirm this finding and it will not be re-opened.

As regards the rest of the case, it seems to me that the contentions of the appellant *malguzar* have considerable force, and the learned Counsel for the tenants has been obliged to admit that he thinks the case as regards the other heads does lie. Section 106 of the Act gives the Deputy Commissioner powers of a Settlement Officer when a settlement is not in progress in his district. Section 78 deals with the village customs which the Deputy Commissioner ascertains and records. Section 80 gives any person aggrieved by an order or entry under s. 78 the right to go to a Civil Court within one year. It can hardly be said that though a Settlement Officer is restrained in this way, the Deputy Commissioner, when acting as a Settlement Officer, is not. Section 220 relied on by the lower Appellate Court commences with the words "Except as otherwise provided," and it does not mention s. 78. The present suit is filed within a year, and as the Deputy Commissioner's order coupled with that of the Sub-Divisional Officer's recommendations comes under s. 78, I think, the Court has jurisdiction to decide the questions left undecided. I must, therefore, remand the case to the lower Appellate Court for a consideration and decision of these questions. Costs will abide the result. There will be only one set of costs.

Z. K. *Case remanded.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 153 OF 1923.

December 10, 1924.

Present:—Mr. Wazir Hasan, A. J. C.

BULAQI DAS—DEFENDANT—APPELLANT

versus

JUGAL KISHORE—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. VI, r. 17, O. XXIII, r. 1—Pleadings—Inadvertent omission—Amendment—Withdrawal of suit, leave for—Illegality—Revision.

Amongst other pleas in answer to a suit the defendant set up one of estoppel which was stated and elaborated in three paragraphs of the written statement. In his replication the plaintiff denied two of these paragraphs and in answer to the third paragraph by inadvertance omitted the word "not" before the word "admitted". The mistake was discovered when the trial was about to be concluded and the plaintiff made an application to amend the replication but the appli-

cation was refused. The Court, however, granted the plaintiff leave to withdraw the suit with liberty to bring a fresh suit. In revision:

Held, (1) that the order permitting the withdrawal of the suit was wholly illegal and must be set aside;

Muhammad Ejaz Rasul Khan v. *Mubarak Husain*, 79 Ind. Cas. 1033; 1 O. W. N. 388; 10 O. & A. L. R. 685; 11 O. L. J. 613; 27 O. C. 231; (1925) A. I. R. (O.) 291, followed.

(2) that the only reasonable and just course to adopt in the circumstances of the case was to accept the plaintiff's application for amendment of his replication and to permit the amendment to be made.

Civil revision, under s. 115, C. P. C., against the judgment and decree of the Munsif, North Lucknow, dated the 2nd September 1924.

Messrs. *Bisheshar Nath* and *Mahesh Prasad*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

ORDER.—This is an application under s. 115 of the C. P. C. made by the defendant in a suit for the recovery of possession of a piece of land brought by the plaintiff-opposite party. Amongst other pleas the defendant set up one of estoppel which was stated and elaborated in paras. 14, 15 and 16 of the written statement. The plaintiff filed a replication to this statement. In this replication he denied para. 14 and also para. 16 of the written statement but so far as para. 15 was concerned it was admitted. The suit proceeded to trial and when the end was in sight the plaintiff discovered that the replication in answer to para. 15 of the written statement omitted by mistake to insert the word '*nahin*' (not) between the words '*taslim*' and '*hai*.' With a view to correct this error an application to amend the replication was made. Considering the substance of the paragraphs not admitted, that is, 14 and 16, it is perfectly clear and indeed is not seriously disputed that the word '*nahin*' was left out by inadvertent omission. The learned Munsif rejected the application for amendment on the ground that the effect of the amendment would be to start the trial of the case *de novo*. A second attempt was made for the same amendment. That attempt met no better fate. The plaintiff then applied for leave to withdraw his suit with permission to bring the same suit afresh. This was readily granted by the learned Munsif.

I refrain from commenting in any strong language on the somewhat startling procedure adopted by the Court below. I would, however, say that the learned Munsif refused to permit the amendment for the reason that the suit would have to be tried *de novo* if the amendment were allowed. I wonder whether it occurred to him when he accepted the application for withdrawal that the permission to the plaintiff to institute a fresh suit would entail a greater waste of public time if the second suit were brought. Be that as it may, the order permitting the withdrawal with liberty to sue again is on the face of it wholly illegal. The view I have explained at some length in the case of *Muhammad Ejaz Rasul Khan* v. *Mubarak Husain* (1) and the attention of the learned Munsif may well be drawn to that decision. I am happy to observe that Mr. Sen, Counsel for the opposite party, as well as Babu Bisheshar Nath, Advocate for the applicant, are agreed and I agree with them that the most reasonable and just course to adopt in the circumstances of the case will be to accept the application for amendment and set aside the order against which this application has been made. I accordingly do so. The record of the case is returned to the Court below with directions that the suit be restored to its original number in the register of suits, that the amendment prayed for by the plaintiff be made in his replication and that the suit be decided according to law. No order as to costs in this Court.

Z. K. *Record be returned.*

(1) 79 Ind. Cas. 1033; 1 O. W. N. 388; 10 O. & A. R. 685; 11 O. L. J. 613; 27 O. C. 231; (1925) A. I. R. (O.) 291.

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GENERAL INDEX.

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Accomplice, *evidence of—Penal Code (Act XLV of 1860), s. 216A, applicability of.*

The evidence of an approver, who owns himself to be a scoundrel and is also a traitor must be received with caution but not rejected totally. It is enough if after considering such evidence and the general corroborative evidence the Court is of opinion that the whole body of evidence put together proves the guilt of the accused person.

To attract the penalty of section under s. 216A, Penal Code, it is not enough that a person should be harbouring dacoits in general but the section renders it penal to harbour persons who intend to commit a particular dacoity. S EMPEROR *v.* SUNDERDAS 26 Cr. L. J. 1028 **916**

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Adverse possession. *See* LIMITATION ACT, 1908, SCH. I, ARTS. 144, 148 **188**

——— *Death of owner—Brother of deceased managing property—Adoption by widow of deceased.*

On the death of a Hindu his widow continued to live with his brother, who also obtained possession of the property of the deceased. The widow subsequently made an adoption, and the adopted son sued to recover the property from the brother of the deceased:

Held, that under the circumstances it must be presumed that the defendant managed the property on behalf of his brother's widow intending merely to help her and that his possession was not adverse either to the widow or to the plaintiff. B KALLAPA MALLAPPA HOSMANI *v.* KALAPPA NINGAPPA, 26 Bom. L. R. 494; (1924) A. I. R. (B.) 469 **705**

——— *Mortgagee—Equity of redemption, whether can be acquired—Physical possession, whether necessary.*

A possessory title to a property can only be acquired by physical possession which ripens into ownership by the failure of the true owner to take steps to recover possession.

Though a trespasser by holding possession against a mortgagor can bar the mortgagor's right to redeem, it cannot be said that an equity of redemption can be acquired by adverse possession unless the person claiming adversely is in physical possession of the mortgaged property. In the case of a possessory mortgage where possession has been delivered to the mortgagee a trespasser obtaining possession may hold adversely to the mortgagee but not to the mortgagor. B TARABAI RAMRAO PATANKAR *v.* DATTARAM GOVINDBHAI GUJAR, 27 Bom. L. R. 441; 49 B. 539 **765**

——— *Possession of Hindu widow, nature of.*

Where the widow of a deceased co-parcener in a joint Hindu family took possession of certain plots of *sir* land and a house belonging to the joint family, set up her own independent title thereto, was continuously shown in the village records as *sir* holder, realized rents and made transfers:

Held, that the possession of the widow was adverse to her deceased husband's co-parceners.

Under certain circumstances the possession of a Hindu widow may be adverse to the reversioners of her deceased husband to the extent only of a widow's estate, but where she has no right to a widow's estate when she takes possession and there is no allegation on the other side that she is holding property on a widow's estate, and she makes transfers of the property as absolute owner thereof, her possession must be regarded as that of an absolute owner and not as that of a Hindu widow. O LAL BAHADUR SINGH *v.* MATHURA SINGH, 1 O. W. N. 740 **164**

——— *Redemption, equity of, whether can be acquired by.*

A right of redemption can be acquired by adverse possession but whether it has been so acquired would depend upon the amount of evidence produced by the parties. O ANPURNA KAUR *v.* JAGESHAR MISRA, 1 O. W. N. 842 **208**

Agra Pre-emption Act (XI of 1922), ss. 14, 15—*Evidence Act (I of 1872), s. 115—Pre-emption—Notice to person entitled to pre-empt—Refusal to pre-empt—Estoppel.*

It is not compulsory for a vendor to give a notice under s. 14 of the Agra Pre-emption Act. He may, by word of mouth, or in any other way, inform a person having a right of pre-emption of his intention to sell. If the person to whom that communication is made states there and then that he refuses to purchase the property, he is disqualified from subsequently maintaining a suit for pre-emption. The case is really one of estoppel under s. 115 of the Evidence Act. A person to whom a notice has been given having intimated his refusal and the sale having been made after that refusal, he cannot be allowed to turn round and seek to enforce his right of pre-emption through the Court. Section 15 of the Agra Pre-emption Act has nothing to do with such a case. A OON MOHAMMAD *v.* BINT ZOHRA, L. R. 6 A. 300 Civ. **414**

Agra Tenancy Act (II of 1901), s. 10 (1)—*Gift of sir land—Ex-proprietary rights, whether created—Ejectment of sub-tenant, suit for—Co-sharers in mahal, whether necessary parties.*

Under s. 10 (1) of the Agra Tenancy Act no ex-proprietary rights are created where there is an alienation by gift and it is immaterial whether the gift is between co-sharers or in favour of a stranger. In the case of a gift the *sir* must retain its character in the hands of the donee.

Where certain plots of land have been the exclusive *sir* and *khud kasht* of a co-sharer from more than twelve years and are let out to a sub-tenant who is the exclusive tenant of such co-sharer, the latter is by himself entitled to eject the sub-tenant and it is not necessary for him in a suit for ejectment to implead persons who though co-sharers in the *khewat* or the *mahal* have no interest in the particular plots of land to which the suit relates. A DUNGAR *v.* JAHANGIR, L. R. 6 A. 87 Rev. **698**

——— **s. 22.** *See* HINDU LAW—SUCCESSION **668**

——— **s. 32**—*Suit by co-tenant for damages or profits, whether maintainable.*

Section 32 of the Agra Tenancy Act bars a suit for partition of a holding. It does not bar the maintenance of a suit for damages or profits where one of the parties entitled to a holding is kept out of possession by his co-tenants. A MUNSHI RAM *v.* BHAGWANT, L. R. 6 A. 90 Rev. **782**

——— **s. 34,** *applicability of—Suit against person who came into occupation with consent of landlord.*

Section 34 of the Agra Tenancy Act refers to suits brought against persons whose occupation began without the consent of the landlord. It has no application to a suit in which it is found that the defendant was initially in occupation with the consent of the landlord. A MATA DIN *v.* ANAND MADHO, L. R. 6 A. 89 Rev. **590**

——— **s. 51.** *See* C. P. C., 1908, s. 11 **789**

——— **s. 88**—*Occupancy tenant, whether entitled to plant trees—Trees planted on occupancy holding, whether can be alienated—Appeal, second—Inference of law from admitted facts, whether can be questioned.*

Trees are mere improvements, but an occupancy tenant cannot plant trees on his holding without the consent of the *zemindar*. Even when he plants trees with the permission of the *zemindar* he is not entitled to sell them.

Where a grove is planted on an existing occupancy holding the character of the holding is not thereby affected and the tenant is not entitled to mortgage or sell the trees.

Where an inference of law drawn by a lower Appellate Court from admitted facts is erroneous, it is liable to scrutiny by the High Court in second appeal. A PEERJI MOHIB ALI SHAH *v.* RAM CHANDER, L. R. 6 A. 104 Rev. **64**

Agra Tenancy Act—concld.

——— **s. 167**—*Mortgagee — Recorded co-sharer — Joint possession, decree for—Mesne profits, whether can be recovered—Jurisdiction of Civil Courts.*

Where a mortgagee of *zemindari* plots is entered as such in the *khewat*, he is a recorded co-sharer, and if he is obstructed in the collection of rents he is entitled to a decree for joint possession against the other co-sharers but he is not entitled to a decree for mesne profits. Being a recorded co-sharer he can only obtain his share of the profits by a suit in a Rent Court. Section 167 of the Agra Tenancy Act bars the jurisdiction of the Civil Courts in the matter. **A** MAHADEO PRASAD *v.* BASANT LAL, L. R. 6 A. 125 Rev. 444

——— **s. 193 (g)**—*Rent, suit for—Decree against landlord paid off by tenant, whether can be pleaded as set-off.*

Under cl. (*g*) of s. 193 of the Agra Tenancy Act it is only a decree held by the defendant himself that can be pleaded as a set-off.

Where a sub-tenant under an ex-proprietary tenant pays off a decree for rent obtained by the *zemindar* against the ex-proprietary tenant, he is not entitled to plead the payment as a set-off in answer to a suit for rent brought against him by the ex-proprietary tenant. **A** BIRJ LAL *v.* MUHAMMAD IBRAHIM, L. R. 6 A. 113 Rev. 713

——— **s. 194**—Lambardar, *right of, to sue for arrears of rent—Record of Rights, entry in, effect of.*

In the absence of a clear indication to the contrary, the *lambardar* is the person who is entitled to recover the rent.

Where a Record of Rights gives the *lambardar* a right to recover the rent, the *lambardar* must be deemed to be appointed as agent of the co-sharers within the meaning of s. 194 of the Agra Tenancy Act.

Where a *lambardar* is not entitled to bring a suit to recover arrears of rent he is not entitled to a decree even with regard to his own share of the rent. **A** MUHAMMAD ABDULLAH KHAN *v.* KUNDAN, L. R. 6 A. 118 Rev. 197

Appeal, second. *See* HINDU LAW, WIDOW 315

——— *Finding of fact—Evidence not weighed, effect of—Finding, whether binding.*

A finding of fact arrived at by an Appellate Court without correctly appreciating the point for determination and without properly weighing all the evidence on the record, is not binding in second appeal. **O** MAHARAJA *v.* BAJRANG BALI 1040

——— *Finding of fact, interference with.*

Even where the evidence in support of a finding of fact is doubtful the High Court will not in second appeal interfere with the finding until strong reasons either of injustice or of misapprehension of evidence by the lower Court are indicated. **O** ANPURNA KUAR *v.* JAGESHAR MISRA, 1 O. W. N. 842 208

——— *New point of law.*

The High Court will, in second appeal, allow a point of law, which arises on the issues as framed and on the evidence led in the Trial Court, to be taken for the first time. But if the point sought to be taken is such that it cannot be decided without remanding the case for further evidence the High Court will not allow it to be raised. **B** KALLAPA MALLAPPA HOSMANI *v.* KALAPPA NINGAPAP, 26 Bom. L. R. 494; (1924) A. I. R. (B.) 469 705

——— Parjaut *land — Finding of fact—* Jamabandi, *entry in, value of.*

Appeal, second—concld.

Where the question is whether the land in dispute is or is not *parjaut* land, an entry in a *jamabandi* showing that the land is *parjaut* land is admissible in evidence and is of great value.

A finding that certain land is *parjaut* land is a finding of fact and is binding on the High Court in second appeal. **A** SRI LAL GOAIKA *v.* KESHO DAS, L. R. 6 A. 93 Rev. 368

——— *Partner or agent—Mixed question of law and fact.*

The question whether a person is a partner with or agent of another is a mixed question of fact and law, which the High Court is entitled to consider in second appeal. **M** CHOCKALINGA CHETTIAR *v.* MUTHUSAWAMI CHETTIAR, 43 M. L. J. 518; 21 L. W. 541; (1925) A. I. R. (M.) 768 663

Arbitration—*Arbitration proceedings—Suit filed—Proceedings, whether invalidated—Award, filing of —Procedure—Stay of suit—Arbitration Act (IX of 1899), s 19.*

The fact that an act is done contrary to a contract does not necessarily render the act invalid.

Thus a party may have contracted to submit his dispute to arbitration, but nevertheless may, if so disposed, break his contract, and submit his dispute for decision to the public tribunal, if no statutory bar exists.

But the mere filing of the suit does not invalidate the arbitration proceedings, and the arbitrators are at liberty to proceed.

Arbitration proceedings pending suit, however, though not invalid, remain in abeyance, and the award cannot be filed, until a stay of the suit is obtained by an application under s. 19 of the Arbitration Act.

If the application for stay of the suit is refused, or the party applying waives his right by pleading in the suit, the arbitration proceedings and any award made therein are invalidated, and the Court alone is seized of the dispute.

Therefore, where an application for filing an award is made during the pendency of a suit relating to the same subject-matter, the correct procedure for the Court is not to order that the award be taken of the file absolutely as invalid, but to postpone the consideration of the application to file the award, or to direct its return to the applicant with liberty to be presented after the Court has disposed of the application under s. 19 of the Arbitration Act or has ceased to be seized of the suit without adjudication on the merits. **S** MITSUI BUSSAN KAISHA LTD. *v.* TOTARAM-BHAGWANDAS, 17 S L. R. 228; (1924) A. I. R. (S.) 146 83

Arbitration Act (IX of 1899), s. 19. *See* ARBITRATION 83

Arms Act (XI of 1878), ss. 14, 19 (f)—*Empty cartridge cases, whether ammunition—Possession—Offence.*

The possession of empty cartridge cases which are incapable of being re-loaded in India does not amount to an offence under s. 19 (*f*) of the Arms Act. **A** AMIR *v.* EMPEROR, 23 A L. J. 455; L. R 6 A. 127 CR.; (1925) A. I. R. (A.) 498; 26 Cr. L. J. 10 9 927

——— **ss. 14, 19 (f)**—*Gun fired by brother of license-holder—Illegal possession of arms.*

The brother of a person who held a license for a gun took out the gun at a time when riots were taking place in different parts of the town and fired shots in the air so that people mischievously

Arms Act—concld.

inclined might know that it was not safe for them to do any mischief to the people living in the house:

Held, that the possession of the gun by the person who fired it was on behalf of and with the express or implied permission of the license-holder and that, therefore, the person firing the gun was not guilty of an offence under s. 19 (*f*) of the Arms Act. A BABU RAM *v.* EMPEROR, 23 A. L. J. 356; L. R. 6 A. 121 CR.; (1925) A. I. R. (A.) 396; 47 A. 606; 26 Cr. L. J. 987 523

——— s. 19 (e)—*"Going armed," meaning of—Intention to use weapon.*

The expression "going armed" within the meaning of cl. (*e*) of s. 19 of the Arms Act indicates, first, an intention to use the weapon as a fire-arm, and secondly, the possibility of using it. For the purpose of a conviction under cl. (*e*), there must be some clear evidence of intention on the part of the accused to use the weapon.

Where in a prosecution under the section, it was found that the accused had only one empty cartridge in his fire-arm and no cartridges at all were found on the person of the accused and there was no proof of the accused having ever previously used the fire-arm:

Held, that the accused could not be convicted of an offence under s. 19 (*e*) of the Arms Act. M *In re* SONAI MUTHU AMBALAM, 48 M. L. J. 502; (1925) M. W. N. 217; (1925) A. I. R. (M.) 585; 26 Cr. L. J. 1028 916

Benami—Burden of proof. *See* HINDU LAW—MITHILA SCHOOL 849

Bengal Alluvial Land Settlement Act (XXXI of 1858), s. 2. *See* BENGAL TENANCY ACT, 1885, CH. X, s. 52 442

B. & N. W. R. Provident Fund Rules, r. 14 (4)—*Railway servant, dismissal of—Fine deducted from Provident Fund—Suit to recover amount of fine, whether maintainable—Jurisdiction of Civil Courts—Power to withhold bonus, exercise of.*

Plaintiff, who was an employee of the B. & N. W. Railway Company, was dismissed from the service of the Company and was fined a certain sum which was ordered to be realized from his Provident Fund. Plaintiff thereupon brought a suit for recovery of the amount of the fine from the defendant Company on the allegation that his dismissal was wrongful and that the fine should not have been imposed upon him. It was found that the dismissal of the plaintiff was wrongful:

Held, (1) that the matter was of a civil nature and that any agreement entered into by the plaintiff which empowered the Company to impose a fine did not take away the plaintiff's right of action in a claim of this sort and did not deprive the Civil Courts of jurisdiction to determine such a claim;

(2) that in inflicting a fine upon plaintiff the defendant Company purported to exercise their legal powers to fine their servant under the terms of the agreement between them and their servant and did not purport to exercise any arbitrary powers over the bonus portion of the servant's Provident Fund under the Provident Fund Rules, and that, therefore, r. 14 (4) of the defendant Company's Provident Fund Rules had no application to the case;

(3) that as soon as it was held that the fine had been wrongly imposed upon the plaintiff the latter was entitled to a decree for a refund of the amount. Pat BENGAL N.-W. R. Co. *v.* SUKHDEO PRASAD, 3 Pat. L. R. 84; (1925) A. I. R. (Pat.) 487 739

Bengal Drainage Act (VI of 1880), s. 37. *See* PUBLIC DEMANDS RECOVERY ACT, 1895, s. 7 339

Bengal Patni Taluks Regulation VIII of 1819, s. 11—*Bengal Tenancy Act (VIII of 1885), s. 25—Patni sale—Occupancy tenants—Purchaser, whether entitled to evict tenants.*

The policy of the law at the time of the enactment of the Patni Regulation was to protect from eviction those actually on the land and cultivating it.

At the time of the enactment of the Patni Regulation occupancy tenants did not exist, those cultivating the lands were either *khudkasht raiyats*, that is, *raiyats* of the village cultivating the lands, or *paikast raiyats* who were cultivators who came from outside the village. Consequently, s. 11 of the Patni Regulation of 1819 extended protection to the only cultivating *raiyats* of the village then known, *viz.*, *khudkasht raiyats* or resident and hereditary cultivators. Since the enactment of Patni Regulation another class of cultivating *raiyats* has grown up, whose occupancy rights after twelve years' possession are recognized and protected by the Bengal Tenancy Act. These tanants also are entitled to protection from eviction under s. 11 of the Regulation.

Per *Chakravarti, J.*—Section 11 of the Bengal Patni Taluks Regulation VIII of 1819 provides that the purchaser at a sale for arrears of rent under the Regulation should get the *patni* in the same condition which existed at the time of its creation.

The substantive rights created in favour of the *raiyats* by the Bengal Tenancy Act do not in any way affect the provisions of the *Patni* Law.

The right of a *patnidar* is primarily to collect rents from *raiyats* and that right is in no way affected by s. 25 of the Bengal Tenancy Act.

A *raiyat* with a right of occupancy now occupies the same position as a *khudkasht raiyat* and should, therefore, have the same protection as a *khudkasht raiyat* had when the Patni Regulation of 1819 was passed. C JNANENDRA MOHUN BHADURI *v.* HARENDRA KRISHNA DE 32

——— s. 11—*Village Chaukidari Act (VI B. C. of 1870), s. 50*—Putni taluq—Chaukidari chakran *lands, resumption of—Sale of* putni taluq *for arrears of rent—Purchaser of* taluq, *whether entitled to resumed* chaukidari chakran *lands.*

A *putni taluq* was created in favour of one *H* in 1820. The *chaukidari chakran* lands situated within the *putni taluq* were resumed under the Village Chaukidari Act and transferred to the *zemindar* under s. 50 of the Act subject to the payment of the amount of assessment made on those lands. Subsequently the *zemindar* settled those lands with one *S*, who had become the owner of the *putni taluq* by purchase in *putni* settlement. The *pattah* contained a clause that if, in future, any other person or persons besides the holder of the *putni taluq* should be proved to have *putni* interest in the *taluq*, he or they would acquire *putni* interest in the *chakran* lands also in the same manner and to the same extent as they may be found to have in the *taluq* and that if, in future, the *putni* interest in the *taluq* be transferred for arrears of rent or extinguished for any reason then the *putni* interest of the grantee in the *chakran* lands would also be transferred or extinguished along with the original *putni*. Later on *S* sold his *putni* interest in the resumed *chaukidari chakran* lands to the defendants. Thereafter the *putni* rent of the *taluq* fell into arrears and the *taluq*

Bengal Patni Taluks Regulation—concld.

was sold under the Bengal Patni Taluks Regulation VIII of 1819 and was purchased by the plaintiff. The plaintiff then obtained possession of the *taluq* but not of the resumed *chakran* lands. She subsequently brought a suit for possession of those lands:

Held, (1) that the interest of the *zemindar* in the *chaukidari chakran* lands passed to the *putnidar* under the *putni* grant of 1820 and that the *putnidar* was entitled to possession of those lands on resumption under the Village Chaukidari Act by virtue of that grant;

(2) that far from separating the resumed *chaukidari* lands from the original *putni* the intention of the parties to the *pattah* granted to *S* was that the *chaukidari chakran* lands should be considered as part and parcel of the *putni*;

(3) that consequently the plaintiff was entitled to the *putni* as it was created in 1820 and was, therefore, entitled to possession of the *chaukidari chakran* lands as being part of the *putni*. C KANCHAN BARANI DEBI *v.* UMESH CHANDRA ROY, 41 C. L. J. 295; (1925) A. I. R. (C.) 807 **529**

Bengal Tenancy Act (VIII of 1885), s. 3 (3)—*Landlord and tenant—Failure to pay rent—Tenant, whether becomes owner.*

It is possible for a *raiyat* to hold lands without paying rent to the landlord but he does not thereby become the proprietor of the soil. He may be a tenant under s. 3 (3), Bengal Tenancy Act, and yet under a special contract may not pay rent to the landlord. C ASWINI KUMAR GUPTA *v.* KAMINI KUMAR DE **798**

——— **s. 25.** *See* BENGAL PATNI TALUKS REGULATION, 1819, s. 11 **32**

——— **s. 29**—*Enhancement of rent*—Jama *amalgamated with fictitious* jama, *whether can be recovered*—*Estoppel*—*Burden of proof, importance of.*

There cannot be any estoppel against a Statute, nor can the parties contract themselves out of any Statute.

The language of s. 29 of the Bengal Tenancy Act is imperative and provides that rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the *raiyat*. This prohibition is not qualified by any provision calculated to save a contract or agreement between the parties.

A *kabuliyat* purported to enhance the *jama* of a holding within the limit permitted by s. 29 of the Bengal Tenancy Act and then purported to amalgamate with it the *jama* of another piece of land which had no existence and the *jama* of which was entirely fictitious. The *jamas* relating to certain other holdings were also enhanced and then the total of all the *jamas* was described. The total of all the *jamas* including the fictitious *jama* exceeded the amount to which the rent of the holdings could be enhanced under the provisions of s. 29. In a suit to recover the *jamas* mentioned in the *kabuliyat*:

Held, (1) that the landlord was entitled to treat the *jamas* of those holdings which were not amalgamated with the fictitious *jama* as separate and his suit with regard to the recovery of those *jamas* must succeed;

(2) that the amount of the *jama* which was amalgamated with the fictitious *jama* being in excess of the amount which could be recovered under the provisions of s. 29 of the Bengal Tenancy Act, the suit with regard to the amalgamated *jama* was not maintainable.

The question of onus ordinarily becomes of very little importance when the whole evidence is considered by the Appellate Court. C JNANENDRA NATH ROY *v.* NALINI MOHAN GHOSE **565**

——— **s. 60**—*Cess Act (IX of 1880), s. 41—Landlord and tenant—Recorded proprietor of* mahal—*Suit to recover rent—Tenant, whether can set up right of third person—Third person, whether necessary party—Road-cess—Liability of tenant.*

Under the provisions of s. 60 of the Bengal Tenancy Act a recorded proprietor of a *mahal* is the only person to whom the tenants of the *mahal* are entitled to pay rent for lands lying within the *mahal*, and in answer to a suit by such a proprietor to recover rent from the tenants in respect of such lands, the latter cannot be permitted to set up the title of the proprietor of another *mahal* to recover the rent. The proprietor whose right is set up by the tenants is not a necessary party to a suit by the recorded proprietor to recover rent.

Under the provisions of s. 41 of the Cess Act every cultivating *raiyat* is liable to pay to the person to whom his rent is payable one-half of the amount of road-cess. Pat KESHO PRASAD SINGH *v.* RAMDEAL KUER, 6 P. L. T. 214; (1925) A. I. R. (Pat.) 473 **439**

——— **s. 67**—*Rent, arrears of—Tenancy created before Act—Interest, rate of—Undue influence, proof of—Construction of document—Lease—Heir, mention of, whether makes lease heritable.*

Where a contract is challenged as providing a very high rate of interest, it is necessary to prove that one party had undue advantage over the other in the matter of the settlement of the rate of interest.

A lease creating a *raiyati* tenancy without any fixed period, before the passing of the Bengal Tenancy Act, is to be treated as a lease from year to year and a claim for rent under such a lease is governed by the provisions of that Act. Interest on arrears of rent due under such a lease cannot, therefore, be recovered at a rate higher than that fixed by s. 67 of the Act.

The use of the word 'heir' in a lease restricting the right of transfer of the "tenant and his heirs," does not necessarily mean that the lease is a heritable one. C ANNADA CHARAN RAY *v.* GRINDRA KUMAR BANDAPADHAYA, 41 C. L. J. 453; (1925) A. I. R. (C.) 722 **178**

——— **ss. 93, 99**—*Common manager, appointment of—Restoration of estate, when can be refused.*

The most essential condition requisite to justify a Judge in appointing a common manager of an estate under s. 93 of the Bengal Tenancy Act, is the existence of a dispute between the co-owners. When, therefore, the question arises as to the restoration of the estate under s. 99 of the Act, and it is alleged that the dispute is no longer existing, what the Judge has to consider is whether it has been really and effectively settled in such a way that the management will be conducted by the co-owners without inconvenience to the public or injury to private rights. If he is satisfied that the dispute has been effectively settled he cannot refuse to make an order directing the restoration of the estate, merely because there is apprehension that the co-owners will oppress the tenants or that there will be a breach of the peace as the result of such oppression. C ABDUD AZAHAR CHOWDHURY *v.* COLLECTOR OF BACKERGANJ **815**

——— **Ch. X, s. 52**—*Bengal Alluvial Land Settlement Act (XXXI of 1858), s. 2*—Diara *proceedings*—*Settlement of rent for accreted lands—Tenants, whether bound to pay rent settled—Suit to recover*

Bengal Tenancy Act—concld.

rent in respect of lands comprised in lease—Failure to include claim for increased rent in respect of accreted lands, effect of.

A suit to recover rent in respect of lands let out under a lease of which the proper description is given in the plaint is not liable to dismissal owing to the fact that the plaintiff might have asked for increased rent for an accretion to the tenure.

In order to make a tenant liable for additional rent for accretions to his tenure, such rent must be settled under Ch. X to the Bengal Tenancy Act or the landlord must take proper proceedings so as to bring into operation s. 52 of the Act or any other appropriate provision of the law.

Where a *diara* officer does not work under Ch. X of the Bengal Tenancy Act, he is required only to ascertain and record the rights of, and not to settle the rents payable by, under-tenants, and the latter are not bound to pay the rent determined by the *diara* officer under s. 2 of the Bengal Alluvial Land Settlement Act of 1858. C DHIRENDRA CHANDRA RAI *v.* HABIB ULLAH, 29 C. W. N. 505; (1925) A. I. R. (C.) 758 442

——— **ss. 102 (e), 103B**—*Record of Rights, entry in—Presumption of correctness—Rebuttal—Landlord and tenant—Suit for rent—Entry in Record of Rights proved incorrect—Procedure.*

Section 102 (*e*) of the Bengal Tenancy Act requires a Revenue Officer to determine the existing rent and not to settle a fair rent in respect of a tenancy.

After a Record of Rights has been finally published a presumption arises under s. 103B of the Bengal Tenancy Act that the entry therein with regard to the rent of a tenancy is correct; in other words in respect of an entry of rent, the presumption arises that what has been recorded is a correct statement of the existing rent. This presumption may, however, be rebutted and the entry may be proved by evidence to be incorrect. This evidence may be either evidence external to the settlement proceedings, or evidence of matters apparent on the face of those proceedings. Where, for instance, the very statement of his reasons for his conclusions given by the Revenue Officer shows that he did not determine the existing rent but an imaginary rent, the presumption with regard to the correctness of the entry in the Record of Rights is sufficiently rebutted.

Where in a suit for rent the landlord relies upon the relevant entry in a finally published Record of Rights, but the entry is proved to be incorrect, the only course open to the Court is to make a decree on the basis of the admission of the tenant. C RAMA NATH SAUT *v.* OFFICIAL TRUSTEE, 29 C. W. N. 517; (1925) A. I. R. (C.) 799 1014

——— **s. 173**—*Order setting aside sale—Appeal; whether lies.*

No appeal lies at the instance of the auction-purchaser against an order setting aside a sale under s. 173 of the Bengal Tenancy Act. C SURENDRA NATH *v.* LAKSHAN CHANDRA RAY 744

Bombay City Police Act (IV of 1902), s. 33 (g).
See EXTRADITION ACT, 1903, ss. 10 (4), 23 100

Bombay District Municipal Act (III of 1901), ss. 59, 60, 71—*Water supplied by Municipality through private connection—Charge leviable, whether "tax"—Rules regulating supply of water and payment therefor—Procedure.*

Bombay District Municipal Act—concld.

Where it is optional with the owner of certain premises to have water supplied to him by the Municipality by means of a private connection and the water is so supplied to him under an arrangement with him, the payment which the owner is required to make in respect of the supply of water cannot be regarded as a "tax" which has been "imposed" upon the owner. It is merely the price of water supplied to him by the Municipality. Such a charge does not constitute a tax imposed within the meaning of s. 59 of the Bombay District Municipal Act, but is only a payment due under s. 71, sub-s. (1), cl. (*b*) of the Act. The rules relating to the levy of such a charge cannot, therefore, be regarded as *ultra vires* and illegal merely because they have not been made in accordance with the provisions of s. 60 of the Act. S COMMITTEE OF MANAGEMENT *v.* RAMCHAND ZOWNKIRAM, (1923) A. I. R. (S.) 1; 16 S. L. R. 98 258

——— **ss. 96, 174**—*Reference to Collector—Advice by Collector, whether order—Order passed on application of person not owner, whether binding on owner—Application for permission to build—Municipality, power of, to refuse application.*

Where before deciding a matter a Municipality refers it to the Collector for his advice and the Collector advises that a previous order passed by him should be adhered to, the advice given by the Collector cannot be treated as an order under s. 174 of the Bombay District Municipal Act, which only gives the Collector power to suspend an order which a Municipality has actually made.

Where a person who is not the owner of a piece of land makes an application to the Municipality for permission to build upon the land an order passed on such application is not binding on the real owner, and it is not necessary for the latter to have the order set aside.

A Municipality has no power on an application to build to pass an order which practically amounts to a refusal. It is entitled to direct, that the proposed building should be set back to a certain distance from the street but it is not entitled to order that on each side of the proposed building open spaces should be left with the object of preventing the applicant from building at all. Such an order is *ultra vires* of the Municipality and cannot be brought within its powers under s. 96 of the Bombay District Municipal Act. B AHMED SULEMAN JIVA *v.* RANDER TOWN MUNICIPALITY, 27 Bom. L. R. 429; (1925) A. I. R. (B.) 345 948

——— **ss. 131, 150**—*Notice to occupier to put land in sanitary condition—Occupier, liability of—Disobedience—Landlord, responsibility of, whether can be pleaded in defence.*

Where a notice is served on the occupier of a plot of land under s. 131 of the Bombay District Municipal Act calling upon him to put the plot in a sanitary condition, as provided by the rules of the Municipality, and the notice is disobeyed, it is not open to the occupier to plead that as between himself and the landlord, it was the latter's duty to comply with the notice. S HAJI UMER *v.* EMPEROR, 18 S. L. R. 104; 26 Cr. L. J. 952 104

Bombay High Court Original Side Rules, rr. 529, 530—*Practice—Taxation—Warrant to tax—Warrant to review—Procedure—Costs of Counsel attending, before Taxing Master, whether can be*

Bombay High Court Original Side Rules—concld.

allowed—Second warrant to review, whether competent—Res judicata.

The procedure on the taxation of a bill in the Taxing Office is that the bill is first taxed roughly by the clerks in the office and then more carefully by the Taxing Master. Thereupon the warrant to tax issues. On that the parties are heard and any party dissatisfied with the Taxing Master's decision can take out a warrant to review under r. 529. The parties are again heard by the Taxing Master and any party dissatisfied with his decision on the review can apply for a certificate. With this certificate the Taxing Master states the grounds for his decision on the points on which a certificate is asked for. The matter then comes before the Chamber Judge for a review of the taxation.

On the warrant to tax the party taking the taxation must pay the costs of the proceedings of that warrant. But if the Taxing Master is of opinion that the party bringing in the bill has unnecessarily or vexatiously increased the costs he may report accordingly and the Chamber Judge will make such order as to those costs as he thinks fit. The proper procedure in such a case is by summons.

The costs of the warrant to review should follow the event on such review, and in a proper case the Taxing Master has power to award costs against the party taking out such a review.

It is not, however, the practice to allow costs of Counsel attending before the Taxing Master.

Where a warrant of review is taken out but is subsequently abandoned, a second warrant of review is not competent as it is not contemplated by rr. 529 and 530 of the Bombay High Court Original Side Rules and would be barred by the application to these proceedings of the principles of *res judicata*. **B** JIVANLAL PANALAL *v.* BAI MANCHHA, 27 Bom. L. R. 532; (1925) A. 1. R. (B.) 355 **1043**

Bombay Regulation V of 1827, s. 14. *See* TRANSFER OF PROPERTY ACT, 1882, ss. 60, 72, 83, 84 **129**

Bombay Rent (War Restrictions) Act (II of 1918), s. 10A—*Proceedings for restoration and compensation—Expiration of Act, effect of—Proceedings, whether can be continued—Temporary Statute, expiration of, effect of, on pending proceedings.*

Civil proceedings which only arise by virtue of a temporary Statute cannot be continued after the expiration of the Statute.

Proceedings which it is permissible for a tenant to take under s. 10A of the Bombay Rent (War Restrictions) Act, are not primarily proceedings to recover either an ascertained sum or liquidated damages. They must be instituted in the first instance for the purposes of getting an order for restoration from the Court, and it is only when the Court is of opinion not only that the tenant in the circumstances of the case is entitled to restoration but also that the landlord has not acted *bona fide*, that the Court can direct the payment of compensation to be made to the tenant by the landlord.

Where, during the pendency of proceedings under s. 10A of the Bombay Rent (War Restrictions) Act, for restoration to possession and compensation the Act expired:

Held, that the proceedings could not be continued and were *ipso facto* determined. **B** R. K. MODY & Co. *v.* MAHOMEDBHAI ABDOOL HOOSSEIN & Co., 27 Bom. L. R. 595; (1925) A. I. R. (B.) 378 **793**

Buddhist Law, Burmese—*Adoption*—Kittima *adoption*—Apatittha *adoption—Surrounding circumstances—Relationship of parties—Amendment of plaint—Alternative claim.*

Among the Burmese, the *kittima* and the *apatittha* forms of adoption are quite distinct. The former is an adoption with a view to inherit and the latter merely for bringing up the child out of pity.

The Burmese expression for the English word "adopted" does not clearly give the idea of adoption as one's own child. The expression is used in connection both with the *kittima* form of adoption and the *apatittha* form. Therefore, the use of the expression by an alleged adoptor without the necessary amplifying words is not a sufficient proof of a *kittima* adoption.

The treatment of a niece by his alleged adoptive father somewhat like a daughter does not raise any presumption of an adoption with a view to inherit, especially when she is an orphan child. If the parties were strangers the fact would be very important.

A plaint based on a *kittima* adoption cannot be amended in appeal by an alternative claim of an *apatittha* adoption, as the two forms of adoption are entirely different. **L B** SHWE KIN *v.* MAUNG SIN, 10 L. B. R. 376 **673**

——— *Adoption*—Kittima *form, essentials of—Wife, whether can adopt without knowledge or consent of husband—Public declaration*—"Shinbyu", *effect of*—"Mwe-za-de", *significance of.*

A *kittima* son or daughter should be adopted with the intention, publicly signified, of taking the adoptee as a son or daughter who will inherit. The intention may be expressed at the time of the taking or later; or may be inferred from a long course of conduct making such intention public. It may happen that a child is at first taken casually and without any intention that it should ultimately occupy the same legal position as that of a natural-born child, but later on, for a variety of reasons, the adoptive parents may come to look upon the son or daughter as their own and invest the child with privileges and duties which clearly show the subsequent formation of the required intention.

The use of the word "*mwe-za-de*" by the witnesses in describing an adoption is not sufficient to establish a *kittima* adoption.

When the donor of an image, or a religious or other charitable building, sets up a public record of a gift and in it mentions the names of his or her relatives, both dead and living, it can safely be assumed that the relationship between the donor and those whose names are thus included is definitely admitted and proclaimed, and where one of them is an adopted son, but is referred to simply as a son, it must be taken that a *kittima* adoption was intended.

Among Burman Buddhists, when a person undertakes to be the sponsor of a boy, who is going to enter the monkhood as a novice, he generally acts in *loco parentis* to that boy; but the fundamental idea in his doing so is that he is himself acquiring merit therefrom, and hence it is a universal custom for well-to-do persons to *shinbyu* not only their own sons, but also the sons of others whenever opportunity offers. Thus, though the act of performing the ceremony is, in some cases, *prima facie* evidence that the

Buddhist Law, Burmese—concld.

donor of the feast regarded the novice as his son, it is by no means a clear indication in every instance that anything more than a charitable intent, sometimes coupled with a love of display, was in the donor's mind. Where several boys are *shinbyued* at the same time, and none of them is a natural-born son, no presumption in favour of adoption can properly arise in the absence of a direct and public declaration of relationship at or about the time of the ceremony.

One of a Burman Buddhist couple cannot legally adopt an heir without the knowledge or consent of the other. The plaintiff lost his mother while still an infant and his father was unable to rear him. *M. N.* with her husband's subsequent approval, gave the child a home, fed and clothed him, and took some interest in his education. While he was still a little boy, she made statements and allowed it to be known that she had adopted a son, and many people in the village looked upon the plaintiff as the adopted son of *M. N.* When he grew to adolescence, she took part in his *shinbyu* along with six other boys, and, later, finding that he was not inclined to study, utilized his services in field work. She took no interest in his marriage, or in his wife and children, and, beyond permitting his wife to use a vacant house belonging to her as a maternity shelter, did not provide any place of residence for them. In return for his labour during many years, the plaintiff was allowed to work a small area of paddy land on payment of rent, and his name was included as joint owner of a piece of land bought by her and two others:

Held, that on the state of facts proved it could not be held that there had been a *kittima* adoption of the plaintiff by *M. N.* and her husband. R MAUNG PO KAN *v.* DAW AT, 1 R. 102; (1923) A. I. R. (R.) 189 **686**

Bundelkhand Alienation of Land Act (II of 1903), ss. 2, 16—*Civil Procedure Code (Act V of 1908), s. 102—Provincial Small Cause Courts Act (IX of 1887), s. 25—Execution of decree of Small Cause Court on Regular Side—Appeal, second, whether lies—Revision—Trees constituting grove, whether land.*

Appellant obtained a decree from the Court of Small Causes against the respondent. The decree was transferred to the Court of the Munsif in order to enable the decree-holder to attach immoveable property. The appellant sought the attachment of certain groves held by the judgment-debtor in an area to which the Bundelkhand Alienation of Land Act applied. The respondent objected that under s. 16 of the Act the groves were not saleable in execution of the decree. The objection was allowed by the Executing Court and its order was upheld on appeal. Appellant came up to the High Court in second appeal:

Held, (1) that a second appeal was barred by the provisions of s. 102 of the C. P. C.;

(2) that the order of the lower Appellate Court was, however, subject to revision under s. 25 of the Provincial Small Cause Courts Act;

(3) that the trees which constituted the groves, apart from the land on which they stood, were not "land" within the meaning of the definition laid down in s. 2 of the Bundelkhand Alienation of Land Act, and that, therefore, s. 16 of the Act was not a bar to the sale of the trees appertaining or belonging to the groves held by the respondent in execution of appellant's decree. A PANCHAITI AKHARA *v.* BENI BAHADUR SINGH, L. R. 6 A. 277 Civ.; (1925) A. I. R. (A.) 587 **262**

Burden of proof. *See* CUSTOM—PRE-EMPTION. **298**

——— *See* SALE OF GOODS **218**

——— *Contract, suit on—Minority, plea of.*

Where in a suit to enforce a contract, the defendant asserts that he was a minor at the date of the contract, the burden to prove the same lies on him.

Where a plaintiff wishes to enforce a contract it is for him to prove the validity of the contract on which he relies. But the age of a person entering into a contract with him is not such an essential part of the contract as must be proved by a plaintiff.

When a person enters into a contract as a major he really makes an admission that he is of age. If in spite of such an admission he asserts that he was not of age at the date of the contract the burden of proof is on him to establish the fact. A KANDHAI LAL *v.* DEBI PRASAD, L. R. 6 A. 219 Civ.; (1925) A. I. R. (A.) 399 **778**

——— *Grant by Government—Presumption of ownership—Burden of proof.*

Merely because Government has issued a *patta* of certain land to some body there is no presumption that Government are entitled to the land of which they have purported to make a grant, and it is always for the grantee to make out that the grantor had a title to the property and was entitled to make a grant of it. M ADINARAYANA *v.* KALAMALLA VENKATA SUBBAYA, 48 M. L. J. 411; (1925) A. I. R. (M.) 752 **46**

C. I. F. contract, *incidents of—Obligations of buyer and seller—Documents of title, delivery of—Insurance—Bill of lading and delivery order, difference between—Repudiation, what is—Refusal to take delivery on wrong ground—Valid ground, whether can be subsequently urged—Evidence Act (I of 1872), s. 92—Written contract—Evidence to vary incidents of contract, admissibility of—Conduct of parties.*

Under an ordinary contract on C. I. F. terms the seller has, firstly, to ship at the port of shipment goods of the description contained in the contract; secondly, to produce a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly, to arrange for an insurance upon the terms current in the trade which will be available to the buyer; fourthly, to make out an invoice and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage.

The bill of lading represents the goods in law and in fact and its possession places the goods at the disposal of the purchaser.

While a transfer of a bill of lading operates as a delivery of the goods a transfer of the delivery order or a dock warrant operates only as a token of authority to take possession and not as a transfer of possession.

But it is open to the parties to a C. I. F. contract to substitute by agreement a delivery order for a bill of lading. Such a variation, however, does not affect the essentials of a C. I. F. contract so as to relieve the seller from the obligation of tendering a policy of insurance to the buyer.

The goods comprised in a C. I. F. contract must be covered by an effective policy of insurance; an open cover taken out by the seller protecting all goods shipped by him is not sufficient and the policy must be tendered even if the goods arrive safely.

A C. I. F. contract is not a mere sale of documents. It is still a contract for the sale of goods, though it is to be performed by transfer of proper documents.

The documents must be tendered as soon as possible after the seller has destined the cargo to the buyer. If there is a mail, the seller must transmit the documents by mail. The contract is performed in fact, and the date of its performance is the date, when the documents would come forward, the seller making every reasonable effort to forward them. In case of non-delivery, the contract is broken at the time when the documents ought to have been tendered, and not when the goods arrive, and damages must be estimated accordingly.

The buyer is bound to pay on tender of the shipping documents, and he is not entitled to refuse payment until he is given an opportunity for inspecting the goods.

Where in a contract for the sale of goods, the buyer clearly shows his intention not to be bound by and to repudiate the contract, it amounts to a breach of the contract. In such a case the seller may treat the notice of intention as inoperative, in which case he keeps the contract alive for the benefit of the seller as well as his own; or, he may treat the repudiation as a wrongful putting an end of the contract, and may at once bring his action as on a breach of it. In the latter case, the repudiation operates as a waiver of conditions precedent to be performed by the seller; the buyer cannot, after repudiation, set up as a defence to the action for damages that the goods were not in conformity with the contract. Nor can he, in the case of a C. I. F. contract, raise the defence that the seller had not the proper documents to tender. But the repudiation which absolves the seller from the performance of conditions precedent must have been made before the due date for the performance of the contract. This date, in the case of a C. I. F. contract, is the date on which the documents ought to have been tendered. A repudiation made after that date does not operate as a waiver of the performance of conditions precedent on the part of the seller.

A buyer who rejects goods on a wrong ground is not thereby precluded from relying on a valid ground which in fact exists. Thus a buyer under a C. I. F. contract who refuses to take delivery on the ground that the goods are of an inferior quality is not precluded from proving at the trial of the action that the proper documents were not tendered to him by the seller.

To constitute a repudiation, one of the parties to the contract must make quite plain his intention not to perform the contract.

Incidents which are impliedly contained in a written contract, whether by construction of the terms or by implication of law, cannot be varied by extrinsic evidence.

Evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract, where such meaning is doubtful, but not where the meaning is plain: nor is it admissible to enlarge or vary the terms of the contract.

Evidence of the course of previous dealings between the parties to show that though the contract between the parties was on C. I. F. terms the buyer was not entitled either to a bill of lading or to a policy of insurance, and was bound to pay against the delivery telegram, is inadmissible under s. 92 of the Evidence Act, as its effect would be to vary the incidents of a C. I. F. contract. **B** STEEL BROS. & CO. LTD. *v.* DAYAL KHATAV & Co., 25 Bom. L. R. 1063; 47 B. 924; (1924) A. I. R. (B.) 247. **67**

Calcutta Municipal Act (III of 1899), s. 228, *construction of—Rate assessed on building and land, whether charge on holding—Interpretation of Statutes.*

In the interpretation of a Statute it is sometimes necessary to read the conjunctions "or" and "and", one for the other.

The policy of s. 228 of the Calcutta Municipal Act is to make the holding primarily responsible for the rates assessed on it. When the Act speaks of the rates on any building or land it includes a tax which has been assessed on the land and the house taken together. The expression "building or land" in the section includes the case of a rate assessed on a building and land and arrears of such rate become a charge on the land and the house. **C** NAYAN MANJURI DASI *v.* CHAIRMAN, HOWRAH MUNICIPALITY **229**

Calcutta Rent Act (III of 1920), s. 15—*Application for fixing standard rent—Premises originally let as part of larger premises—Rent Collector, power of, to make enquiry determining proportionate rent of premises in dispute.*

Where an application is made for fixing the standard rent in respect of premises which were originally let as part of larger premises, the Rent Collector has power to make an enquiry as to what portion of the rent originally payable in respect of the entire premises can be allocated to the premises in respect of which the application is made, so as to determine the question whether he has jurisdiction to entertain the application at all. **C** HURSUK DAS THAKUR DAS *v.* GOURI CHARAN LAW **796**

Carriage of goods—*Charter party—"Advance freight," what is—Advance, payment of, for voyage—Voyage impossible—Suit for refund, maintainability of—Substitution of ship, when enforceable.*

Under a contract of charter party plaintiff paid a sum of money to defendant, a ship-owner, as advance for carrying certain cargo for two voyages, but no voyage was made as the vessel was stranded on its way to load the cargo for the first voyage. In a suit for the refund of the advance:

Held, that the payment was purely an advance and not in the nature of "advance freight" at all and was, therefore, recoverable.

Per *Phillips, J.*—Advance freight must connote freight, and the idea of freight does not arise until the voyage has actually begun, or at any rate until the goods for which the freight is payable have been loaded on the ship or accepted by bills of lading.

Per *Odgers, J.*—A ship-owner is only entitled to compel the acceptance of a substituted ship after the voyage in the ship contracted for has begun. **M** SIVANADIAN CHETTIAR *v.* BATCHU SURAYYA, 48 M. L. J. 413; 21 L. W. 445; (1925) M. W. N. 303; (1925) A. I. R. (M.) 727; 48 M. 459 **127**

——— *Risk Note Form "A," execution of—Burden of proof—Liability of Railway Company—Company when can insist on Risk Note being executed.*

Risk Note Form "A" is to be used when articles intended for carriage are either already in a bad condition or so defectively packed that they are liable to damage, leakage or wastage in transit. When goods are carried under this Risk Note, the obligation of the carrier is simply to deliver them to the consignee at destination; he is not responsible for the condition in which the goods are delivered,

Carriage of goods—concld.

If a consignor consents to execute a Risk Note in Form "A" he must be bound by it unless he shows that he was compelled to execute it by fraud or mis-representation.

In a suit to recover damages in respect of goods consigned to a Railway Company for carriage under Risk Note Form "A" the burden is on the plaintiff to show that the consignor was compelled by force, fraud or mis-representation to execute the Risk Note, when, as a matter of fact, the goods were properly packed and not damaged.

It is open to a Railway Company to require that perishable articles consigned to it for carriage should be packed securely.

Tobacco is a perishable article and as single bagging is not sufficient to keep out rain when a consignment of tobacco in single bagging is made over to Railway Company for carriage, the Company is entitled to require the consignor to execute a Risk Note in Form "A." N MADRAS & SOUTHERN MARATHA RY. Co. *v.* RAMNATH, (1925) A. I. R. (N.) 333 **1031**

Caste Disabilities Removal Act (XXI of (1850) —*Hindu widow, conversion of, to Islam—Claim to succeed to property under Will, whether affected.*

Where a Hindu widow becomes a convert to Islam her conversion does not affect her right to property to which she is entitled under the Will of her father. M GANSHAMDOSS NARAYAN DOSS *v.* SARASVATHI BAI, 21 L. W. 415; (1925) M. W. N. 285; (1925) A. I. R. (M.) 861 **621**

C. P. Land Revenue Act (II of 1917), ss. 78, 80, 106—*Order of Deputy Commissioner declaring customary rights of tenants—Declaration, suit for, by* Malguzar, *maintainability of—Jurisdiction of Civil Courts.*

Defendants, who were the tenants of the plaintiff *malguzar*, complained to the Deputy Commissioner that the plaintiff was interfering with their rights and the Deputy Commissioner passed an order declaring that the tenants had the right to take water from the village tank for building purposes and to remove earth and that they could take fuel and timber from the *malguzari* jungle and were entitled to graze a number of cattle therein. He also ordered that the excess grazing dues recovered by the plaintiff should be refunded to the defendants and warned the plaintiff against molesting the defendants in the exercise of their rights. Plaintiff, thereupon, brought a suit for a declaration that the order of the Deputy Commissioner was erroneous and for a declaration of the proper rights of the defendants and for an injunction against them :

Held, that the order of the Deputy Commissioner fell within the purview of s. 78 of the C. P. Land Revenue Act, and that the plaintiff's suit was, therefore, maintainable under s. 80 of the Act. N MADHORAO *v.* LAXMANRAO **1054**

——— **s. 80**—*Settlement entry recording villagers' right—Suit for cancellation of entry, whether maintainable—Order passed by Settlement Officer—Presumption—Burden of proving contrary—Order not produced—Presumption, whether arises.*

A suit for the cancellation of the Settlement entry of a *mouza* in respect of the right, recorded therein of the villagers, to water their cattle at the plaintiff's tank, and for an injunction against the villagers to prevent their doing so is maintainable under s. 80 of the C. P. Land Revenue Act.

C. P. Land Revenue Act—concld.

Every order passed by a Settlement Officer must be presumed to have been passed after due enquiry, and the burden of proving that it was not so passed lies on the person who alleges it.

Where, however, the order has not been produced, no presumption arises as to whether it does or does not contain any reference to any particular matter as being passed after enquiry. N RAGHO *v.* R. M. DOYE, 8 N. L. J. 36; (1925) A. I. R. (N.) 324 **81**

C. P. Tenancy Act (XI of 1898), s. 45, cls. (1) and (5), Exp.—Sir *land—Lease—Transfer by* malguzar, *without sanction of Deputy Commissioner—Position of lessee—"Lessee," meaning of.*

The rights of an ordinary tenant in *sir* land held by him remain unaffected by the accrual of the occupancy tenant right in the *sir* land under s. 45 (1) of the C. P. Tenancy Act.

The occupancy rights in *sir* land of the original proprietor are compatible with the existence of ordinary tenants on the same land.

In other words *sir* rights and occupancy rights may often exist side by side.

The Tenancy Act contemplates leases to ordinary tenants of *sir* lands apart from transfers of the kind provided for in s. 45 (1), which applies only to leases or other transfers of proprietary rights in *sir* fields and does not apply to agricultural leases which do not affect the proprietary rights and, therefore, do not require Deputy Commissioner's sanction.

A "lease," within the meaning of the Explanation to s. 45 of the C. P. Tenancy Act, is a transfer of only the proprietary rights in the *sir* lands and does not as such require the sanction of the Deputy Commissioner. N DURGAPRASAD *v.* THAKURPRASAD **72**

——— **ss. 46, 47**—*Occupancy holding—Trees, interest in, nature of—Trees, whether transferable—Transfer of holding—Revenue Officer, jurisdiction of, to put next heir in possession, extent of—Order of Revenue Officer, whether can be questioned.*

Trees of all kinds standing on an agricultural holding are part and parcel of the holding, at least in those cases where the property in them has not been expressly severed from the property in the soil on which they stand.

In order that there should be a valid severance of the interest or property in the trees, the trees must become the separate property of a person other than the owner of the soil on which they stand, and the interest in the trees as also in the soil must be of a nature transferable under the law applicable to the land.

Inasmuch as, in trees standing on occupancy holdings the tenants hold analogous rights, and the interest of occupancy tenants in their holdings has by law been made non-transferable, the property in the trees is also non-transferable and is not capable of being validly severed or parted with, apart from the soil of the holding in which the trees stand.

Section 47 of the C P. Tenancy Act does not restrict the jurisdiction of the Revenue Officer to the giving of possession to the next heir of only that part of the holding which was sought to be transferred. The very idea of letting in the next heir and putting him in possession of the holding by avoidance of the transfer assumes that the transferring tenant was dead at the date of the transfer. He cannot, consequently, be treated as only partially dead and partially alive. Once the matter is decided under s. 47 of the C. P. Tenancy Act and possession of the holding is

C. P. Tenancy Act—1898—concld.

transferred to the claimant, no power is given to any outside authority to revise the decision of the Revenue Officer and to divest the claimant of the right vested in him under the order. N FAKIRA *v.* RAMKISAN, (1925) A. I. R. (N.) 277; 21 N. L. R. 25 1045

——— **s. 49**—*Lease, permanent—Lessee, whether "proprietor"—Determination of lease—Lessee, whether occupancy tenant of* sir *lands.*

A lessee whether permanent or not is not a "proprietor" within the meaning of s. 49 of the C. P. Tenancy Act and does not retain any interest as an occupancy tenant in the *sir* land comprised within his lease on the determination of the lease. N BALWANTRAO *v.* FARID SAHEB, 8 N. L. J. 44; (1925) A. I. R. (N.) 274 253

C. P. Tenancy Act (I of 1920), ss. 12, 13—*Contract Act (IX of 1872), s. 23—Occupancy right, transfer of, whether void or voidable—Surrender—Lease to third person—Loss of possession by lessee—Suit to recover amount paid to landlord, whether maintainable.*

A transfer of occupancy or ordinary tenancy rights is not unlawful within the meaning of s. 23 of the Contract Act. Such a transfer is only voidable in the manner and to the extent provided for by the C. P. Tenancy Act; it is not absolutely void.

Where a tenant surrenders his tenancy right to the landlord and the landlord leases the land to a third person and the latter subsequently loses possession of the land leased to him, he is entitled to recover the sum paid by him to the landlord on the ground of failure of consideration. N VITHOBA *v.* VISHNU 1043

——— **ss. 12, 13, 35**—*Occupancy holding—Relinquishment by tenant in favour of co-sharer, effect of* Lambardar, *right of, to let out holding—Abandonment, what amounts to—Notice—Publication—Transfer of Property Act (IV of 1882), s. 43, applicability of, in case of doubtful title.*

A relinquishment of his holding by a tenant in favour of a co-sharer for a private debt due to him is a transfer and not a surrender, and is governed by the provisions of s. 12 of the C. P. Tenancy Act. Such a transfer is liable to be set aside by the *lambardar* under s. 13 of the Act, and until steps are taken to have the transfer set aside under that section the *lambardar* has no right to let out the holding to a third person.

When a tenant transfers his occupancy holding and abandons possession of the same he must be taken to have abandoned his holding. But the landlord is not entitled to enter on the holding unless he files a notice in the office of the Tahsildar, under s. 35 of the C. P. Tenancy Act, stating his intention to treat the holding as abandoned and such a notice is duly published under the section.

A lease by a *lambardar* of a holding which is in the actual possession of a tenant, and on which the *lambardar* has no present right to enter, is absolutely illegal and void.

Semble.—Section 43 of the Transfer of Property Act cannot operate on a doubtful title. N DHEKAL *v.* RAGHU, 8 N. L. J. 52; (1925) A. I. R. (N.) 259 115

——— **ss. 12 (1) (ii), 13**—*Occupancy tenant—Transfer of holding—Ejectment suit—Jurisdiction of Civil Court—Test.*

Where the transfer of an occupancy tenant right would be valid between the parties thereto except for the prohibition contained in s. 12 of the C. P. Tenancy Act, 1920, it can only be avoided in the manner and to the extent provided by s. 13 thereof. No suit to avoid it can be maintained in the Civil Court.

In other words no landlord can sue in a Civil Court to evict a person to whom an occupancy tenant has made over his holding unless that person is one of those persons mentioned in s. 12 (1) (*ii*) of the C. P. Tenancy Act of 1920 or holds under a lease for not more than one agricultural year granted not more than two months before the beginning of that year, without any covenant to renew being attached to it; in all other cases he must apply to a Revenue Officer under s. 13 of the Act. N TIJAU *v.* GOPI 826

C. P. Tenancy Act—1920—concld.

——— **Sch. II**—*Landlord and tenant—Surrender—Licensee from tenant, position of—Suit by fresh grantee to eject licensee of former tenant—Limitation, commencement of.*

On the surrender of a tenancy a license granted by the former tenant expires and the licensee becomes a trespasser from the date of the surrender, and his possession becomes adverse to a fresh grantee of the tenancy rights from the *zemindar*, from the date of the grant, and limitation for a suit to eject the licensee by such grantee begins to run from the date of the grant under Sch. II of the C. P. Tenancy Act. N MAHAMAD NIYAJUDDIN KHAN *v.* JETHU 823

Cess Act (IX of 1880), s. 41. *See* BENGAL TENANCY ACT, 1885, s. 60 439

City of Bombay Municipal Act (III of 1888), ss. 3 (z), 394, 515—*Specific Relief Act (I of 1877), s. 45—Stables—License, refusal of—Municipal Commissioner, discretion of—High Court, power of, to interfere—Court prohibiting issue of license on ground of private nuisance—Abatement of nuisance—License, whether can be granted under changed circumstances—Public and private nuisances, distinction between—Remedies.*

Where a Municipal Commissioner has acted illegally in refusing to exercise his discretion in granting a license under s. 394 of the City of Bombay Municipal Act, the High Court would interfere under s. 45 of the Specific Relief Act and order him to exercise his discretion and issue the license.

Section 515 of the City of Bombay Municipal Act is designed to empower a Magistrate to give summary relief by way of prevention or otherwise, not only in respect of a public nuisance but in respect of any nuisance as defined by s. 3 (*z*) of the Municipal Act which includes both private and public nuisances.

Where in proceedings under s. 515 of the City of Bombay Municipal Act relating to certain stables the Court thinks that the nuisance complained of relates to the whole locality, the nuisance is a public nuisance, but if it relates only to one or two houses it is a private nuisance. The relief which the Court can give in both cases under s. 515 is, *inter alia*, abatement of the nuisance by ordering the Municipal Commissioner not to grant the license for the stables. But it does not follow from the Court making an order on the Commissioner that he should not grant a license that that order is to govern all circumstances and all cases at all times.

Where the order of the Court proceeds on the assumption that a private nuisance exists, the Commissioner is at liberty to grant a license when he finds that the private nuisance complained of in the proceedings under s. 515 of the City of Bombay Municipal Act has ceased to exist, owing to the residents of the particular houses affected by the nuisance having vacated those houses.

City of Bombay Municipal Act—concld.

With regard to a private nuisance each individual has his remedy in civil law by way of injunction and damages. He has further his remedy under s. 515 of the City of Bombay Municipal Act. It is necessary for the protection of the health and comfort of the inhabitants of a big city like Bombay that any resident who is affected by the nuisance in the manner mentioned in s. 3 (*z*) of the Act, should have a right to go to a Magistrate over the head of the Commissioner or the Corporation that the Commissioner should be restrained from exercising his powers so as to affect the complainant's individual right as a resident by the creation of a private nuisance. If the private nuisance affects two or three houses only, the inhabitants of the houses might either join in a civil suit or a complaint before a Magistrate and ask the Magistrate to decide specifically that a particular nuisance is a private nuisance affecting the residents of those particular houses. With regard to a public nuisance also, any resident can ask for an order under s. 515, and if the Court finds a public nuisance proved, the order of the Court would give relief to the public of the locality as against the nuisance and the vacating of any one or more houses would not mean abatement of the nuisance, as the nuisance is in respect of the public. In the case of a public nuisance no particular limits need be defined. B ALIMAHOMED SALEMAHOMED *v.* MUNICIPAL COMMISSIONER, BOMBAY, 27 Bom. L. R. 581 771

Civil Procedure Code (Act V of 1908), ss. 2 (2), 47, 151, O. IX, r. 13—*Execution of decree—Objection by legal representative of deceased judgment-debtor—Objection allowed* ex parte—*Application to set aside* ex parte *order, maintainability of—Inherent power of Court.*

In execution of a mortgage-decree, the legal representative of the judgment-debtor, who had been brought upon the record of the execution proceedings after the death of the judgment-debtor, filed certain objections under s. 47 of the C. P. C. On the date fixed for the hearing of the objections the decree-holder did not appear and the Court passed an *ex parte* order allowing the objections. The decree-holder put in an application for setting aside the *ex parte* order alleging that he had no notice of the date of hearing:

Held, (1) that the objector having set up his own right to the property his objections must be taken to have come under s. 47 of the C. P. C.;

(2) that the order allowing the objections, although an *ex parte* order, amounted to a decree under the provisions contained in sub-cl. (2) of s. 2 of the C. P. C.;

(3) that, therefore, O. IX, r. 13 of the Code was applicable to the matter and it was competent to the Court to set aside the *ex parte* order on being satisfied that there were sufficient reasons for the absence of the decree-holder on the date of hearing;

(4) that in any case the Court had inherent jurisdiction to review its *ex parte* order provided sufficient cause was shown. A JHUNNI LAL *v.* NATHA RAM, L. R. 6 A. 278 Civ. 287

——— **s. 2 (11), O. XXII, r. 4, O. XXXIV, r. 3**—*Foreclosure suit—Preliminary decree—Death of judgment-debtor—Legal representatives, one of several, brought on record—Decree absolute, whether binding on other legal representatives.*

Where a Court issues a notice to a person supposed to be the only legal representative of a deceased defendant or judgment-debtor who alone is in possession of the estate of the deceased, and holds that the service of notice was sufficient, any decree passed in the suit or proceedings taken in execution, will be considered sufficient to cover the entire estate of the deceased, including the shares of those heirs of the deceased who were not brought on the record and who had not received any notice. In this respect no distinction can be made between the estate of a deceased Hindu and that of a deceased Muhammadan inasmuch as under the Muhammadan Law suits and claims can be effectively brought by a creditor against those legal representatives of the deceased who are in actual possession of his assets so as to make the decrees in such suits binding on all the legal representatives including those who are not made parties to the suits.

In a suit for foreclosure a preliminary decree was passed but the judgment-debtor died before the decree could be made absolute. At the instance of the decree-holder a notice was served on the widow of the deceased who was in sole possession of the entire estate of the deceased and the decree was made absolute and the decree-holder obtained possession of the property:

Held, that the widow of the deceased effectively represented the estate of the deceased in the suit for foreclosure subsequent to the preliminary decree so as to make the absolute decree binding on all the legal representatives of the deceased.

Per *Dalal, J. C.*—By the definition of "legal representative" given in the C. P. C., 1908, the Legislature possibly desired to bring the procedure in India in conformity with that prevailing in England.

Per *Ashworth, A. J. C.*—The alteration of the definition of "legal representative" in the Code of 1908 by the addition of the words "and includes any person who intermeddles with the estate of the deceased" was merely designed to draw attention to the fact that in some cases a mere intermeddler may sufficiently represent the estate of the deceased person.

It cannot be laid down that one out of several heirs of a deceased defendant or judgment-debtor, although in sole possession of the entire estate of the deceased, can in no circumstances be deemed to have sufficiently represented the estate, so as to make a decree binding on other heirs of the deceased who are not parties to it. O KANIZ ABBAS *v.* BALADIN, 12 O. L. J. 37; 2 O. W. N. 34; (1925) A. I. R. (O.) 330; 28 O. C. 177 892

——— **ss. 10, 11, 47, O. XXXIV, r. 8**—*Mortgage—Redemption suit by co-mortgagor—Subsequent suit by another co-mortgagor, whether barred*—Res judicata—*Continuation of proceedings by co-mortgagor—Extension of time for payment.*

A suit for redemption by a co-mortgagor must be treated as a representative suit on behalf of all the co-mortgagors and operates as a bar to a subsequent suit for redemption by any of the other co-mortgagors.

Where, however, no proceedings are taken in the previous suit for redemption after the preliminary decree, the suit must be regarded as still pending and a subsequent suit for redemption by another co-mortgagor would be barred not under s. 11 but by virtue of the provisions of s. 10 of the C. P. C. In such a case another co-mortgagor can apply to continue the proceedings and the Court would have power to extend the time for payment under the proviso to r. 8 (4) of O. XXXIV of the C. P. C. O NARAIN *v.* GAYA DEEN, 1 O. W. N. 910; 28 O. C. 212 290

——— **s. 11**—*Agra Tenancy Act (II of 1901), s. 51*—Res judicata—*Decision on question of law—Ejectment suit.*

Civil Procedure Code—1908—contd.

A decision on a point of law does not operate as *res judicata* if the cause of action in the subsequent suit is different from that in the former suit, as often happens in cases of recurring liability or even in ejectment suits. On the other hand, if the cause of action is the same, the decision would operate as *res judicata*

The right to eject a tenant accrues afresh every year and a previous decision in an ejectment suit between the parties that the suit is not maintainable in a Revenue Court does not operate as *res judicata* in a subsequent suit, it being open to the Revenue Court in a subsequent suit to say that on a correct view of the law it has jurisdiction to entertain the suit. A GANGA *v.* MAMMUD-UN-NISSA BEGAM 789

——— s. 11—*Contract Act (IX of 1872), s. 74*—Res judicata—*Question of law—Interest, high rate of—Penalty.*

A case must be decided upon the law as it stands when the judgment is pronounced and not upon what the law was at the date of a previous suit, and if the law has been altered in the meantime and the effect of the law has been differently interpreted by judicial decision or altered by Statute, a decision on a point of law in an earlier suit will not operate as *res judicata* with regard to the same question in a subsequent suit. For instance, where a stipulation as to the payment of interest contained in a *kabuliyat* is held to be penal and, therefore, unenforceable, and the law is subsequently altered by judicial pronouncements, the decision as to the penal nature of the stipulation will not operate as *res judicata* in a subsequent suit to recover rent on the basis of the same *kabuliyat.*

In the absence of anything to prove undue influence or to show that there was an unconscionable bargain, a mere high rate of interest is not to be treated either as penal or unconscionable. C NABIN CHANDRA SAHA PODDAR *v.* DUDU MIA 767

——— s. 11—*Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15D—Mortgages, several—Suit for account on one mortgage—Plea by mortgagee that account should be taken on all mortgages—Subsequent suit to enforce other mortgages, whether maintainable*—Res judicata.

Where a mortgagor executes several mortgages on the same property and asks for an account on one of those mortgages under s. 15D of the Dekkhan Agriculturists' Relief Act, although the mortgagee can ask that an account should be taken of all the mortgages existing on the property, so that the mortgagor would not be entitled to redeem except on paying what is due on all the mortgages, yet, if the Court takes an account of the one mortgage in which it decides nothing with regard to the validity or the existence of other mortgages at the time when the account is taken, the mortgagee would be entitled to enforce the other mortgages against the mortgagor. The decision in the suit under the Dekkhan Agriculturists' Relief Act will not operate to bar a subsequent suit by the mortgagee to enforce the other mortgages, on the ground of *res judicata.* B MAHADEV NARAYAN JOSHI *v.* SHRIDHARBHAT GOPALBHAT JOSHI, 27 Bom. L. R. 488; (1925) A. I. R. (B.) 311 716

——— s. 11—Res judicata—*Competency of Court.*

Competency in s. 11, C. P. C., has reference to the value of the suit and not to territorial jurisdiction. M *In re* AYISHA BIBI AMMAL 705

——— s. 11—Res judicata—*Landlord and tenant—Suit for rent*—Ex parte *decree—Ejectment suit—Decree, whether operates as* res judicata.

Where a plaintiff, alleging himself to be the landlord of the defendant sues the latter for rent and obtains an *ex parte* decree against him, which is subsequently satisfied by the defendant, the decree operates as *res judicata* on the question of the relationship of landlord and tenant between the parties in a subsequent suit for ejectment. C UMEDALI MUNSHI *v.* GOYJADDI MOLLA 672

——— s. 11—Res judicata—*Mixed question of fact and law—Question of title.*

A judgment operates as *res judicata* with regard to all the findings that are necessary and essential to the judgment.

A finding on a mixed issue of law and fact stands on the same footing as a decision on a question of fact and operates as *res judicata.*

Plaintiff brought a suit for declaration of his title to and recovery of possession of two plots of land, on the allegation that he had purchased the plots in dispute, along with other lands, from a co-sharer of the defendant. His title was declared but it was held that he could not recover possession from a co-sharer and that his remedy lay in a suit for partition. He subsequently brought a suit for partition of the plots which were in dispute in the previous suit and some others, having been deprived of possession by the defendant:

Held, that the question of the plaintiff's title to the plots in dispute in the subsequent suit must be held to be *res judicata* by virtue of the decision in the previous suit, inasmuch as in order to decide that suit it was necessary to decide his title to the whole of the land purchased by him from the co-sharer of the defendant. C RAJENDRA NATH DUTTA *v.* BHABINI DASI 811

——— s. 11—*Suit by Hindu widow to challenge adoption—Decision, whether binding on reversioners*—Res judicata—*Arbitration, reference to—Award, evidentiary value of.*

A suit brought by a Hindu widow to challenge an adoption alleged to have been made by her late husband must be regarded as a representative suit and the decision arrived therein is, in the absence of collusion, binding upon the reversioners and operates as *res judicata* between them and the adopted son.

Where the question of the factum and validity of an adoption is referred to arbitration, the award made by the arbitrators is, apart from its being *res judicata*, a weighty piece of evidence in a subsequent suit between the parties in which a dispute arises as to the alleged adoption. A SHIB DEO MISRA *v.* RAMPRASAD, 22 A. L. J. 690; 46 A. 637; (1925) A. I. R. (A) 79 938

——— s. 11, cl. (4)—*Mortgage—Redemption suit—Properties not included in mortgage included in suit—Delivery of possession—Suit to recover possession of properties wrongly delivered, maintainability of*—Res judicata.

Where in a suit for redemption, the mortgagor includes certain properties as comprised in the mortgage and obtains delivery thereof in execution of the redemption decree, it is not competent to the mortgagee to bring a subsequent suit on the ground that some of the properties so delivered were not comprised in the mortgage and were wrongly delivered. Such a suit is barred by s. 11, cl. (4), C. P. C. M UTTARAVELLI PEDA APPALANAIDU *v.* UTTAR VELLI APPALANAIDU 711

Civil Procedure Code—1908—contd.

——— **s. 11, O. II, r. 2**—Res judicata—*Inconsistent suits.*

Where a claim made in a subsequent suit, if added to the claim in a previous suit, would have been likely to embarass the trial of the suit or to place the plaintiff in a false position, it must be held that it was not incumbent upon the plaintiff to ask for that relief in the former suit, and a suit to enforce such relief cannot, therefore, be barred by the operation of the rule of *res judicata*.

The mere fact that the parties to a subsequent suit are the same as those to a previous suit and that some allegations are common to both the suits, does not necessarily lead to the conclusion that the second suit is barred by *res judicata*.

Plaintiff brought a suit to set aside a sale-deed on the ground that it was fictitious, was not made to pass title and that she had received no portion of the consideration money. It was found that she was entitled to avoid the sale but that she had received a portion of the consideration and a decree was granted in her favour for recovery of possession of the property dealt with by the sale-deed on payment of the sum held to have been received by her as consideration for the sale. She failed to pay the amount and to execute the decree. Subsequently she brought a suit to recover the balance of the consideration money:

Held, that the relief which was claimed in the subsequent suit was entirely inconsistent with the position taken up by the plaintiff in the previous suit and that, therefore, she could not have asked for the relief in the previous suit and that consequently her suit was not barred by *res judicata*. A KANDHAIYA SINGH *v.* KUNDAN, 23 A. L. J. 461; (1925) A. I. R. (A.) 486; 47 A. 561 **257**

——— **s. 11, O. IX, rr. 8, 9.** *See* SUCCESSION ACT, 1865, ss. 50, 187 **621**

——— **s. 11, Expl. IV**—*Limitation Act (IX of 1908), Sch. I, Art. 96—Mortgage—Payment made by mortgagor to one of several mortgagees—Suit on mortgage—Decree for sale—Suit, by mortgagor to recover money paid by him*—Res judicata—*Limitation—Hindu Law—Money received by father—Pious duty of sons to re-pay amount received.*

B, *L*, and *S* were joint mortgagees of certain property. The mortgagor remitted the mortgage-money to the names of the three mortgagees by Money Order, but the amount was received by *S* alone who did not pay their share of the mortgage-money to the other mortgagees. *L* and *S* having died the sons of *L* and *S* and *B* subsequently brought a suit for sale on foot of the mortgage in which the mortgagor put forward the defence of payment but the Court held that payment to *S* alone did not amount to satisfaction of the mortgage-deed and made a decree. Thereupon the mortgagor brought the present suit against the sons of *S* to recover from them the amount received by *S* together with interest:

Held, (1) that with regard to one-third of the amount in suit the plaintiff's claim was barred by the doctrine of *res judicata* inasmuch as in the previous suit he should have put forward the claim that at least one-third of the amount received by *S* should be given credit for to him as against the sons of *S*;

(2) that the claim with regard to the remaining two-thirds was not barred by *res judicata* as the Court in the previous case could not have given a decree to the mortgagor against the sons of *S* for that amount;

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(3) that the suit was governed by Art. 96 of Sch. I to the Limitation Act and that limitation began to run from the date of the judgment in the mortgage suit when the mortgagor discovered his mistake that *S* alone had been paid the money by the Post Office;

(4) that the mere keeping of the money by *S* or delay in distributing it did not amount to mis-appropriation on the part of *S* and that the sons of *S* were, therefore, under a pious duty to re-pay the money received by their father;

(5) that the present suit was not premature inasmuch as a decree for sale had been passed against the plaintiff and the plaintiff had been damaged by the threat of the sale of his property. O GANESH PARSHAD *v.* JOT SINGH **1017**

——— **s. 11, Expl. IV**—*Mortgages, simple and usufructuary—Suit to redeem usufructuary mortgage—Failure of mortgagee to set up simple mortgage in defence*—Res judicata.

Plaintiff held two mortgages in respect of a house, the earlier mortgage being a simple one and the later a usufructuary one. Defendant, who was the purchaser of the equity of redemption of the house, sued plaintiff for possession of the house by redemption of the later mortgage, which was a usufructuary mortgage, and obtained a decree. Subsequently plaintiff brought a suit to recover the amount of the simple mortgage from the defendant and the latter pleaded that as the plaintiff had not set up the simple mortgage in his defence to the prior suit he was barred by the 4th Explanation to s. 11 of the C. P. C., from suing on it:

Held, that as the earlier mortgage which was the subject-matter of the present suit was a simple mortgage and defendant could not in that suit have been compelled to pay the amount due thereon before he could obtain possession of the house, the failure of the plaintiff to set up the mortgage in defence to the earlier suit did not operate as *res judicata* so as to debar him from suing to recover the amount due under that mortgage. L RELU MAL *v.* MASITI, (1925) A. I. R. (L.) 516 **237**

——— **s. 11, Expl. VI**—*Hindu Law—Alienation by widow—Suit by reversioner—Subsequent suit by another reversioner, whether maintainable*—Res judicata.

The reason of allowing a reversioner to challenge an alienation by a Hindu widow in the lifetime of the widow is that the reversioner sues not on his own behalf but on behalf of the entire body of reversioners, or the persons who would be the actual reversioners on the death of the widow. In other words, such a suit by a reversioner comes within the purview of Expl. VI to s. 11 of the C. P. C., and the decision in such a suit is binding on the entire body of reversioners.

A reversioner of a deceased Hindu brought a suit to challenge an alienation effected by the widow of the deceased. It was held that a portion of the property alienated had become the absolute property of the widow by adverse possession and the suit was decreed with regard to the rest of the property. Subsequently another reversioner brought another suit to challenge the same alienation on the same grounds on which it was challenged in the previous suit:

Held, that the suit was barred by *res judicata* and the mere fact that the widow was holding a portion

of the property in dispute not as a representative of her husband but in her own right was immaterial. A BANSIDHAR *v.* DULHATIA, 23 A. L. J. 329; L. R. 6 A. 303 Civ.; (1925) A. I. R. (A.) 483; 47 A. 505 **235**

——— **ss. 11, 100**—*Gujarat Talukdars' Act (VI of 1888), ss. 11, 15, 16—Talukdari Settlement Officer, order of—Appeal, second, whether competent—Order, whether operates as* res judicata.

The Talukdari Settlement Officer is not a Court exercising original jurisdiction, and it cannot be said that because s. 16 of the Gujarat Talukdars' Act gives a right of appeal to the District Judge from the decision of the Talukdari Settlement Officer under s. 15 of the Act, that decision is a decree within the definition in s. 2 (2) of the C. P. C. The District Court hears the appeal as if it were an appeal from a decree of a Court from whose decision the District Court is authorized to hear appeals, but that is a specific right of appeal based on an analogy and the analogy cannot be extended further so as to entitle a party who is dissatisfied with the decision of the District Judge to take a second appeal to the High Court.

The Talukdari Settlement Officer is an administrative officer and not a Court. An order passed by him, therefore, under s. 15 of the Gujarat Talukdars' Act does not operate as *res judicata* in a subsequent suit between the parties in the Civil Court.

In considering the question of *res judicata* the Court must look to the powers of the Court in which the previous suit was instituted and not to the powers of the Court by which that suit was decided on appeal. B AMARSANGJI DUNGARJI JHALA *v.* DEEPSANGJI KAVABHAI JHALA, 27 Bom. L. R. 345; (1925) A. I. R. (B.) 241; 49 B. 442 **588**

——— **s. 21**—*Territorial jurisdiction, transfer of —Pending suits, effect on—Jurisdiction of Court to pass final decree—Waiver of objection—Suit to set aside decree, maintainability of.*

Section 21 of the C. P. C. enacts an exception to the general rule that parties by mutual consent cannot confer upon a Court jurisdiction where it has not, is one of territorial jurisdiction the plea may be waived.

Where an objection to territorial jurisdiction is cured by waiver, it is cured not merely for the purpose of the Appellate or Revisional Court but cured entirely and for all purposes, whether there was want of jurisdiction at the institution of the suit or at any stage during the progress of it.

In a suit on a mortgage, the preliminary decree was passed by the Kumbakonam Sub-Court. Subsequently in virtue of a Government Notification, the territorial jurisdiction over the place wherein the mortgage property was situated was transferred from the Kumbakonam Sub-Court to the Mayavaram Sub-Court, but nevertheless the former Court passed the final decree in the suit. In a suit by one of the mortgagors-defendants to set aside the decree as being absolutely void for want of jurisdiction:

Held, that the objection to want of jurisdiction had been waived and s. 21, C. P. C., cured it and the decree could not, therefore, be challenged as being without jurisdiction even in collateral proceedings.

Per *Phillips, J.*—When a case has been properly instituted in a Court and is pending, the mere transfer of territorial jurisdiction affecting that case does not transfer the proceedings which were actually pending in the Original Court.

The jurisdiction of a Court consists in its power to entertain suits. Once the suit has been entertained, the remaining proceedings taken therein are not taken by reason of any particular territorial jurisdiction, but in the exercise of the powers vested in the Court to try suits generally and consequently the only time at which the territorial jurisdiction comes into operation is at the time of filing the suit. M CHOKKALINGHA PILLAI *v.* VÉLAYUDA MUDALIAR, 47 M. L. J. 448; (1925) A. I. R. (M.) 117 **152**

——— **ss. 21, 38, 39**—*Territorial jurisdiction, transfer of—Case decided without objection by either party—Waiver—Appellate Court, whether will entertain objection.*

On an application for the appointment of a Receiver in a pending suit before a Judge, arguments were heard and the petition was adjourned for orders to a particular day, and meanwhile the Local Government acting under ss. 10 and 11 of the Civil Courts Act, by notification, transferred the territorial jurisdiction of the area in which the suit properties were situate to another Court. The Judge, however, heard the petition without objection by any party and pronounced his order appointing a Receiver. On an appeal against the order objection was raised that the territorial jurisdiction having been transferred, the order was without jurisdiction:

Held, that s. 21 of the C. P. C. was applicable to all cases of want of territorial jurisdiction, and the appellant not having objected to the Judge passing the order and no failure of justice having been caused, the appellant must be held to have waived all objections on the ground of want of jurisdiction and the order was a good and valid one.

When a particular local jurisdiction of one Court is transferred to another by notification under ss. 10 and 11 of the Madras Civil Courts Act, such transfer carries with it automatically all pending suits and proceedings of any and every sort arising out of that local jurisdiction, so that the Court in which they were originally filed loses jurisdiction and the Court to which the local jurisdiction is transferred assumes it. M RAMANI *v.* NARAYANSAMI AIYAR, 47 M. L. J. 192; 20 L. W. 467; (1924) A. I. R. (M.) 697 **341**

——— **s. 24.** *See* GOVERNMENT OF INDIA ACT, 1915, (5 & 6 GEO. V, c. 61), s. 107 **170**

——— **ss. 39, 50, 68, 99, O. XXI, r. 22, Sch. III, Para. 1**—*Execution of decree—Transfer to another Court—Death of judgment-debtor—Execution against legal representative—Procedure—Failure to apply to Court passing decree—Irregularity—Duty of Court —Proceedings transferred to Collector—Civil Court, power to interfere.*

Courts in India have to be careful to see that the process of the Court and the law of procedure are not abused by judgment-debtors in such a way as to make Courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights.

Where a Court passing a decree transfers it to another Court for execution under s. 39 of the C. P. C., and while the proceedings are being carried on in the Court of transfer, the judgment-debtor dies, the Court of transfer is not divested of jurisdiction over the execution proceedings by the death of the judg-

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ment-debtor. On the application of the decree-holder the Court of transfer, which is executing the decree, must issue a notice under O. XXI, r. 22 of the C. P. C. to the person against whom execution is applied for as legal representative of the deceased judgment-debtor. Where such notice is issued and the person against whom execution is applied for acquiesces in the proceedings and submits to the jurisdiction of the Court of transfer by putting forward objections to the execution, the mere fact that no application has been made under s. 50 of the Code to the Court which passed the decree will not vitiate the proceedings.

Paragraph 1 of Sch. III to the C. P. C. puts the Collector in charge of the income of the property as well as of the property itself, and his powers over the income of the property cannot be interfered with by the Civil Court so long as he is in a position to exercise the powers conferred on him by the Schedule. O JANG BAHADUR *v.* BANK OF UPPER INDIA LTD. 2 O. W. N. 73; 12 O. L. J. 146; (1925) A. I. R. (O.) 448 21

——— **s. 47.** *See* JURISDICTION 313

——— **s. 47**—*Execution of decree—Sale—Dispute as to extent of property sold, whether must be decided by separate suit or in execution proceedings.*

When a question arises between an auction-purchaser and the judgment-debtor as to what was the property that was sold, the matter is one to be investigated by a separate suit and not by an application in the Execution Court. The fact that the decree-holder is himself the auction-purchaser makes no difference. A JAI SINGH *v.* CHIRANJI LAL, L. R. 6 A. 282 Civ. 641

——— **s. 47, O. XXI, r. 2**—*Execution of decree—Agreement prior to decree not to execute decree against particular judgment-debtor, effect of.*

Section 47 of the C. P. C. is wide enough to permit any valid objection to be taken by a judgment-debtor to the execution of a decree by the decree-holder or his legal representative.

Any pre-decretal agreement between parties to a suit, by the terms of which the passing of the decree is not to be objected to but execution of the decree is not to be taken out against a particular judgment-debtor, can be pleaded and given effect to in execution proceedings and O. XXI, r. 2, C. P. C., is no bar to the entertainment of an objection based on such an agreement. M VELU THEVAN *v.* KRISHNASWAMI REDDI, 48 M. L. J. 277; (1925) A. I. R. (M.) 591; 21 L. W. 725 297

——— **s. 47, O. XXI, r. 58**—*Suit dismissed as against some defendants—Execution of decree—Attachment—Objection by defendant against whom suit dismissed—Appeal—Appeal, second, whether lies.*

Parties to the suit within the meaning of s. 47 of the C. P. C. include parties against whom the suit has been dismissed.

Where, therefore, a suit is dismissed as against some defendants but is decreed as against others, and in execution of the decree certain property is attached, and an objection is preferred to the attachment by a defendant against whom the suit had been dismissed, on the allegation that the property attached belongs to him and not to the judgment-debtor, the determination of the objection is a matter which falls within the purview of s. 47 of the C. P. C., and the order of the Execution Court thereon is subject to appeal and second appeal. Pat KALOO *v.* BHOLANATH, 3 Pat. L. R. 90; (1925) A. I. R. (Pat.) 482 743

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——— **s. 47, O. XXI, rr. 66, 90**—*Execution of decree—Sale, application to set aside—Notice of sale proclamation—Under-valuation—Appeal, second, whether lies.*

An application by a judgment-debtor to set aside a Court sale on the ground that he had no notice of the proclamation of sale and that there was an under-valuation of the property falls under O. XXI, r. 66, C. P. C., and a second appeal lies against an order therein, although the application purported to have been filed under r. 90 of O. XXI. M KAMANA VENKATASWAMI *v.* GODAVARTI NAGAYYA 413

——— **s. 47, O. XXI, r. 71**—*Execution of decree—Sale—Non-payment of purchase-money—Re-sale—Order directing payment of deficiency—Suit to set aside order, whether lies.*

An order under O. XXI, r. 71 of the C. P. C., directing a defaulting purchaser to pay the balance of the original purchase-money comes within the provisions of s. 47 of the Code and a separate suit to set aside the order is not maintainable. O MATHURA PRASAD *v.* BAHADUR SINGH, 2 O. W. N. 141; 12 O. L. J. 80; (1925) A. I. R. (O.) 360 284

——— **s. 47, O. XXI, r. 90**—Mortgage-decree—Sale—Objection by judgment-debtor, dismissal of—Legal representatives, whether can maintain suit to recover property. *See* HINDU LAW—MITHILA SCHOOL 849

——— **s. 47, O. XXI, rr. 97, 99, 100**—*Decree for possession—Obstruction—Subsequent suit for possession, whether maintainable.*

Plaintiff obtained a decree for possession against defendant No. 1. He subsequently brought another suit for possession on the allegation that in execution of the previous decree he had recovered possession of the property but that he had been subsequently dispossessed by defendants Nos. 1 and 2. It was found that the plaintiff had not obtained possession in execution of the previous decree and that he had been unable to prove a title as against defendant No. 2:

Held, that plaintiff's suit was barred as against defendant No. 1 by the provisions of s. 47 of the C. P. C., and was liable to be dismissed as against defendant No. 2 for want of proof of better title. Pat SOVANI JENA *v.* BHIMA RAY, (1922) A. I. R. (Pat.) 407; 1 Pat. 157 251

——— **ss. 47, 151, O. XXI, r. 90**—*Execution of decree—Sale—Permission given to decree-holder to bid at auction—Restriction placed on permission without notice to decree-holder—Irregularity—Purchase by clerk of decree-holder's lawyer—Fraud—Inherent power of Court to refuse to confirm sale.*

In execution of a decree the Court granted an unconditional permission to the decree-holder to bid at the auction-sale of the judgment-debtor's property. Subsequently the Court made an order, without giving any notice to the decree-holder, fixing the minimum amount of the decree-holder's bid. As a result of this restriction the property was sold at a grossly inadequate price:

Held, that the action of the Court in placing a restriction upon the permission given to the decree-holder to bid at the auction-sale, without giving notice to the decree-holder, amounted to an irregularity within the meaning of O. XXI, r. 90, or of s. 47 of the C. P. C.

The clerk of a lawyer retained by a decree-holder stands in a position of active confidence towards the decree-holder, and if in execution of the decree, the

clerk proceeds to purchase the property of the judgment-debtor which has been put up for sale, without informing the decree-holder of his intention to bid, his conduct amounts to a gross abuse of confidence and fraud on the decree-holder, and the Court has inherent power in such a case to refuse to confirm the sale. O ALI ABBAS *v.* NARAIN DASS, 2 O. W. N. 297; 12 O. L. J. 321; (1925) A. I. R. (O.) 381 997

——— **s. 47, Sch. II, paras. 1, 15, 16**—*Dispute, what amounts to—Execution of decree—Reference to arbitration, validity of—Award whether can be enforced—Appeal, whether lies—Jurisdiction, whether can be conferred by consent.*

Any question on which the parties join issue, whether or not the Court can legally enquire into it, is a dispute within the meaning of para. 1 of Sch. II to the C. P. C.

The Second Schedule to the C. P. C. does not apply to execution proceedings and, therefore, a reference to arbitration made by an Executing Court is without jurisdiction and an award made thereon is illegal and unenforceable.

Paragraphs 15 and 16 of the Second Sch. to the C. P. C. depend for their operation on a valid reference under para. 1 of the Schedule. Where, therefore, a reference is made to arbitration by an Executing Court and an award is passed thereon, the entire proceedings must be regarded as without jurisdiction and must be totally ignored and the only question which is left for consideration, namely, whether the award should or should not be enforced is one relating to the satisfaction and discharge of the decree under s. 47 of the C. P. C., and on this question an appeal and second appeal are competent.

Parties cannot by consent confer jurisdiction where it does not exist. C WANG *v.* SONA WANGDI, 52 C. 559; 29 C. W. N. 886; 42 C. L. J. 26; (1925) A. I. R. (C.) 812 633

——— **s. 48**, *whether retrospective—Mortgage-suit—Instalment decree—Default—Limitation, commencement of.*

Section 48 of the C. P. C. is retrospective and governs an application for the execution of a mortgage-decree passed before that Code came into force. Therefore, such an application if presented 12 years after the date of the decree is barred.

In a mortgage-suit redemption was allowed on payment of Rs. 2,000 by annual instalments of Rs. 50 and it was directed that if there was a default in payment of an instalment, the plaintiff was entitled to take out execution for the whole amount. The decree was passed in 1899. There was default in conforming to the terms of the decree in 1901. Various attempts were made to recover the decretal amount by execution and the last application was made in 1922:

Held, (1) that on the occurrence of the first default in 1901 the decree-holder obtained the right to execute his decree for the whole amount and that time began to run against the decree-holder from the date of the default;

(2) that, therefore, the execution application was barred under the provisions of s. 48 of the C. P. C. B GULABRAO YESHVANT HARPHALE *v.* MAGAN GHELLABAI GUJRATHI, 27 Bom. L. R. 461; (1925) A. I. R. (B.) 326 769

——— **s. 60 (c)**—*Agriculturist, who is—Person subsisting on agriculture—Person who has ceased to cultivate land, whether agriculturist.*

If a case comes within the language of s. 60 (c) of the C. P. C. the exemption therein mentioned must be granted.

Where it appears that the only means of livelihood of a judgment-debtor is agriculture and that he has no other means of livelihood and he occupies the house which is sought to be attached by the decree-holder, the case comes within the purview of s. 60 (c) of the C. P. C. and the house is exempt from attachment.

Per *Mukerji, J.*—Although a person has lost his agricultural land he does not cease to be an agriculturist if he continues to cultivate soil for remuneration.

Per *Daniels, J.*—Where it is proved that a judgment-debtor has no cultivation at all, his house would not be the house of an agriculturist within the meaning of s. 60 (c) of the C. P. C., merely because he had a fixed rate holding up to a few years of the date when the objection in execution was taken. A BHUTA *v.* BISHESHAR SINGH, L. R. 6 A 217 Civ.; (1925) A. I. R. (A.) 432 564

——— **s. 60 (n)**—*Execution of decree—Maintenance, right of, whether liable to attachment and sale—Procedure—Receiver, appointment of.*

A right of maintenance is not liable to attachment and sale in execution of a decree by virtue of the provision contained in cl. (*n*) of s. 60 of the C. P. C.

The proper remedy of a decree-holder, however, lies, in a fitting case, in the appointment of a Receiver for realising the rents and profits of the property, paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor and his family, and applying the balance, if any, to the liquidation of the judgment-creditor's debt. P C RAJINDRA NARAIN SINGH *v.* SUNDER BIBI, 41 C. L. J. 383; 3 Pat. L. R. 142; 27 Bom. L. R. 849; (1925) A. I. R. (P. C.) 176; 23 A. L. J. 634; 47 A. 385; 49 M. L. J. 244; 22 L. W. 284; L. R. 6 A (P. C.) 138; (1925) M. W. N. 630 (P. C.) 295

——— **ss. 63, 73**—*Assets, when can be regarded as realized—Rateable distribution—Decrees of inferior Courts stayed by superior Court—Decree-holders in inferior Courts, whether entitled to rateable distribution—Procedure—Practice, uniformity in, desirability of.*

Where a sale of property belonging to the judgment-debtor is held in execution of a decree, the mere deposit of the earnest money cannot be said to be assets realized by the sale, within the meaning of s. 73 of the C. P. C., until the balance of the purchase-money is deposited and the sale becomes a concluded transaction. Where, however, separate properties belonging to the judgment-debtor are sold separately and their sale-proceeds are realized separately, the sale of each lot must be regarded as having been completed when the whole of the balance of the purchase-money in respect of that lot is deposited in Court.

The duty of a superior Court under s. 63 of the C. P. C. is to consider and determine the rights of the attaching creditors in all the cases to which that section applies, whether they have applied to the superior Court or not. There is nothing in that section which requires that before an attaching creditor can have his claim to rateable distribution determined he must obtain a transfer of the decree to the superior Court and apply to that Court for execution. The holders of decrees of inferior Courts, therefore, whose execution has been stopped by a superior Court under s. 63, are entitled to rateable distribution under that section

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read with s. 73 without any further application.

In matters of practice uniformity is of great practical importance and when a practice has been established it should not be departed from even if there may be some doubt as to its strict soundness. C GIRINDRA NATH RAY *v.* KEDAR NATH BIDYANTA, 29 C. W. N. 575 783

——— s. 73—*Execution of decree—Realisation of assets—Subsequent application for rateable distribution, maintainability of.*

Under s. 73 of the C. P. C. every person who has applied, previous to the realisation of assets, to the Court for execution of the decree obtained by him is entitled to rateable distribution. The section is not rendered inapplicable merely because the application for rateable distribution is presented subsequent to the realisation of assets. M KARPAGA NIDHI LTD. *v.* VANIA VILASA NIDHI LTD., (1925) M. W. N. 173; 48 M. L. J. 459; 21 L. W. 518; (1925) A. I. R. (M.) 587 390

——— s. 73, O. XXI, rr. 11, 30—*Rateable distribution, when can be ordered—Application for rateable distribution—Application for execution, absence of, effect of—"Otherwise as the nature of the relief granted may require", scope of.*

Before a person is entitled to rateable distribution under s. 73 of the C. P. C., a formal and regular application for execution must be made. Rateable distribution cannot be ordered where there is only a prayer for rateable distribution of the assets, but there is no regular application for execution.

Under O. XXI, r. 11, sub-r. (2), cl. (*j*) of the C. P. C., an application for execution must specify the mode in which the assistance of the Court is required, the modes of execution of a money-decree being given in r. 30 of the Order. Rateable distribution is not one of the modes of execution of a money-decree, and an application which merely contains a prayer for rateable distribution cannot, therefore, be treated as an application for execution.

The words "otherwise as the nature of the relief granted may require" in cls. (*j*) (*v*) of r. 11 (2) of O. XXI of the C. P. C. refer to the nature of the relief granted by the decree and have no reference to the mode in which the assistance of the Court is required. N ALI MAHAMMAD *v.* MAHAMMAD NOOR 1025

——— s. 91—*Nuisance—Encroachment on public street—Private person, suit by, whether maintainable—Special damage, proof of.*

Plaintiff brought a suit for a declaration that certain land was street land and for an injunction directing the defendant to remove an *otla* made by him on the land:

Held, that the plaintiff could not sustain the suit in the absence of evidence to show that as a consequence of the encroachment he was unable to use the road, nor could he seek the assistance of the Court to get the *otla* removed, merely because he wanted to walk over that portion of the street occupied by the *otla* unless he proved special damage. B MANILAL JIBHAI *v.* ISHWARBHAI SAMALBHAI, 27 Bom. L. R. 421; (1925) A. I. R. (B.) 367 934

——— s. 92. *See* COURT FEES ACT, 1870, SCH. II, ART. 17 vi 25

——— ss. 92, 115—*Trust—Scheme suit—Trustee, whether can be plaintiff—Revision—Interference in pending suit.*

A trustee is a person interested in the trust within the meaning of s. 92 of the C. P. C., and there is nothing in the section to prevent his being one of the plaintiffs in a suit brought under the section, or even to prevent both the plaintiffs being trustees. The real plaintiff in such a suit, by whomsoever it may be represented, is the trust, and the representation may be either by the interested public or by a trustee and so long as the plaintiffs, whether trustees or not, are vindicating a public and not an individual right, the suit is maintainable.

Interference with findings in a suit not yet disposed of is not a matter which the High Court will view with favour and it will require very strong proof of want of jurisdiction or irregular exercise of jurisdiction to warrant interference. Where, however, it appears that a suit is not maintainable at all, it might in some cases be advisable for the High Court to interfere in revision and thus to prevent further waste of time and money, the ground of interference being that a Court has no jurisdiction to proceed with a suit which is not maintainable in law. M BALKRIEHNA ODAYAR *v.* JAGANNADA CHARIAR, 48 M. L. J. 531; (1925) A. I. R. (M.) 820 194

——— s. 95, O. XXXVIII, r. 5—*Attachment before judgment, order for—Attachment not actually levied—Damages, suit for, whether maintainable.*

Section 95 of the C. P. C. which provides for compensation in the case of wrongful attachment of the goods of a party is applicable only where the attachment is in fact effected, and does not apply to a case where the attachment is applied for but is not in fact levied. Where the aggrieved party claims a larger compensation than Rs. 1,000 the remedy by way of a suit is allowed, but that does not make the basis of the suit in any way different from the basis on which compensation is allowed in the suit itself where the process has been wrongly put into effect, except that in a suit something more is required than under s. 95, that is to say, that under s. 95 it is sufficient to prove that the attachment was applied for on insufficient grounds while in a suit the plaintiff has to show not merely that it was applied for on insufficient grounds but that it was so done maliciously and without reasonable and probable cause. In both cases it must be proved that the attachment was actually levied.

It is an essential part of the cause of action in a suit to recover damages for wrongful attachment that the plaintiff must show that the order under which the process was enforced to his detriment was set aside in the original suit.

Where an attachment before judgment is ordered but the actual levy of the attachment is avoided by payment of the amount required as security for the decree, the person against whom the order for attachment was made can have no cause of action for a suit to recover damages for wrongful attachment. B KEDARNATH TULSHIDAS *v.* BIHARILAL JAGAMAL, 27 Bom. L. R. 525; (1925) A. I. R. (B.) 357 1026

——— s. 96, O. IX, rr. 7, 13—Ex parte *proceedings—Remedy—Appeal from final decree—Objection to* ex parte *proceedings, whether can be taken.*

A party against whom proceedings are taken *ex parte* and who has failed to avail himself of the remedy given by r. 7 or r. 13 of O. IX of the C. P. C. is not entitled, on an appeal from the decree passed against him under s. 96 of the C. P. C., to urge that the Trial Court was wrong in proceeding to hear the suit *ex parte* against him. The remedy

provided by rr. 7 and 13 of O. IX and that provided by s. 96 of the C. P. C. are not cumulative.

Where an application to set aside an *ex parte* trial is dismissed under r. 7 of O. IX of the C. P. C., the aggrieved party is not bound to take proceedings under r. 13 of O. IX inasmuch as such a course would be futile. The order refusing to set aside the *ex parte* proceedings, however, may, in such a case, be challenged in an appeal filed against the decree under s. 96 of the C. P. C. O MAZHAR HUSAIN *v.* RAFIQ HUSSAIN, 10 O. & A. L. R. 1142; 1 O. W. N. 835; 28 O. C. 85. 222

——— **s. 99, O. I, rr. 1, 9, O. II, r. 3**—*Suit by several plaintiffs against same defendant on one cause of action—Suit really arising out of several causes of action—Misjoinder of causes of action—Procedure.*

Plaintiffs, five in number, sued to recover a certain sum from the defendant as the balance alleged to be due from the defendant on account of a certain contract for the sale of cotton jointly entered into by the plaintiffs with the defendant. It transpired during the trial of the suit that there was not one contract for the sale of cotton by all the plaintiffs but that each plaintiff had contracted to supply a certain quantity to the defendant:

Held, (1) that the plaintiffs having based their claim against the defendant on a single contract, their suit was liable to be dismissed when it was discovered that the cause of action alleged by them did not exist and that there were five separate contracts entered into by the plaintiffs with the defendant;

(2) that the case was not one of a misjoinder of parties or of a misjoinder of causes of action and that any one of the plaintiffs could not be allowed to change the suit which was brought in the name of all into a suit brought by one of them. B CHANDULAL SUKLAL SHET *v.* DAGDU MAHADU CHAUDHARI, 27 Bom. L. R. 472; (1925) A. I. R. (B.) 342 435

——— **s. 102.** *See* BUNDELKHAND ALIENATION OF LAND ACT, 1903, ss. 2, 16 262

——— **s. 102**—*Provincial Small Cause Courts Act (IX of 1887), s. 23—Suit to recover balance of consideration for sale of crops, nature of—Small Cause Court, jurisdiction of—Appeal, second, whether lies—Question of title raised by defendant, effect of.*

The question whether a suit is cognizable by a Court of Small Causes or not must depend on the nature of the suit and not on the nature of the defence set up.

Plaintiffs sued to recover the sum of Rs. 149 from the defendants on the allegation that they were the owners of certain groves and had sold the crop of the groves for a particular season to the defendants who had failed to pay the balance of the consideration for such sale:

Held, that the suit was based on an allegation of pure contract and was cognizable by a Court of Small Causes and that the value of the suit being below Rs. 500 a second appeal was not competent in the case.

When an intricate question of title to property arises in the course of a small cause suit the Court of Small Causes is authorized, by s. 23 of the Provincial Small Cause Courts Act, to return the plaint for presentation to a regular Court, but the character of the suit is not changed merely because a question of title has been raised by the defendant and a suit of the nature of a small cause is not thereby exempted from the operation of s. 102 of the C. P. C. A SAMIR KHAN *v.* BASI RAM 659

——— **s. 102**—*Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 28—Succession Act (X of 1865), ss. 43, 187—Suit by heir to recover share in intestate's property—Small Cause Court, jurisdiction of—Will, whether can be set up in defence—Succession—Husband's share in deceased wife's property.*

Plaintiff, as the heir of his wife, brought a suit to recover a certain amount of money from the defendant. The defendant put forward a Will alleged to have been executed by the plaintiff's wife the effect of which was to defeat the plaintiff's claim to the property:

Held, that the suit fell within the purview of Art. 28 of Sch. II to the Provincial Small Cause Courts Act and was not, therefore, a suit of a nature cognizable by a Small Cause Court.

Section 187 of the Succession Act does not stand in the way of a defendant putting forward the existence of a Will in answer to a plaintiff's claim to a share in the intestate's property.

Under s. 43 of the Succession Act, a husband can only succeed to half of his wife's property in case the wife dies intestate leaving no lineal descendant. In the absence of the next-of-kin, however, the husband would be entitled to the whole of the property as his wife's heir. M GANTA DANIYELU *v.* GUNTI YESU RATNAM 354

——— **s. 105, O. XXII, r. 9**—*"Affecting the decision of the case," meaning of—Order setting aside abatement, whether can be challenged in appeal from final decree.*

The expression "affecting the decision of the case", in s. 105 of the C. P. C., means affecting the merits of the case.

Section 105 of the C. P. C. allows a party who is not entitled to appeal against an interlocutory order, to challenge that order when he is appealing against the decree in the case. But unless such interlocutory order affects the merits of the case it cannot be so challenged. An order setting aside an abatement is not an order which affects the merits of the case and cannot, therefore, be challenged in an appeal from the final decree passed in the suit. A BABU RAM *v.* BANKE BEHARI LAL, 23 A. L. J. 444; L. R. 6 A. 297 Civ.; (1925) A. I. R. (A.) 426; 47 A. 555 211

——— **s. 107 (2), O. I, r. 9**—*Appeal—Non-joinder of necessary party, effect of—Limitation, period of, expiry of, effect of.*

Order I, r. 9 of the C. P. C., read with s. 107 (2) of the Code, does not permit the non-joinder of any party being condoned by an Appellate Court, when such non-joinder makes it impossible for the Court to deal equitably and sufficiently with the matter in controversy between the parties to the appeal.

Where a decree was granted against several defendants and one of the defendants preferred an appeal against the decree so far as it affected him, and took up a position which, if accepted, would enhance the liability of the other defendants, but they were not made parties to the appeal:

Held, (1) that the plea urged by the appellant could not be entertained as it could not be disposed of in the absence of the other defendants whose liability would be enhanced as a consequence and who had had no opportunity of contesting the appeal;

Civil Procedure Code—1908—contd.

(2) that the period of limitation for the appeal having expired, the Court could not permit the other defendants to be made parties to the appeal at a late stage. O PARMESHWAR DEEN *v.* CHHAB NATH 904

——— **s. 115.** *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920 113

——— **s. 115**—*Revenue Court, order of—Revision—High Court, power of.*

The High Court has no power to interfere in revision under s. 115 of the C. P. C. or otherwise, with any order that has been passed originally, or in appeal, by a Revenue Court, or by a District Judge, in reference to questions decided under the provisions of the Agra Tenancy Act, even where a question is raised as to the jurisdiction of the District Judge to pass the order complained of. A MANOHAR *v.* MANGAL DAS, L R. 6 A. 124 Rev. 351

——— **ss. 115, 152**—*Amendment of decree, application for—Decree signed by Pleader of applicant, effect of—Refusal to consider application on merits—Revision.*

A judgment-debtor made an application under s 152 of the C. P. C. for amendment of the decree passed against him, by excluding from the amount of the costs allowed to the opposite party, a certain sum which represented expenses incurred in summoning witnesses by the decree-holder, on the ground that none of the witnesses had appeared on behalf of the decree-holder. The Trial Court refused to consider the application on its merits for the reason that the decree as prepared had been signed by the judgment-debtor's Pleader. On revision:

Held, that the Trial Court in refusing to consider the application on its merits had failed to exercise the jurisdiction vested in it by law and that its order must be set aside and the case remanded to it for disposal according to law. O SHEO BALAK *v.* AMBIKA SAHAI, 12 O. L. J. 141; (1925) A. I. R. (O.) 373 333

——— **s. 115, O. VI, r. 17**—*Amendment of pleading—Power of Court—Interlocutory order—Revision.*

The powers of amendment of pleadings conferred on the Courts are very wide and all amendments should be allowed as would enable the Court finally to determine all matters in controversy between the parties.

The High Court has power to interfere with interlocutory orders in a pending suit but it is only in extraordinary circumstances that such interference would be justifiable.

Where an application for amendment of a plaint, so as to include a claim which was omitted by inadvertance or ignorance is rejected by the Trial Court, the High Court would be justified in interfering in revision and directing that the amendment should be allowed in order to avoid trouble, expense and delay which would be occasioned if the amendment was not carried out immediately. M KARIYA GOUNDAN *v.* TIRUKKAIVELU CHETTY, 48 M. L. J. 349; 21 L. W. 639; (1925) A. I. R. (M.) 585; (1925) M. W. N. 469 90

——— **s. 115, O. VI, r. 17, O. XXIII, r. 1**—*Pleadings—Inadvertent omission — Amendment—Withdrawal of suit, leave for—Illegality—Revision.*

Amongst other pleas in answer to a suit the defendant set up one of estoppel which was stated and elaborated in three paragraphs of the written statement. In his replication the plaintiff denied two of these paragraphs and in answer to the third paragraph by inadvertance omitted the word "not" before the word "admitted". The mistake was discovered when the trial was about to be concluded and the plaintiff made an application to amend the replication but the application was refused. The Court, however, granted the plaintiff leave to withdraw the suit with liberty to bring a fresh suit. In revision:

Held, (1) that the order permitting the withdrawal of the suit was wholly illegal and must be set aside;

(2) that the only reasonable and just course to adopt in the circumstances of the case was to accept the plaintiff's application for amendment of his replication and to permit the amendment to be made. O BULAQI DAS *v.* JUGAL KISHORE 1055

——— **s. 115, O. VI, r. 17, O. XLI, r. 23**—*Remand, when can be made—Amendment of pleadings—Power of Court.*

A remand should be made when a preliminary point only is decided or where the Trial Court has not understood the case and a new trial is desired.

The discretion of the Court under O. VI of r. 17 of the C. P. C. to allow amendment of pleadings is very wide. O RAGHURAJ SINGH *v.* MAJID-UN-NISSA 950

——— **s. 115, O. XIII, rr. 1, 2**—*Madras Civil Rules of Practice, r. 64—Petition to admit documents—Delay—Dismissal—Revision.*

Rule 64 of the Madras Civil Rules of Practice requires that the Court should call upon the parties to produce the documents relied upon by them on or before a fixed date.

Where after the settlement of issues but at an early stage of the trial of a suit, the defendant applied to the Court to receive certain documents produced by him in evidence, and alleged in his affidavit in support of the petition that he was unable to find the documents earlier, and there was no counter-affidavit by the plaintiff, and the Judge summarily rejected the application on the ground that the "reasons given for non-production earlier could not be accepted:"

Held, that the order was improper and was liable to be set aside in revision by the High Court. M CHIDAMBARA CHETTIAR *v.* PARVATHI ACHI, (1925) A. I. R. (M.) 744 351

——— **s. 115, O. XXI, r. 58**—*Execution of decree—Attachment—Objection, disposal of—Possession, question of, not gone into—Revision.*

In a case under O. XXI, r. 58 of the C. P. C., the Court is bound to decide the question of possession, and if a case is disposed of without deciding such a question, the High Court ought to interfere under s. 115 of the C. P. C. to set the matter right. M APPASWAMY CHETTIAR *v.* BALAKRISHNA PILLAI, 21 L. W. 230; 48 M. L. J. 603; (1925) A. I. R. (M.) 583; (1925) M. W. N. 590 189

——— **s. 115, O. XXI, r. 90**—*Execution of decree—Sale of non-transferable occupancy holding—Purchaser of portion of holding, whether can apply to set aside sale—Collusion—Sale set aside—Revision.*

A purchaser without the landlord's consent of a portion of a non-transferable occupancy holding has an interest in the holding sufficient to entitle him to apply after an execution sale of the holding, as a representative of the tenant, to have the sale of the holding set aside under O. XXI, r. 90 of the C. P. C. on the ground of fraud.

Where a Court finds that there was collusion between the judgment-debtor and the decree-holder, and that there was a material irregularity in the sale proclamation, and that the value of the property as stated in the sale proclamation was grossly inadequate,

Civil Procedure Code—1908—contd.

and that the price fetched at the sale was also inadequate, it has jurisdiction to set aside the sale and its order cannot be questioned in revision. **Pat** SURAJ NARAIN MISSER *v.* HARDWAR SINGH, 6 P. L. T. 295; (1925) A. I. R (Pat.) 461 **381**

——— **s. 115, O. XXII, r. 9, O. XLIII, r. 1 (k)**—*Limitation Act (IX of 1908), Sch. I, Art. 171—Abatement, order setting aside—Appeal, whether lies—Limitation, period of, failure to take into consideration—Revision.*

No appeal lies from an order setting aside an abatement.

Where a Court in dealing with an application to set aside an abatement fails to take into consideration the period of limitation fixed by law for a party to apply to set aside an order of abatement, the order is bad and is liable to be set aside in revision. **C** HEM KANTA GHOSE *v.* MONOJ PROVA SINGHA **173**

——— **s. 115, O. XXXIII, r. 5**—*Application for leave to sue* in forma pauperis—*Cause of action—Allegations in plaint—Order granting leave—Revision.*

Per *Suhrawardy, J.*—Where on the allegations contained in an application for leave to issue *in forma pauperis* the application discloses a cause of action, however weak it may be, the order of the Court granting leave to sue cannot be upset in revision on the ground that the application does not disclose a cause of action, under O. XXXIII, r. 5 of the C. P. C.

Per *Cuming, J.*—Where on an application for leave to sue *in forma pauperis* the Court comes to the conclusion that there is a cause of action, the High Court cannot interfere with the order in revision on the ground that no cause of action is disclosed. The Court has jurisdiction to decide rightly or wrongly and a wrong decision even though on a question of law can by no stretch of imagination be considered to be illegal exercise of jurisdiction or exercise of jurisdiction with material irregularity within the meaning of s. 115 of the C. P. C. **C** SOURENDRA NATH MITRA *v.* JATINDRA NATH GHOSE **737**

——— **s. 115, O. XLVII, rr. 1, 4, 7**—*Review—Appeal, grounds for—Revision.*

An order granting an application for review may be objected to in appeal under O. XLVII, r. 7 of the C. P. C. only on the grounds that the application was (*a*) in contravention of the provisions of r. 2 of the Order; (*b*) in contravention of the provisions of r. 4 of the Order; and (*c*) was made after the expiration of the period of limitation.

Where there is a mistake apparent on the face of the record and an application for review is granted on the ground of such mistake and an appeal against the order granting review is dismissed, the order of the lower Appellate Court is not open to revision by the High Court. **O** RAM LAL *v.* RAM DHANI, 10 O. & A. L. R. 832; 11 O. L. J. 700; (1925) A. I. R. (O.) 223; 1 O. W. N. 349 **204**

——— **s. 115, Sch. II, para. 15**—*Appeal—Reference to arbitration—Misconduct of arbitrator—Objection, decision of—Revision, whether lies.*

During the pendency of an appeal the parties agreed to refer their dispute to certain arbitrators. The arbitrators made an award but the award was attacked on the ground that the arbitrators had made secret enquiries and the Court before whom the appeal was pending gave effect to the objection and entertained and decided the appeal without reference to the arbitration;

Civil Procedure Code—1908—contd.

Held, that the question of the misconduct of the arbitrators having arisen for decision by the Appellate Court and the Court having jurisdiction to decide it, it could not be said that the Court had acted without jurisdiction or had acted illegally or with material irregularity in deciding the question and that, therefore, its order was not open to revision. **A** RAM LAL SINGH *v.* BEHARI SINGH, (1924) A. I. R. (A.) 761; L. R. 5 A. 367 Civ. **371**

——— **s. 115, Sch. II, para. 16**—*Award, decree on—Revision, whether lies—Interference by High Court—Discretion of Court.*

It cannot be laid down that an application under s. 115 of the C. P. C. can under no circumstances be entertained against a decree passed in terms of an award. If the action of the lower Court can be brought within the purview of s. 115, an application for revision would be competent.

There is no obligation on the High Court to interfere with an application made under s. 115 of the C. P. C., even if facts are proved which bring the application within the section. It is purely a matter of discretion and no rules can be laid down as to how such discretion is to be exercised. Whether the Court will interfere or not is entirely for the Court which hears the application to decide on the particular circumstances of the case before it. **B** BHIKHALAL GIRDHARLAL *v.* ACHARATLAL LALLUBHAI, 27 Bom. L. R. 423; (1925) A I. R (B.) 341; 49 B. 535 **910**

——— **s. 129, O. XLI, r. 10**—*Madras High Court Original Side Rules, rule 354—Original Side appeal—Security for costs.*

The effect of s. 129 of the C. P. C. is that if the Rules of the High Court on the Original Side and the rules contained in the Code are inconsistent, the Rules of the High Court prevail.

Order XL, r. 10 of the C. P. C. may be read along with r. 354 of the Rules of the Madras High Court, Original Side. The effect of the two rules is that the manner of applying on the Original Side must be by notice of motion and to that extent the Original Side Rules modify the provisions in the Code. As to what the Court should do on such application, the Original Side Rules are silent.

The proviso to O. XLI, r. 10 of the C. P. C. applies to Original Side appeals. **M** VIRUPAKSHA RAO NAIDU *v.* RANGANAYAKI AMMAL, 21 L. W. 662 **346**

——— **s. 144**—*Payment into Court—Decree set aside—Restitution—Interest, whether can be claimed.*

In a suit for specific performance of a contract of sale plaintiff having got a decree for the return of the earnest-money and damages for breach of contract proceeded to appeal on the ground that he was entitled to specific performance of the contract. Pending the appeal the defendant paid into Court the amount which had been awarded to the plaintiff. The plaintiff was successful in appeal and defendant applied for return of the money paid by him into Court and also claimed interest on it:

Held, that the plaintiff having retained the benefit of the payment into Court made by the defendant during the whole time when his appeal was pending and having failed to give notice to the defendant to take his money out, could not be allowed to say that he had derived no benefit from the payment and that consequently he was liable to pay interest on the deposit. **B** HIRABHAI DAHYABHAI *v.* MANEKLAL RANCHHOD, 27 Bom. L. R. 485; (1925) A. I. R. (B.) 313 **713**

Civil Procedure Code—1908—contd.

——— s. 146, O. XXII, rr. 3, 10—*Death of plaintiff—Legal representative not brought on record—Assignee from legal representative, whether entitled to continue suit.*

Rule 10 of O. XXII of the C. P. C. contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant, upon some one else, and applies only to cases not covered by r. 3 of the Order.

Where on the death of a plaintiff his legal representative does not bring himself on the record within the time prescribed by law, an assignee from such representative is not entitled to make an application under O. XXII, r. 10, of the C. P. C., to be allowed to continue the suit. Section 146 of the Code cannot be availed of in support of such an application inasmuch as the applicant is not claiming under any one who might himself have put in a valid application under r. 10 of O. XXII. M KALLIAM KUTTI AMMA *v.* KALLINGAL TARVAD KARUNAWAN 402

——— s. 148, O. IX, r. 9—*Dismissal of suit for default—Application to set aside dismissal—Dismissal set aside subject to payment of costs within period fixed—Failure to pay costs within period—Extension of time—Power of Court.*

Section 148 of the C. P. C. is applicable to proceedings antecedent to the passing of a decree.

Where an order requiring a party to do something within a certain period fails to mention the consequences resulting from the failure to obey the order, the Court has power under s. 148 of the C. P. C. to extend the period for compliance with the order.

Where an order dismissing a suit for default was set aside and the suit was restored on condition of the plaintiff paying a certain sum to the defendant within a certain period by way of costs, but the plaintiff failed to make the payment within the period mentioned :

Held, that the Court had power under s. 148 of the C. P. C. to extend the time mentioned in the order for the payment of costs. N BULAKICHAND *v.* AMIRALI, 21 N. L. R. 111 12

——— s. 151—*Pre-emption decree—Mistake in stating amount payable by decree-holder—Payment of correct amount—Amendment of decree after date fixed for payment—Inherent power of Court.*

Under s. 151 of the C. P. C. the Courts have very wide powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

By a clerical mistake the decretal amount entered in a decree for pre-emption was in excess of the amount which the Court had declared to be payable. The decree-holder paid the correct amount of the decree within the time specified in the decree and obtained possession of the property. After the expiry of the period fixed in the decree for payment the judgment-debtor filed an objection to the effect that the decree had not been complied with and prayed that possession should be restored to him. Thereupon the decree-holder made an application for amendment of the decree and the Court amended the decree and corrected the mistake as to the amount payable by the decree-holder :

Held, that the Court had power to make the correction under s. 151 of the C. P. C. and that the power had been properly exercised. O SURAJ BAKHSH SINGH *v.* BANS BAHADUR SINGH, 12 O. L. J. 216; 2 O. W. N. 218; (1925) A. I. R. (O.) 418 987

Civil Procedure Code—1908—contd.

——— s. 151, O. IX, r. 9—*Execution of decree, application for—Dismissal in default—Restoration, grounds for—Duty of Court.*

An application for execution of a decree was dismissed in default and the decree-holder put in an application for restoration under s. 151 of the C. P. C. Without issuing any notice to the judgment-debtor and without considering the merits of the case the Court granted the application and restored the application for execution. On revision :

Held, that the order of restoration could not be maintained and that the case must be remanded to the lower Court for a proper trial after issuing notice to the judgment-debtor.

Where a Court acts under s. 151 of the C. P. C., in restoring execution proceedings dismissed in default, it ought to state in what manner the ends of justice require the revival of the proceedings and at least as strong grounds should be required to justify an application under s. 151 as would be required on an application for review. O SITAPAT RAM *v.* MAHABIR PRASAD, 1 O. W. N. 747 438

——— s. 151, O. XXXIV, r. 5—*Mortgage suit—Preliminary decree—Application for final decree, dismissal of, for default, legality of—Inherent power of Court to rectify mistake.*

A preliminary decree for sale on foot of a mortgage was passed in favour of the appellant and as the judgment-debtor failed to make the payment directed by the decree the appellant made an application to the Court to pass a final decree. Notice was issued to the judgment-debtor and when the case was ripe the appellant happened to be absent, and the Court passed an order dismissing the suit in default. The appellant thereupon made an application pointing out that as nothing further remained to be done by him, the Court should not have dismissed the suit in default but should have proceeded to pass a final decree. The judgment-debtor objected that this last application made by the appellant must be treated as a fresh application for the passing of a final decree and that as it was barred by time it should be dismissed :

Held, that the order passed by the Court dismissing the suit for default of the decree-holder owing to his absence was erroneous, and that the Court had inherent power to rectify its own mistake by setting aside that order and by proceeding to pass a final decree on the original application of the decree-holder which must be regarded as still pending. A JODHA SINGH *v.* PANDEY GOKARAN DAS, 23 A. L. J. 405; 47 A. 546 225

——— s. 151, O. XLI, r. 23, O. XLIII, r. 1 (u)—*Remand, when can be made—Inherent power of Court—Appeal—Pleadings—Issues, framing of—Amendment of issues.*

The right of appeal should not be curtailed except on very clear proof of circumstances justifying such curtailment.

Where an order of remand does not specify under what provision of law it is made, the Court should be slow to hold that the order is not made under the provisions of O. XLI, r. 23 of the C. P. C. The order will ordinarily be open to appeal under O. XLIII, r. 1 (*u*).

The powers of an Appellate Court to remand are not restricted to the case specified in O. XLI, r. 23 of the C. P. C. The Court may by reason of its inherent jurisdiction vested in it by s. 151 of the Code, make an order of remand in any case other than the case

specified in O. XLI, r. 23 if it be necessary for the ends of justice to do so.

An issue may be framed not merely by reference to the pleadings but also by reference to other matters, and so long as any amendment that is made does not prejudice the parties, it cannot be said that the trial held upon the amended issue was not a proper trial. C UMSH NARAIN CHOWDHURY *v.* SECRETARY OF STATE FOR INDIA 575

——— O. I, r. 3—*Parties—Joinder of defendant against wishes of plaintiff, whether permissible—Power of Court—Practice.*

Ordinarily the plaintiff who comes into Court is the *dominus litis* and it must always be left to him to choose his opponent against whom he has to claim relief in the suit, and it is not the lookout of the Court or of any other third person, to see whether somebody else must be allowed to intrude into the case as a co-defendant, against the plaintiff's will, simply because he represents to the Court that he is a person who would be affected by the decision.

Nobody is bound or affected by a decision to which he is not properly made a party, and it is not the intention of the law to let third persons ventilate their own grievances in, and thus derive profit from, a suit commenced by another man at his own cost and for his own benefit. N VITHOBA *v.* SECRETARY OF STATE FOR INDIA 988

——— O. I, r. 9. *See* HINDU LAW—JOINT FAMILY 180

——— O. II, r. 2—*Specific Relief Act (I of 1877), s. 56 (1)—Contract for sale of land—Agreement to sell to third person—Injunction, suit for—Specific performance, subsequent suit for, whether maintainable.*

The usual mode of proceeding in case of a breach of contract for the sale of land is to bring a suit for specific performance of the contract. The party aggrieved by the breach is not entitled to two reliefs in respect of the breach of such a contract, one by way of injunction restraining the defendant from selling the property to a third person and the other by way of specific performance. He is entitled only to one relief, namely, a suit for specific performance in which he can add a claim for compensation. The dismissal, therefore, of a suit for an injunction restraining the vendor from selling the property to a third person does not operate as a bar to the maintainability of a subsequent suit for specific performance. L LACHHA MAL *v.* HIRDE NATH, (1925) A. I. R. (L.) 459; 6 L. 384 994

——— O. VI, r. 11, *scope of—Signature to plaint, object of—Omission to sign, whether can be amended.*

The object of the signature to a plaint is to prevent as far as possible disputes as to whether a suit was instituted with the plaintiff's knowledge and authority or not. This authority may be established by other means besides the signature.

The provisions of O. VI, r. 11, C. P. C., relate to a mere matter of procedure and any mistake or omission in the signature may be amended at any time subsequent to the institution of the suit. S SECRETARY OF STATE FOR INDIA *v.* DINSHAW NAVROJI 1002

——— O. VI, r. 15—*Plaint—Verification, absence of—Subsequent verification, effect of.*

A plaint which does not contain the verification clause as required by r. 15 of O. VI of the C. P. C. is not void. The omission to verify the plaint is a mere irregularity which can be cured at a later stage, and a subsequent verification does not amount to an amendment of the plaint. A SHIB DEO MISRA *v.* RAM PRASAD, 22 A. L. J. 690; 46 A. 637; (1925) A. I. R. (A.) 79 938

——— O. VI, r. 17. *See* C. P. C., 1908, s. 115 90

——— O. VI, r. 17—*Amendment of plaint—Alternative case.*

Where a plaintiff relies on a special custom, an amendment of the plaint setting up alternatively that he would be entitled to succeed even if the custom were not proved, should be allowed. O MOHAMMAD GHAFOOR *v.* MEHDI HASAN KHAN, 12 O. L. J. 253; (1925) A. I. R. (O.) 523 356

——— O. VI, r. 17—*Amendment of plaint at late stage—New cause of action, whether can be allowed to be introduced.*

An amendment of a plaint should not be permitted at a late stage of a suit which would have the effect of introducing a new cause of action which has become time-barred. C MCLEOD & Co. *v.* IVAN JONES & Co. 218

——— O. VI, r. 17—*Amendment of pleadings—New cause of action, whether can be put forward.*

The most important rule relating to the amendment of a plaint is that a plaintiff cannot by amendment be allowed to substitute one plaint for another. However leniently the rules regarding the amendment of pleadings in this country should be construed to prevent a failure of justice, it would impede the administration of justice if this particular rule were not strictly observed.

Plaintiff sued as a principal on a contract alleged to have been made with him by the defendants for the import of certain goods on *c. i. f.* terms. During the course of the trial the plaintiff wanted to sue as the defendants' agent who had on the receipt of the shipping documents cleared and delivered the goods to the defendants:

Held, that the claim which the defendants wanted subsequently to put forward was based on an entirely new cause of action and that the plaintiff could not be allowed to put forward that claim in the suit as originally brought and that consequently the suit must be dismissed. B KOKAMAL MADHGRAM *v.* GULABSING GURUDATSING, 27 Bom. L. R. 277; (1925) A. I. R. (B.) 248 481

——— O. VI, r. 17—*Plaintiff suing as shebait of an idol—Omission to describe in the cause title—Amendment.*

Where a suit is brought by a plaintiff to recover possession of certain properties belonging to an idol, as *shebait* of the idol, the omission to describe the plaintiff in the cause title of the suit as *shebait* of the idol is a misdescription which may be cured at any stage by amendment of the cause title without any hardship being caused to the defendant. C DYAMOYI *v.* SANKAR NATH MUKHOPADHAYA, 42 C. L. J. 30 159

——— O. VII, r. 10, O. XLI, r. 25, O. XLIII, r. 1 (a)—*Order returning plaint for presentation to proper Court—Appeal—Remand order, legality of—Procedure.*

The plaint in a suit was returned by the Subordinate Judge for presentation to the proper Court on the ground that the relief had been overvalued and that the suit was cognizable by a Munsif. An appeal was preferred against this order to the District Judge before whom it was admitted by both parties that the Trial Court's decision on the question

of valuation was erroneous. The District Judge accepted the appeal and remanded certain issues to the Subordinate Judge for findings under O. XLI, r. 25 of the C. P. C.:

Held, (1) that the order of remand was entirely illegal as the appeal which was preferred to the District Judge was not an appeal from a decree but an appeal from an order;

(2) that the proper order for the District Judge to pass was an order setting aside the order of the Court below and directing the Subordinate Judge to re-admit the suit to its file and dispose of it on the merits. O KANDHAI LAL *v.* ANANTU, 12 O. L. J. 277: 2 O. W. N. 239; (1925) A. I. R. (O.) 393 **172**

——— **O. VII, r. 11, O. XLIII, r. 1 (a)**—*Order directing payment of deficit Court-fees, failure to comply with—Rejection of plaint—Appeal; valuation of—Appellate Court, duty of.*

A plaint was rejected under O. VII, r. 11, of the C. P. C., owing to the failure of the plaintiff to pay the deficit Court-fees directed to be paid by the Court. The plaintiff appealed against the order and valued his appeal at the original valuation put by him upon his claim and questioned the finding of the Trial Court as to the valuation of the suit. The Appellate Court rejected the appeal on the ground that the memorandum of appeal was insufficiently stamped:

Held, that it was the duty of the Appellate Court to decide the question as to what the real value of the suit was, and what the Court-fees payable upon that finding should be, and that after deciding that question the Appellate Court should have given an opportunity to the plaintiff to pay the deficit Court-fees and then remanded the case to the First Court for trial on the merits after the payment of proper Court-fees by the plaintiff. C AMARTA LAL KUMAR *v.* SISIR KUMAR BASU **651**

——— **O. VIII, r. 6**—*Contribution, suit for—Defendant, also entitled to contribution—Set-off, whether can be allowed.*

Plaintiff and defendant were joint owners of a *zemindari*. The *zemindari* was let out in *patni* and was brought to sale by the *zemindars* for arrears of *patni* rent and was purchased by a third party. The sale was subsequently set aside at the suit of the *patnidars* and the *zemindars* were held liable for the costs of the *patnidars* and the *patnidars* recovered these costs from the plaintiff The defendant was compelled to pay the costs of the auction-purchaser in the *patnidar's* suit. Plaintiff brought a suit against the defendant for contribution in respect of the costs which had been paid by the plaintiff:

Held, that the defendant was entitled to set-off against the plaintiff's claim the amount which he had paid to the auction-purchaser to the extent to which it represented the liability of the plaintiff in respect of the auction-purchaser's costs. C RADHIKAPRASAD DATTA *v.* PANCHANAN CHOUDHURY **788**

——— **O. IX, rr. 6, 13**—Bona fide *belief that case would not be taken up on date fixed for hearing—Adjournment, whether should be granted*—Ex parte *decree, application to set aside.*

On the date fixed for the hearing of a suit the defendant's Counsel applied for an adjournment and on the adjournment being refused he stated that he had no instructions and the Court thereupon passed an *ex parte* decree against the defendant. It appeared that the defendant and his Counsel *bona fide* believed that owing to the pendency of a certain application the case would not be heard on the date to which it was posted. Defendant made an application to set aside the *ex parte* decree, but the application was rejected. On appeal:

Held, that under the circumstances of the case the adjournment prayed for by the defendant should have been granted and that, therefore, the *ex parte* decree must be set aside and the case remanded for trial to the lower Court. M BALAMANI AMMAL *v.* K. N. RAMA IYER, 48 M. L. J. 273; (1925) M. W. N. 163; 21 L. W. 528; (1925) A. I. R. (M.) 786 **57**

——— **O. IX, r. 8**—*Dismissal of suit for default—Bar of fresh suit—Test—Mortgage-suit—Misjoinder of plaintiffs, effect of.*

Order IX, r. 8 of the C. P. C., prohibits the filing of a second suit on the same cause of action. Where, however, there is even a slight discrepancy arising out of a single fact among many other facts common to the two causes of action, that single fact alone makes them different causes of action.

The misjoinder of plaintiffs in a mortgage-suit, to some of whom the relief claimed cannot be granted is a mere defect of form which is not fatal to the suit. N UDARAM *v.* GONDU **35**

——— **O. IX, rr. 8, 9, O. XVII, rr. 2, 3**—*Adjourned date of hearing—Default of plaintiff—Procedure.*

On the date fixed for the hearing of a suit the plaintiff's Pleader asked for an adjournment undertaking to produce his witnesses without summonses. The adjournment was granted but on the adjourned date of hearing the plaintiff was absent. The Court proceeded under O. XVII, r. 3 of the C. P. C., to decide the suit and rejected the plaintiff's claim:

Held, that the procedure adopted by the Trial Court was wrong and that it should have proceeded under O. XVII, r. 2 of the Code and that the plaintiff was entitled to be heard on the question of his non-appearance at the adjourned date of hearing by the Trial Court. B BASAYYA AYAPPA SARGHNACHAYAR *v.* ALLAYYA MAHARUDRAYYA, 27 Bom. L. R. 477; (1925) A. I. R. (B.) 328 **710**

——— **O. IX, r. 9.** *See* C. P. C., 1908, s. 148 **12**

——— **O. IX, r. 9**—*Dismissal for default—Restoration, application for—Sufficient cause—Duty of Court.*

It is the business of the Courts to decide the rights of the parties and not to deprive them of their rights by the mere exercise of discipline, but to use their discipline for the purpose of visiting neglect upon them and removing the results of such neglect.

Where a suit was dismissed for default and on an application for restoration it appeared that the plaintiff had started with his witnesses in time to catch the last train which would bring him to the Court before the suit was called on, but had missed that train and was thus prevented from arriving in Court till after the suit had been dismissed:

Held, that the plaintiff was entitled to have the suit restored as there was sufficient cause for his failure to appear at the time when the suit was called on for hearing. A ANRUDH SINGH *v.* RUPA KUNWAR, L. R. 6 A. 221 Civ. **118**

——— **O. XVI, r. 1**—*Application for summons made at late stage, refusal of—Duty of Court—Procedure.*

The circumstance that an application for the issue of summonses on a party's witnesses is made at a late stage is no ground for refusing the application, though the Court may, when the case is heard, refuse to

adjourn the hearing if the witnesses have not been served owing to the delay in making the application for summonses. Except in cases of manifest abuse of procedure, the Court has no discretion to refuse an application for summonses. C KANDRU HALDAR *v.* TARAPRASANNA ROY CHOWDHURI 355

——— O. XVI, r. 1—*Summoning of witnesses—Application for summonses, whether can be refused on ground of delay.*

Under O. XVI, r. 1 of the C. P. C., a party to a suit is entitled as of right to obtain summonses at any time before the date fixed for the disposal of the suit, and on an application being made for the issue of summonses the Court is bound to issue the summonses and cannot refuse to do so on the ground that the application is made at too late a stage in the suit and that it would not be possible to get the summonses served upon the witnesses in time. If owing to the delay in the making of the application the witnesses are not served and an adjournment is asked for at the hearing it would then be open to the Court to consider whether an adjournment should or should not be granted. B SAIBAI GOVIND LAVLEKAR *v.* BALKRISHNA PANDURANG BANE, 27 Bom. L. R. 471; (1925) A. I. R. (B.) 368 702

——— O. XX, r. 12, O. XXII, r. 4—*Decree for possession and mesne profits—Death of judgment-debtor—Substitution of legal representatives—Order declaring liability of legal representatives for mesne profits—Appeal, whether lies.*

Respondent obtained a decree for possession of certain property which also directed that an account should be taken of the dealings of the judgment-debtor with the disputed property and of the rents and profits arising therefrom and that the judgment-debtor must pay to the decree-holder what may be found due to him on the taking of accounts. The judgment-debtor died and his legal representatives were substituted on the record in his place. The latter objected that they were not liable for mesne profits. The Court went into the matter and made an order declaring that they were liable to render accounts of the mesne profits which the deceased had appropriated and then proceeded to direct the method in which the accounts should be taken. On appeal:

Held, that the preliminary decree which directed the taking of accounts was not capable of execution and the question which had been actually determined by the lower Court was merely a question relating to the substitution of the names of the appellants in the place of the deceased judgment-debtor and their liability to render the accounts directed by the decree as such legal representatives, and that no question relating to the execution, satisfaction or discharge of the decree had been decided and that s. 47 of the C. P. C. had, therefore, no application to the case and the order of the lower Court was not appealable.

An order by which the Court determines the principle whereupon mesne profits are to be assessed and directs their ascertainment by a Commissioner is an interlocutory order in a pending suit and is not appealable as a decree.

The effect of the change introduced by O. XX, r. 12 of the C. P. C. is that the Court which hears the suit is the Court which is eventually to ascertain the mesne profits and pass a final decree for such profits and that till such final decree is passed there is no decree for mesne profits capable of execution.

A RUDRA PRATAP SINGH *v.* SARDA MAHESH PRASAD SINGH, 23 A. L. J. 458; L. R. 6 A. 359 Civ.; (1925) A. I. R. (A.) 588; 47 A. 543 322

——— O. XXI, r. 1—*Compromise decree—Decree directing payment of money by certain date—Court closed on last date for payment—Payment on first date of re-opening, whether compliance with decree.*

Where under the terms of a decree, money is to be paid by a party, O. XXI, r. 1 of the C. P. C. gives the party, who is liable to make the payment, the option of making the payment to the other party in person or of making a deposit in Court.

A party who is prevented from doing a thing not by any default of his own but by the Court itself, is entitled to do that thing at the earliest subsequent opportunity available to him.

Where under the terms of a decree a party is bound to make a payment to the other party and the last date fixed for the payment happens to be a date on which the Court is closed, the decree is sufficiently complied with if the money is deposited into Court on the first day on which the Court re-opens. M SANKARAN UNNI *v.* RAMAN, 21 L. W. 469; 48 M. L. J. 596; (1925) A. I. R. (M.) 743; (1925) M. W. N. 566 560

——— O. XXI, r. 2—*Execution of decree—Adjustment pleaded after expiry of period prescribed for certification—Court, whether can go into question of adjustment.*

Where in execution of a decree an adjustment is pleaded after the expiry of the period of limitation prescribed for the certification of the adjustment, the Executing Court cannot go into the question whether there has or has not been any adjustment. L MULCHAND *v.* CHAMPA 635

——— O. XXI, r. 15—*Execution of decree—Attachment—Claim petition, whether can be heard after sale.*

An application for the release of certain property from attachment cannot be heard after the property has been sold. C KALI CHARAN GHOSE *v.* SARAJINI DEBI 168

——— O. XXI, r. 16—*Execution of decree—Assignment of decree—Notice to judgment-debtor—Order declaring that execution can proceed—Objection, subsequent, that decree cannot be executed*—Res judicata.

Under O. XXI, r. 16 of the C. P. C., when the assignee of a decree applies for execution of the decree a notice has to be issued to the judgment-debtor to show cause why the execution should not be granted. The Court is directed not to execute the decree till the objection of the judgment-debtor has been heard. If the judgment-debtor has any objection as to why the execution should not be granted, for instance, on the ground that the decree is a nullity, the objection must be put forward at the time when the notice is served upon him. Once the Court holds that the execution can proceed, the matter becomes *res judicata* and the judgment-debtor cannot at a subsequent stage object that the decree is not executable. A RAM CHARAN SAHU *v.* SALIK RAM SAHU, L. R. 6 A. 295 Civ. 436

——— O. XXI, r. 22—*Limitation Act (IX of 1908), Sch. I, Art. 182 (6)—Execution of decree—Notice to judgment-debtor, when to be issued—Limitation, extension of.*

In every case where an application for execution of a decree is made more than a year after the date of the decree or more than a year after the date of the

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last order made against the judgment-debtor in any previous execution, a fresh notice must be issued under O. XXI, r. 22 of the C. P. C. An order directing the issue of such a notice falls within the purview of cl. (6) of Art. 182 of Sch. I to the Limitation Act and operates to extend limitation for execution and the order is not bad merely on the ground that the application in respect of which it is issued was not made in accordance with law. **Pat** ADAYA PRASAD SINGH *v.* RAM NARAYAN DAS, (1925) Pat. 121; 6 P. L. T. 290; (1925) A. I. R. (Pat.) 474 **531**

——— **O. XXI, rr. 22, 23.** *See* LIMITATION ACT, 1908, SCH. I, ART. 183 **61**

——— **O. XXI, r. 50 (2), O. XXX,** *scope of—Suit against firm, nature of—Deceased partner, whether party—Legal representatives, whether can be proceeded against.*

Order XXI, r. 50 (2), C. P. C., is limited in its operation to the case of a partner, who is living at the date of the decree and the estate of a deceased partner in the hands of his legal representatives, as such, cannot be proceeded against under this rule.

Order XXX of the C. P. C. is not intended to recognize a firm as a legal entity but to provide, subject to certain limitations, a convenient mode of describing the partners who compose the firm in the plaint and in the summons.

A suit against a firm is in effect a suit against the individual partners of the firm and a dead partner cannot be assumed to be a party to the action. **S** GOKALDAS KHATAOO *v.* VASSUMAL WADHUMAL **992**

——— **O. XXI, r. 52**—*Insolvency—Dividend payable to creditor of insolvent, whether can be attached by person holding decree against creditor.*

Moneys in the hands of an Official Assignee which are payable to a judgment-debtor who is a creditor of the insolvent by way of dividend declared by the Official Assignee, are attachable under O. XXI, r. 52, of the C. P. C. **B** HARDAYAL SHIVLAL *v.* ADAM GOOLMAHOMED, 27 Bom. L. R. 545; (1925) A. I. R. (B.) 344 **1011**

——— **O. XXI, rr. 57, 58, 63**—*Execution of decree—Attachment—Claim petition, dismissal of—Subsequent dismissal of execution petition, effect of—Claimant, whether bound to sue under r. 63.*

An order on a claim petition is final against the claimant only in so far as the rights worked out in pursuance of the particular attachment are concerned.

A claim petition against an attachment of certain properties was disallowed, and subsequently the execution petition itself was dismissed as the decree-holder was unwilling to proceed with it:

Held, (1) that the original attachment ceased to exist under O. XXI, r. 57 of the C. P. C.;

(2) that the claimant was not bound to set aside the order on the original claim petition. **M** KUMARA GOUNDAN *v* THEVARAYA REDDI, 48 M. L. J. 616; (1925) M. W. N. 406 **635**

——— **O. XXI, r. 60, O. XXXVIII, r. 9.** *See* LIMITATION ACT, 1908, SCH. I, ART. 11 **756**

——— **O. XXI, r. 66**—*Bombay High Court Civil Circular No. 69 (6), (7)—Hindu Law—Joint family—Decree against father as manager of family—Execution of decree—Sale of family property—Interest of sons, whether passes to purchaser.*

A decree was passed against a Hindu father carrying on business in the name of the family as manager, and certain family property was sold in execution of the decree. In a suit by the sons of the judgment-debtor for a declaration that their interest in the property had not passed to the auction-purchaser:

Held, that the decree having been passed against the father as manager of the family the whole of the family property was liable for the family debt and that the whole interest of the family had passed to the purchaser. **B** AMOLAKCHAND LADURAM *v.* MOTILAL AGIARIRAM, 27 Bom. L. R. 437 **953**

——— **O. XXI, r. 71**—*Execution of decree—Sale—Failure to pay purchase money—Re-sale—Liability to make up deficiency in price—Proclamation of sale—Omission to mention time and place of sale—Date of sale not specified in proper place—Irregularity—Illegality.*

There is no general rule for distinguishing between an illegality and an irregularity in a Court sale. The decision in every case must rest on the special facts of the case.

Where an auction-sale is held in the Court premises and within the usual office hours, the mere omission to mention the time and the place of the sale in the sale proclamation does not amount to an illegality, in absence of proof that such omission caused a low price to be fetched.

The omission to mention the date of sale in the sale proclamation in its proper place is an irregularity, but in the absence of evidence to show that any possible bidder was kept away owing to his not knowing the exact date of the sale as a result of the date not being entered in its proper place, the sale is not vitiated.

The provision contained in O. XXI, r. 71 of the C. P. C. is a salutary one intended to minimise the hardship resulting from the purchaser's default and there is no reason why the Court should refuse to give effect to it, unless the defaulting purchaser would be substantially prejudiced. **M** SANKARA NARAYANA PILLAI *v.* GANGAMMAL, 21 L. W. 232; (1925) A. I. R. (M.) 631 **1**

——— **O. XXI, r. 89**—*Execution of decree—Sale—Deposit of decretal amount—Application to set aside sale, absence of, effect of.*

An application either in writing or oral for setting aside the auction sale is necessary before the Court can be called upon to act and set aside the sale under the provisions of O. XXI, r. 89 of the C. P. C. The mere deposit of the required amount unaccompanied by an application is not sufficient to enable the Court to set aside the sale. **M** PECHIAYEE *v.* VALLAMUTHU VELAN, (1925) M. W. N. 175; 48 M. L. J. 405; (1925) A. I. R. (M.) 639 **437**

——— **O. XXI, r. 89**—*Limitation Act (IX of 1908), s. 5, Sch. I, Art. 166—Execution of decree—Sale—Deposit—Application to set aside sale, absence of; effect of—Limitation—Extension of time.*

An application either written or oral is necessary for the setting aside of a sale under O. XXI, r. 89 of the C. P. C. and such an application must be made within the period of 30 days laid down by Art. 166 of Sch. I to the Limitation Act. Where no application to set aside the sale is made, the deposit of the necessary amount required under O. XXI, r. 89, even if rightly made in the Civil Court, will be of no avail.

Semble:—The provisions of s. 5 of the Limitation Act do not apply to an application under O. XXI, r. 89 of the C. P. C. **O** RAM AUTAR *v.* SHEO PIAREY LAL PANDEY, 12 O. L. J. 137; (1925) A. I. R. (O.) 411 **722**

——— O. XXI, r. 89—*Transfer of Property Act (IV of 1882), s. 72—Execution of decree—Sale of mortgaged property—Mortgagee, whether entitled to apply to set aside sale on deposit—Deposit, amount of, whether can be added to mortgage-money.*

The question whether a person holds an interest in property sold in execution of a decree by virtue of a title acquired before such sale, within the meaning of r. 89 of O. XXI, of the C. P. C., is not one of pure law but must always be decided with reference to the particular circumstances of each case.

Where a mortgaged property is sold in execution of a decree against the mortgagor with merely a note at the foot of the proclamation that the property is incumbered with a charge up to a certain amount, the mortgagee is a person holding an interest in the property by virtue of a title acquired before the sale within the meaning of r. 89 of O. XXI of the C. P. C., and is entitled to make an application under that rule to set aside the sale, and by virtue of s. 72 of the Transfer of Property Act is entitled to add the amount of the deposit to his mortgage-money with interest at the rate payable on the principal amount of the mortgage. O JAGANNATH SINGH *v.* JAG JIWAN DAS, 12 O. L. J. 289; 28 O. C. 221; (1925) A. I. R. (O.) 429 829

——— O. XXI, r. 90—*Execution of decree—Sale, application to set aside—Person who has sold his interest, whether can apply.*

A person whose interests are affected by an execution sale at the time of the sale is entitled to make an application under O. XXI, r. 90 of the C. P. C. to set aside the sale. It is not necessary to show that the interest of the applicant was affected by the sale at the time of the application. A person who has, since the date of the sale, parted with his interest in the property sold is, therefore, entitled to maintain such an application. C SHUNDI BIBI *v.* MOBARAK ALI 94

——— O. XXI, r. 90—*Execution of decree—Sale—Auction-purchaser, whether entitled to apply to set aside sale—Substantial loss, meaning of—Misrepresentation as to quality of property, effect of.*

The expression, "a person whose interests are affected by the sale" in r. 90 of O. XXI of the C. P. C., is wide enough to include the auction-purchaser. An auction-purchaser is, therefore, entitled to make an application under this rule to set aside the sale and is consequently debarred from bringing a separate suit for that purpose.

Where an auction-purchaser makes an application under O. XXI, r. 90 of the C. P. C., to set aside the auction-sale, the principle of *caveat empter* does not apply where it is shown that there has been a misdescription or a concealment amounting to a substantial misrepresentation affecting the quality and value of the property.

The expression "substantial loss" in r. 90, O. XXI of the C. P. C., is not confined to pecuniary loss.

An auction-purchaser at a Court auction is entitled to make his own choice, and he is entitled to know what it is for which he is asked to pay, and when he discovers that he is burdened with some charge of which he was ignorant, he is entitled to say "the amount of this charge is not in itself a matter of great consequence to me, it is its existence which stamps the property with a character I do not like, and I should not have purchased, or, at any rate, I was not prepared to pay a substantial price for the property if it was charged in any way."

A decree-holder who even honestly misdescribes the subject-matter of the sale by misrepresentation, such as the description "free from encumbrances," when there is an encumbrance, cannot be heard in a Court of Law to complain that the purchaser should have known what he was buying. A RAVI NANDAN PRASAD *v.* JAGAR NATH SAHU, 23 A. L. J. 233; L. R. 6 A. 229 Civ.; (1925) A. I. R. (A.) 459; 47 A. 479 278

——— O. XXI, r. 90, O. XLIII, r. 1 (j). *See* LIMITATION ACT, 1908, s. 18, SCH. I, ART. 166 555

——— O. XXII, r. 3, O. XLI, r. 4—*Appeal—Death of one appellant before hearing—Appeal allowed—Application by legal representatives of deceased appellant to be brought on record, whether can be allowed.*

An appeal was filed by two appellants who were members of a joint Hindu family. A few days before the hearing of the appeal one of the appellants died and the appeal was heard and allowed in ignorance of his death. Subsequently the legal representatives of the deceased appellant made an application that the cause title of the decree may be amended and that they may be brought on the record in place of the deceased appellant:

Held, that having regard to the provisions of r. 4 of O. XLI of the C. P. C. the decree passed in appeal in favour of the surviving appellant must enure for the benefit of all the members of the appellant's family and that as the remaining members wished to be formally brought on the record as legal representatives of the deceased appellant, the application should be allowed. M GUNTUKU APPANNA *v.* JELLEPALLI GAVARAPPADU, 48 M. L. J. 601; 22 L. W. 142 748

——— O. XXII, r. 4, O. XXXIV, rr. 2, 3—*Foreclosure suit—Preliminary decree—Death of judgment-debtor—Substitution of representative of judgment-debtor—Final decree—Co-representative of judgment-debtor, whether entitled to redeem.*

Where in a foreclosure suit the judgment-debtor dies between the passing of the preliminary decree and before the final decree and the decree-holder honestly substitutes in his place the person whom he believes to be his sole representative and that person accepts the position and a final decree for foreclosure is passed, any other person who has a right to be a co-representative of the judgment-debtor's estate and has, as such, a right to redeem the property, cannot enforce such right after the passing of the final decree. A DIP NARAIN RAI *v* LACHHMAN UPADHIYA, 23 A. L. J. 332; (1925) A. I. R. (A.) 479; 47 A. 466 799

——— O. XXII, rr. 4, 9—*Limitation Act (IX of 1908), s. 5, Sch. I, Arts. 171, 177—Appeal—Death of respondent—Application for substitution made after expiry of limitation—Order permitting substitution, effect of.*

One of several respondents died during the pendency of a suit and an application was made after the expiry of the period of limitation for substitution of his legal representatives on the record. The application was allowed *ex parte* and the substitution was made. On the day fixed for the hearing of the appeal the Judge, in ignorance of the order for substitution, decided that the appeal had abated. On second appeal:

Held, that an order having actually been passed permitting substitution and the substitution having been made and the order not having been objected to at the hearing by the other respondents, it must be

held that time had been extended and that the legal representatives of the deceased respondent had properly been brought upon the record. L CHARAN SIGH *v.* RAMDAYAL 632

——— **O. XXII, rr. 4, 10**—*Accounts, suit for—Preliminary decree—Death of defendant—Abatement.*

The provisions of O. XXII, r. 4 of the C. P. C., are applicable as well before as after a preliminary decree in a suit for accounts. Therefore, where after a preliminary decree in a suit for accounts, one of the defendants dies and no application is made to bring his legal representatives on the record under O. XXII, r. 4, the suit abates. C MANUJENDRA DUTT CHOWDHURY *v.* JNAN RANJAN SOMADDAR 818

——— **O. XXII, r. 8, O. XXXIII, r. 5**—*Application for leave to sue as pauper—Insolvency of petitioner, effect of—Procedure—Cause of action, meaning of.*

The grounds on which an application for leave to sue as a pauper can be rejected are stated in O. XXXIII, r. 5 of the C. P. C., and the subsequent insolvency of the petitioner is not one of such grounds. Where it appears that after making an application for leave to sue as a pauper the petitioner has become insolvent, the proper procedure is for the Court to enquire whether the petitioner is or is not a pauper and if he is and his allegations show a cause of action, leave should be granted. When the leave is granted the application would be numbered as a suit, and the provisions of O. XXII, r. 8 of the C. P. C. can then be applied and the Official Receiver can make himself a party to the suit.

Clause (*d*) of r. 5 of O. XXXIII of the C. P. C. only requires that the allegations contained in a petition for leave to sue as a pauper must show a cause of action, the clause has no reference to subsequent events, for instance the insolvency of the petitioner. M CHIDAMBARAM CHETTIAR *v.* KOTHER MYTHEEN ROWTHER, 48 M. L. J. 491; (1925) A. I. R. (M.) 791 720

——— **O. XXIII, r. 1**—*Application for leave to withdraw suit—Formal defect, absence of—Order granting leave—Revision.*

Where, on an application for leave to withdraw a suit with liberty to bring a fresh suit, which merely alleges that there is a formal defect in the plaint but does not specify what the defect is, the Court, without applying its mind to the question at all and without considering what the alleged formal defect is, grants leave for the withdrawal of the suit with liberty to bring a fresh suit, it acts with material irregularity and its order is liable to be set aside in revision. A GANGA PRASAD *v.* KISHNI, L. R. 6 A. 155 Civ.; 47 A. 319; (1925) A. I. R. (A.) 466 175

——— **O. XXIII, r. 1**—*Withdrawal of suit with liberty to bring fresh suit—Order directing payment of costs, non-compliance with, effect of—Fresh suit, dismissal of, as non-maintainable—Third suit, whether maintainable.*

Where a plaintiff is allowed to withdraw a suit with liberty to bring a fresh suit on condition that before instituting a fresh suit he pays the costs of the defendant, and he institutes a fresh suit without complying with the condition and that suit is dismissed as non-maintainable, he has no further right to bring a suit after payment of costs to the defendant, for the permission granted in the first suit would only extend to the filing of one fresh suit and not to the filing of any number of fresh suits which might be dismissed each in its turn without any trial on the actual merits of the case between the parties, for failure of the plaintiff to pay the costs of the first suit. B AMBUBAI HANMANTRAO *v.* SHANKARSA NAGOSA, 27 Bom. L. R. 243; (1925) A. I. R. (B.) 272 807

——— **O. XXIII, r. 3**—*Compromise—Order recording compromise—Decree—Appeal against order recording compromise, whether competent.*

Where a preliminary decree or order is followed by a final decree an appeal does not lie against the former after the final decree is passed.

Where an order recording a compromise under O. XXIII, r. 3, of the C. P. C. is followed by a decree, all proceedings previous to the decree, including the order recording the compromise, merge in the decree and no appeal lies against the order recording the compromise. C BENGAL COAL CO. LTD. *v.* APCAR COLLIERIES LTD., 29 C. W. N. 928 248

——— **O. XXIII, r. 3, O. XLIII, r. 1 (4)**—*Order recording compromise followed by decree—Appeal, whether lies.*

An order recording a compromise under O. XXIII, r. 3, C. P. C., is appealable at the instance of the party denying the factum of compromise, even though the order has been followed by a decree passed in terms of the compromise. M SATYANARAYANAMURTHI *v.* JAYANTI BUTCHEYYA, 48 M. L. J. 249; (1925) A. I. R. (M.) 606 124

——— **O, XXVI, r. 11**—*Accounts, suit for—Order for taking accounts, whether can be made before determination of defendant's liability.*

The proper course in a suit for accounts is to try the suit in order to determine the liability of the defendant to render accounts and after this liability has been established to make an order for the taking of accounts. An order for taking accounts cannot be made, notwithstanding the provisions of O. XXVI, r. 11 of the C. P. C., before the liability of the defendant has been established. C J. C. DAS *v.* CACHAR NATIVE JOINT STOCK CO., LTD. 764

——— **O. XXX, rr. 1, 3**—*Suit against firm—Service of summonses—Dissolved partnership—Individual liability of partners—Proviso to r. 3, scope of.*

Where a suit is, under O. XXX, r. 1, of the C. P. C., properly filed against a partnership firm in the firm's name, service on any one or more of the partners or on the manager must be deemed good service upon the firm. There is no difference at all as to the mode of effecting service whether the firm is going on or has been dissolved at the date of the service of the summons. If the service is effected as provided by r. 3 of O. XXX, the suit can be proceeded with against the firm and the plaintiff is entitled to obtain a decree against the firm. In the case of partnerships, which are going concerns at the date of the institution of the suit, the decree which is obtained against the firm is binding on all the partners in the firm, whether they have been served individually or not. In the case of a firm which has been dissolved to the knowledge of the plaintiff before the institution of the suit, an exception is made as to the liability of the partners in the firm under the decree passed against the firm by the proviso to r. 3 of O. XXX to the effect that in the case of such a firm the plaintiff must serve each and every person whom he wants to make liable personally in respect of the decree passed against the firm, and if he has not done so, he cannot execute the decree against the partner whom he had not

served personally. The right to execute the decree against the firm is, however, in no way affected by the proviso. B GORDHANDAS KALYANJI BHAT *v.* GAUTAMCHAND RUPCHAND, 27 Bom. L. R. 541; (1925) A. I. R. (B.) 331 1051

——— **O. XXXII, r. 4**—*Guardian* ad litem, *appointment of—Presumption—Consent of guardian, whether necessary—Negligence of guardian—Minor, whether bound by decree.*

The presumption that judicial acts have been regularly performed applies to the acts of the Court alone. Where, therefore, it appears from the record of a suit that a minor defendant was represented by a guardian *ad litem* it might be presumed that the necessary notices were issued and that a formal order appointing the guardian *ad litem* was drawn up, but there can be no presumption that the person who was named as the guardian *ad litem* of the minor defendant was a fit person to be appointed guardian.

Where a question arises whether a minor is bound by the result of a previous suit or not, it is open to the Court which is investigating the point to enquire as to whether the person who was named as the guardian *ad litem* of the minor in the previous litigation was or was not a fit person to be appointed guardian.

Sub-rule (3) of r. 4 of O. XXXII of the C. P. C. lays down that no person shall, without his consent, be appointed guardian *ad litem* for a minor defendant. A person who is named as guardian *ad litem* of a minor defendant but does not appear in the suit cannot be said to have consented to be appointed guardian.

A minor is as much bound by a judgment in his own action as if he were a person of full age unless he can establish gross *laches* or fraud and collusion on the part of his guardian.

The omission of a guardian *ad litem* to raise a defence on behalf of his ward which he might and ought to have raised does not preclude the ward from raising that defence in a subsequent suit. O RAMESHWAR BAKHSH SINGH *v.* RIDH KUER, 1 O. W. N. 775 238

——— **O. XXXII, rr. 4, 9**—*Hindu Law—Joint family—Partition, suit for—Father, whether competent to act as next friend of minor son.*

A member of a joint Hindu family is competent to act as the next friend of his minor son in a suit for partition brought by him on behalf of himself and the minor inasmuch as the interests of the father and the minor in such a suit are identical and not adverse. M LINGA REDDI *v.* CHENGALRAYA REDDI, 48 M. L. J. 417; 21 L. W. 659; (1925) A. I. R. (M.) 734 42

——— **O. XXXII, r. 9**—*Minor—Appeal filed by minor through next friend dismissed for default—Negligence of next friend—Minor, whether entitled to re-hearing.*

An appeal filed on behalf of a minor was dismissed for default of appearance and thereupon another relative of the minor made an application to the Court for removing the next friend of the minor, for appointment of himself as next friend and for an order directing that the appeal should be re-heard. The Appellate Court dismissed the application without taking any evidence. In the meantime the minor had attained majority and adopted the proceedings taken on his behalf by the relative who had made the application:

Held, (1) that the minor having become a major it was no longer necessary to remove the next friend as the latter had ceased to be such by the mere efflux of time;

(2) that the lower Court should have taken evidence as to whether the next friend of the minor had been guilty of gross negligence in allowing the appeal to be dismissed in default and if such negligence was established the minor was entitled to re-hearing of the appeal. M RAMAPPA NAYUDU *v.* SAMBOORANATHACHI, 21 L. W. 325; (1925) A. I. R. (M.) 774 117

——— **O. XXXIII, r. 9**—*Suit* in forma pauperis—*Death of plaintiff—Legal representative, whether can be dispaupered—"Plaintiff," whether refers to physical person—Court-fee, levy of, on dispaupered plaintiff.*

When a plaintiff in a suit instituted *in forma pauperis* dies, his executor is not liable to be dispaupered because personally he is not a pauper.

The expression 'plaintiff' in r. 9 of O. XXXIII of the C. P. C., when applied to the legal representative of a deceased pauper plaintiff refers not to the physical person before the Court but to the legal person in his representative capacity as the legal representative of the deceased pauper plaintiff.

The mere fact that a right to sue *in forma pauperis* is a personal right is no reason for holding that the legal personal representative of a pauper plaintiff loses that right.

Obiter.—There is no provision in O. XXXIII of the C. P. C. giving retrospective effect to an order dispaupering a plaintiff. A dispaupered plaintiff cannot, therefore, be required to pay the Court-fee in respect of a plaint which has been by the order of the Court admitted to be filed without any fees. M SIVAGAMI AMMAL *v.* GOPALASWAMI ODAYAR, (1925) M. W. N. 176; 48 M. L. J. 390; (1925) A. I. R. (M.) 765 372

——— **O. XXXIV, r. 1**—*Mortgage by adult members of joint Hindu family, suit on—Minor member of family, not made party, effect of—Suit, whether maintainable.*

In the case of a mortgage executed by the adult members of a joint Hindu family it is open to the mortgagee, in a suit for sale on foot of the mortgage, to ask the Court to grant him a decree against the persons who borrowed the money from him and who had executed the mortgage, for they cannot be allowed to plead want of authority to make the mortgage. Such a suit is not liable to dismissal merely on the ground that a minor member of the joint family of the mortgagors has not been impleaded as a party to the suit. The decree, however, passed in such a suit would not affect the interests of the minor who has not been made a party to the suit. A NATHU *v.* RAM SARUP, 23 A. L. J. 246; 47 A. 427; (1925) A. I. R. (A.) 335 700

——— **O. XXXIV, r. 5.** *See* LIMITATION ACT, 1908, s. 20, SCH. I, ART. 181 746

——— **O. XXXIV, r. 5**—*Mortgage-decree, preliminary—Final decree, application for, whether maintainable—Application, whether must be in writing—Presumption—Suit to set aside decree, whether maintainable.*

Where a Court has jurisdiction to decide a matter but in the exercise of such jurisdiction it acts illegally or with material irregularity, its judgment is voidable but not void and can be vacated in an appropriate proceeding by way of review, appeal or revision. A separate suit to set aside the judgment is not maintainable.

A judgment vitiated by fraud is void but a judgment affected by an illegality or irregularity is merely voidable.

An application under O. XXXIV, r. 5 of the C. P. C., to make a decree final is not required to be in writing.

Where the law does not require an application to be in writing an oral application satisfies its requirements, and where an order is such that the Court would not have made it without an application by the judgment-creditor, it may be presumed that due application had been made for it.

Where the parties agree by compromise to a decree being passed in the form of a preliminary mortgage-decree, an application under O. XXXIV, r. 5 of the C. P. C., will lie to make the decree final, irrespective of the fact that the preliminary decree was framed as a decree in a mortgage suit merely as a matter of convenience. N SITARAM *v.* LAXMANRAO 820

——— O. XXXIV, r. 5—*Mortgage—Lease to mortgagor—Suit for arrears of rent and ejectment—Decree for sale of property on non-payment, whether preliminary decree—Final decree, whether necessary.*

A usufructuary mortgagee of certain properties leased them to the mortgagor himself on a *kychit* by which the latter agreed to pay rent and which provided that any arrears of rent which fell due would be a charge on the equity of redemption. The rent fell into arrears and the mortgagee brought a suit for rent and ejectment and obtained a decree which directed that the plaintiff should deposit a certain sum of money into Court on account of the improvements effected by the defendant and that the defendant should surrender possession of the properties and pay up the arrears of rent, the amount decreed in respect of improvements to be set off in execution against the arrears, and that after three months from the date of the decree the plaintiff should recover any deficit which remained unpaid after the set off by sale of the property:

Held, that the direction in the decree with regard to the sale of the property was not in the nature of a preliminary decree requiring a separate final decree before it could be executed, but was in the nature of a money-decree which the decree-holder was authorized to execute against the property in the event mentioned in the decree. M MACHULLATHIL CHANDU KUTTY *v.* KURUVATHANCHEI KEEZANA 557

——— O. XXXIV, r. 7—*Redemption, suit for—Decree, construction of—Costs, whether charge on mortgaged land—Payment of decretal amount without costs, whether compliance with decree.*

The decree of an Appellate Court in a suit for redemption increased the amount of money declared to be payable to the mortgagee by the First Court by a certain sum and went on to state that a certain specified sum was payable by the plaintiff to the defendant on or before a certain date. The decree further stated that certain costs were payable by the plaintiff to the defendant and continued that if the plaintiff paid the "sum aforesaid" to the defendant within a certain date, etc.:

Held, per *Mukerji, J.*—That it was not the intention of the Court to make the costs as stated in the decree a charge on the property and that if the plaintiff paid the sum mentioned in the earlier portion of the decree as payable by him to the defendant it was a sufficient compliance with the decree.

Per *Daniels, J.*—That the operative part of the decree clearly directed that the plaintiff must pay the sum mentioned in the decree and the costs and that if the plaintiff failed to pay the costs along with the mortgage-money within the time limited by the decree, the decree was not satisfied.

Per *Mukerji, J.*—It is open to an Appellate Court in a mortgage suit either to pass a personal decree for costs against the unsuccessful party or to make the costs payable out of the mortgaged property. In every case it is a matter of interpretation what was intended by the Appellate Court.

Per *Daniels, J.*—Under O. XXXIV, r. 7 of the C. P. C. the Court must direct that an account be taken of what is due to the defendant for principal and interest on the mortgage and for his costs of the suit, if awarded to him. The form of the decree prescribed by the Code under the rule contemplates that the costs of the suit shall be a charge on the mortgaged property and shall be regarded as such. A SHEODARSHAN SINGH *v.* BENI CHAUDHRI, L. R. 6 A. 225 Civ.; (1925) A. I. R. (A.) 492 585

——— O. XXXVIII, r. 5—*Attachment of immoveable property before judgment—Small Cause Court, power of.*

A Court exercising the jurisdiction of a Small Cause Court has power to attach immoveable property before judgment under O. XXXVIII, r. 5 of the C. P. C. M KOSHANARAMA CHETTIAR *v.* ANNAMALAI PILLAI, (1925) M. W. N. 169; 48 M. L. J. 406; (1925) A. I. R. (M.) 589; 22 L. W. 103; 48 M. 488 399

——— O. XLIV, r. 1, proviso—*Leave to appeal in forma pauperis—Principles applicable—Respondent, locus standi of, to be heard.*

On an application for leave to appeal in *forma pauperis* under r. 1 of O. XLIV of the C. P. C., all that is required under the proviso to the rule is that the Court before admitting the appeal should be satisfied that it is not merely a frivolous appeal, and that there are reasonable grounds for doubting the correctness or justness of the decision of the lower Court.

It is not necessary that the Court must go through the whole case and admit the appeal only if it is satisfied that it would reverse the decision of the lower Court there and then if no appearance were entered for the respondent.

Where such an application comes on for admission the respondent has no *locus standi* to be heard. M MERUVA PARASURAMADU *v.* MANDAVILLIRAMANNA, 22 L.W. 23; 49 M. L. J. 353 960

——— O. XLVII, r. 1 (1)—*Review—Mistake of law—Decision wrong on merits—Authoritative precedent, whether discovery of new and important evidence—Ground for review—Practice—Reference to Full Bench—Decided case, whether can be referred.*

A case already decided cannot be referred to a Full Bench.

A judgment cannot be reviewed under O. XLVII, r. 1 (1) of the C. P. C., on account of some mistake or error apparent on the face of the record, where the alleged mistake or error is a wrong exposition of law, for instance, where the judgment is based on a precedent which has been modified by a subsequent decision.

Even assuming that the discovery of an authoritative precedent by which a precedent relied on in the judgment has been modified amounts to the discovery of new and important evidence within the meaning

of O. XLVII, r. 1 (1) of the C. P. C., such a discovery is not a ground for review without strict proof that the subsequently relied on authority was not within the knowledge of the applicant or could not be produced by him when the decree or order was passed or made.

A review which is really an attempt to re-argue the appeal cannot be ordered on the ground that the decision was wrong on the merits. N ATMARAM *v.* PUNJABRAO 1029

——— **O. XLVII, r. 1 (1)**—*Review—Mistake of law or merits, whether ground for review—"Any other sufficient reason," scope of—Judgment based on precedent subsequently modified—Discovery of new evidence.*

A review cannot be granted on the ground of a mistake of law or on the merits.

Order XLVII, r. 1 of the C. P. C. must be read as in itself definitive of the limits within which review of a decree or order is permitted and the words "any other sufficient reason" in the rule mean a reason sufficient on grounds at least analogous to those specified immediately previously.

A judgment cannot be reviewed under O. XLVII, r. 1 (1), C. P. C., on account of some mistake apparent on the face of the record, where the alleged mistake or error is a wrong exposition of law, as for instance where the judgment is based on a precedent which has been modified by a subsequent decision.

Even assuming that the discovery of an authoritative precedent, by which a precedent relied on in the judgment has been modified, amounts to the discovery of new and important matter or evidence within the meaning of O. XLVII, r. 1 (1), C. P. C., such a discovery is not a ground for review without a strict proof that the subsequent authority was not within the knowledge of the applicant when the decree or order was passed or made. N RAMCHANDRA MAHADEORAO *v.* GOVINDRAO, 8 N. L. J. 31; (1925) A. I. R. (N.) 266 125

——— **O. XLVII, rr. 1, 4**—*Review—Discovery of new and important matter—Want of knowledge, strict proof of—"Other sufficient case," whether can be relied on.*

On an application for review under O. XLVII, r. 1, C. P. C., on the ground of discovery of new and important matter, the Court has no power to grant a review without calling for strict proof that the new matter was not within the knowledge of the petitioner at the time of the original hearing. Nor can in such a case the Court grant a review "for other sufficient reason" and evade the requirements of r. 4 (2) by adopting as its own reason, without any inquiry, the petitioner's reason for seeking review. M VELOVOLU POTHURAJU *v.* MATTA ADISESHU, 21 L. W. 276; (1925) A. I. R. (M.) 578 391

——— **O. XLVII, rr. 1, 4, 7**—*Review, grounds for—Evidence, re-consideration of, whether ground for review—Appeal—Appellate Court, whether can examine grounds for review—Procedure.*

When an application for review is granted the party dissatisfied with the order may, under r. 7 of O. XLVII of the C. P. C., appeal against that order or may take the same objection in an appeal filed against the final decree, and on such an appeal it is open to the Appellate Court to examine the ground upon which the review was admitted, and if the ground for review does not come within the words of r. 1 of O. XLVII, then the Appellate Court is competent to hold that the review was improperly admitted and should have been rejected under r. 4 of the Order.

A review cannot be granted for re-consideration of the evidence in the case or for re-examination of a finding of fact. C NRITYA GOPAL MITRA *v.* JOEIT MONJARI DASI 770

——— **O. XLVII, r. 7.** *See* C. P. C., 1908, s. 115 204

——— **Sch. II, paras. 1, 15, 16.** *See* C. P. C., 1908, s. 47 633

Company—*Mortgage of shares—Issue of new shares—Redemption—New shares, whether accretion.*

The question whether an accretion to mortgaged Company shares by the issue of fresh capital can be treated as belonging to the corpus depends on whether accumulated profits are distributed as dividend or converted into capital. If a sum that is entered in the Balance Sheet to the credit of the Reserve Fund is transferred from the Reserve Fund to the Capital Account and new shares are issued to the existing share-holders, it may be said that there is a distribution of capital and the mortgagee is only entitled to interest on the new shares, but if the share-holders prefer that instead of getting dividends paid to them in cash, the amount to the credit of Profit and Loss Account available for payment of dividends in a particular year should be transferred to the Capital Account and new shares issued in respect thereof, there is a distribution of dividends and the mortgagee would be entitled to retain the new shares.

Plaintiff's father was the owner of certain Company shares but was entitled to retain only a certain sum out of the dividend, the balance being payable to *A* and *G* during their lifetime. Subsequently he mortgaged some of the shares with *A*. In the meantime the capital of the Company was increased by the issue of new shares called B shares, each of the original share-holders being allotted one B share for each old share held by him, and the B shares were to be paid for out of the dividends payable on the original shares, such dividend being payable to the share-holders at a certain rate and the balance being credited towards the calls on the B shares. After the death of *A* and *G*, plaintiff, who had become entitled to the shares, brought a suit to redeem them from the trustees of the estate of *A*. The plaint did not specifically mention the B shares but claimed to redeem the original shares "together with the issues thereof." The trustees of the estate of *A* filed a statement showing the dividends received in respect of the original shares as well as in respect of the B shares. The decree eventually passed in the suit allowed redemption of "the mortgaged shares together with the issues mentioned in the suit" and the decree was confirmed on appeal. In execution the question arose whether the mortgagor was entitled to the B shares or whether the *B* shares merely represented the dividend on the original shares and consequently belonged to the mortgagee:

Held, that having regard to all the circumstances of the case it was a fair inference that the profits of the Company were capitalized and that the new shares were allotted to the holders of the old shares as part of the capital and did not represent the dividends on the old shares and that consequently the plaintiff was entitled to the *B* shares. B MOTILAL HIRABHAI *v.* BAI MANI, 23 Bom. L. R. 1279; 46 B, 529; (1922) A. I. R. (B.) 370 269

Compound Interest. *See* CONTRACT ACT, 1872, s. 74 129

Construction of deed. *See* HINDU LAW—MITHILA SCHOOL 849

Construction of document—*Mortgage by way of conditional sale—Sale, out and out—Principles applicable.*

Where a question arises as to whether a document is a deed of mortgage by conditional sale or a deed of sale with the condition of re-purchase attached to it, each case must be decided upon the intrinsic evidence afforded by the terms of the document and upon the consideration of surrounding circumstances.

A deed which purported to be a deed of sale conferred full proprietary rights on the vendee in the first part, but towards the end of the document there was a clause to the effect that if within a period of seven years the consideration mentioned in the document was not re-paid to the vendee, then the vendor would have to give up the land, and in that case the sale would become valid like an absolute sale and it would then divest the vendor of his title and confer upon the vendee the right to make sale or gift with effect from the expiry of the aforesaid period. The consideration money mentioned in the deed represented the actual price of the land at the date when the deed was executed. More than forty years after the date of the deed the vendor brought a suit for redemption on the allegation that the deed was a deed of mortgage by conditional sale :

Held, that the deed was a deed of an out-and-out sale with a condition of re-purchase and the plaintiff's suit must, therefore, fail. C CHANDRA KUMAR KRITIRATNA *v.* ALAM KHAN 546

——— *Will, or authority to adopt—Principles applicable.*

It is not proper to interpret one document in the light of words used in another document. Each document must be considered with reference to words and expressions used in it and where the question is whether the document is a Will or an authority to adopt, and the document when read as a whole gives an impression that the executant intended to dispose of his property by it and that it should take effect after his life, then whatever may be the words used in the document, the general intention should not be overlooked. In construing the terms of the document the main thing to be considered is whether the executant had an intention to devise his properties to any one, in other words, whether the document contains clear words as to a testamentary intention on the part of the executant.

A Hindu executed a document giving his wife authority to make an adoption after his death and the document contained the following clause "my whole property shall be divided into two equal shares, one share being enjoyed by the adoptive mother and the other share by the adopted son. During her lifetime, the mother shall enjoy the said property to her own liking. After her death the whole property in respect of the said share shall pass to the adopted son" :

Held, that from the words of the document the intention to devise the property to the wife could be clearly gathered and that, therefore, the document was a Will and not an authority to adopt and consequently did not require registration. M SUBBAMMA *v.* PAPAYYA, 48 M. L. J. 425; (1925) A. I. R. (M.) 748 187

Contract—*Sale of goods*—"Force majeure", *meaning of—War conditions—Vessel commandeered by Government—Performance of contract, whether excused—Impossibility of performance—Vendor, liability of.*

It is not reasonable to ask a person who has entered into a particular contract to supply goods, to break his other contracts or to make others to break their contracts in order to perform that particular contract. If a party to a contract cannot perform his part without breaking other contracts, then the existence of those other contracts might be deemed to hinder or prevent him from performing the contract in question.

It is not sufficient for a party to a contract to point to something in the nature of a *force majeure* and seek to escape liability in respect of the contract. It is necessary to go further and establish by satisfactory evidence that the circumstance or occurrence which is called *force majeure* was the real cause which prevented the performance of the contract.

Where a contract to supply goods is entered into during a period when there is to the knowledge of the parties difficulty in securing tonnage for the cargo, such difficulty or even the impossibility of procuring tonnage cannot be aptly described by the expression *force majeure*.

Where a commercial man finds himself face to face with an upsetting of his plans and calculations brought about by *force majeure*, he is not bound to prove more than that he made his best endeavours as a man of ordinary prudence would and should, who was anxious to procure some tonnage for himself under the prevailing conditions.

Where in a contract for sale and delivery of goods the manner of the performance of the contract is not indicated or included as necessarily being in the contemplation of the parties, the difficulty or even impossibility of performing the contract in the manner contemplated by one of the contracting parties would be no excuse for non-performance. But if the manner of performance is indicated in the contract or otherwise comes to be included as a term in the contract then the *force majeure* clause would apply to any case of *force majeure* preventing the performance of the contract in that manner.

Whenever the possibility of performance is referred to in commercial contracts, what must be considered and contemplated is the possibility in a commercially reasonable sense and not a suppositious possibility.

Defendant, a merchant in Madras, contracted in November 1916 with the plaintiffs, a firm in Marseilles, to ship 400 tons of groundnut kernels to Marseilles in December-January 1916-1917 on C. I. F., terms, the goods to be of a particular brand. The defendant booked the necessary tonnage on S. S. *Seapool* but the vessel was commandeered by the Government on 14th November for purposes connected with the War. In spite of his best endeavours the defendant was unable to obtain accommodation for this cargo on any other steamer. The contract contained *force majeure* clauses discharging the parties from performance of the contract in cases of war, revolution, etc. In a suit by the plaintiffs for damages :

Held, (1) that the defendant was not liable for non-performance of the contract ;

(2) that the contract being a C. I. F. contract, under which the defendant had to tender Bills of Lading for goods of a particular brand, a tender of goods of some other brand would not have been a strict compliance with the terms of the contract, such as the

plaintiffs were bound to accept and that, therefore, the defendant could not have bought groundnuts at Marseilles or London and supplied them to the plaintiffs. M EDMUND BENDIT *v.* EDGAR RAPHAD PRUDHOMME, 48 M. L. J. 374; (1925) A. I. R. (M.) 626 **681**

Contract Act (IX of 1872), s. 11—*Suit on mortgage-bond—Plea of minority—Burden of proof.*

Where in answer to a suit for sale on foot of a mortgage-bond the defence is that the defendant was a minor at the time of the execution of the bond, the burden lies on him to prove his minority at the date of the execution of the document and not on the plaintiff to prove that the defendant was a major on that date. A SURJA *v.* JOTI PRASAD, L. R. 6 A. 283 Civ.; 47 A. 493 **445**

——— **ss. 20, 65**—Inam, *resumption of*—Ryotwari patta, *grant of—Resumption declared illegal—Revenue, recovered from holder of* patta, *refund of—Mistake.*

Government resumed a *devadayam inam* attached to a temple and granted a *ryotwari patta* in respect of it to the trustee of the temple and thereafter to a purchaser from him. Subsequently at the instance of third parties the resumption was declared illegal. In a suit by the purchaser from the trustee for refund of the assessment levied from him by Government during the whole period of litigation:

Held, (1) that the plaintiff when he accepted the *patta* was aware that the right of resumption by Government was being questioned and that, therefore, there was no mistake so as to render s. 20 of the Contract Act applicable;

(2) that the issue of a *ryotwari patta* by Government to the plaintiff not only did not convey the land from Government to the grantee but did not even create a contract in respect of the land between them, and that plaintiff was consequently not entitled to any relief. M SECRETARY OF STATE FOR INDIA *v.* YELLEPEDDI JANAKIRAMAYYA PANTULU, 48 M. L. J. 440; (1925) M. W. N. 481; (1925) A. I. R. (M.) 859 **644**

——— **s. 23**. *See* C. P. TENANCY ACT, 1920, ss. 12, 13 **1043**

——— **s. 23**—*Excise licensee—Partnership contract, legality of.*

Where a licensee for sale of intoxicating drugs takes another person as partner in the business, without obtaining the approval of the Collector, as required by the terms of the license, the partnership contract cannot be recognised by a Civil Court, as the object of the contract is illegal, being a violation of the ordinary law under which no person is allowed to sell intoxicating drugs without permission of Government. S DEWANDAS KIMATMAL *v.* KISSUMAL PAHLUMAL, (1925) A. I. R. (S.) 55; 18 S. L. R. 16 **353**

——— **s. 43**. *See* EXECUTION OF DECREE **47**

——— **s. 74**. *See* TARIFF ACT, 1894, s. 10 **119**

——— **s. 74**—Interest, high rate of—Penalty. *See* C. P. C., 1908, s. 11 **767**

——— **s. 74**—*Compound interest, whether penal—Compound interest, award of, circumstances—Waiver of right, when can be presumed.*

The Courts do not lean towards compound interest, they do not award it in the absence of stipulation, but where there is a clear agreement for its payment, it is, in the absence of disentitling circumstances, allowed.

A stipulation in a mortgage deed that if any of the monthly instalments of interest is not paid on its due date, such unpaid instalment of interest should be capitalised and added to the amount of the principal loan and that all such additions by way of capitalised interest should be chargeable upon the mortgaged property, is not penal, so as to bring it under s. 74 of the Contract Act.

The general rule in regard to waiver is that there can be no waiver, unless the person against whom waiver is claimed had full knowledge both of his rights and of the facts which would enable him to take effectual action for their enforcement.

The mere receipt of interest by the mortgagee after such default by the mortgagor as would entitle the mortgagee to compound interest does not amount to waiver of his right to charge compound interest.

Every man may renounce a benefit or waive a privilege which the law has conferred upon him, so long as it does not prejudice the rights of third persons. B NADERSHAW SHERIARJI RABADI *v.* SHIRINBAI BAPUJI MUSA, 25 Bom. L. R. 839; (1924) A. I. R. (B.) 264 **129**

——— **s. 245**—*Liability by "holding out," extent of—Joint Hindu family—Manager entering into partnership—Family, whether becomes partner—Insolvency proceedings against partner—Partnership, whether dissolved.*

Where the managing member of a joint Hindu family enters into a partnership with strangers he does not thereby make other members of the family partners in the business so as to clothe them with all the rights and obligations of a partner as defined by the Indian Contract Act. In such a case the family as a unit does not become a partner but only such of its members as in fact enter into a contractual relation with the strangers, will be governed by the Act.

The rule of liability "by holding out" contained in s. 245 of the Indian Contract Act can be relied on only by the persons to whom the representation has been made and who have acted on the faith of its being true.

Mere institution of insolvency proceedings against the partners of a firm, or even the adjudication of a partner as an insolvent, does not by itself effect a dissolution of a partnership. S HARNAMDAS *v.* MAYADAS LAKHMICHAND **905**

——— **ss. 253, 254**—*Partnership—Assignment of his share by partner, effect of—Assignee, position of—Suit for accounts by assignee, whether maintainable—Release of his rights by a partner before assignment, effect of—Transfer of Property Act (IV of 1882), s. 6* (e)*—Right to sue to set aside release, whether can be transferred.*

An assignment by one of the partners in a firm of his share in the partnership, without the consent of the other partners, does not cause an immediate dissolution of the partnership, nor does the assignment give the assignee a right to an account of the profits. He must accept the account of the profits as agreed to by the partners. It is only when dissolution occurs that the right of the assignee arises to claim an account as from the date of the dissolution.

It is only a partner who can file a suit against the other partners for dissolution. Consequently, an assignment by one partner in favour of an outsider merely gives a right of action to the other partners to ask the Court to dissolve the partnership.

Plaintiff filed a suit for accounts of a partnership on the allegation that defendants Nos. 1 to 5 constitute

Contract Act—concld.

a partnership together with defendant No. 6 whose right, title and interest in the partnership had been purchased by the plaintiff. Defendants Nos. 1 to 5 set up a release executed by defendant No. 6 before the assignment in favour of the plaintiff. Defendant No. 6 urged that the release was obtained from him by fraud and misrepresentation:

Held, (1) that if the release executed by defendant No. 6 in favour of the other defendants was valid, defendant No. 6 had ceased to have any right of action against his co-partners and that there was nothing left in him which he could have assigned to the plaintiff;

(2) that if the release executed by the defendant No. 6 was not binding on him on the ground that it had been obtained from him by misrepresentation or fraud, defendant No. 6 would have a right to have the release set aside, but that such a right, being a mere right to sue, could not be transferred to the plaintiff;

(3) that assuming that the defendant No. 6 succeeded in having the release set aside, the partnership would still be existing between defendants Nos. 1 to 5 and the plaintiff, as assignee of defendant No. 6, who was one of the partners, would have no right to sue for an account of the profits of the partnership;

(4) that in either view of the case the plaintiff's suit was liable to be dismissed. B DHANAJI JHELAJI *v.* GULABCHAND PANA, 27 Bom. L. R. 409; (1925) A. I. R. (B.) 347 812

Co-owners—*Party wall—Nature of wall built on party wall—Windows, whether can be opened in party wall—Trespass—Injunction, suit for—Limitation Act (IX of 1908), Sch. I, Art. 120.*

Where one of two neighbouring owners raises a party wall with the consent or acquiescence of the other, the raised portion must assume the same character, as the old party wall on which it stands, and neither party can be allowed to commit a trespass on the party wall so increased in height. If either of the parties opens windows in the raised part of the party wall his action would amount to a trespass and would be liable to be restrained at the instance of the other party. A suit to restrain such action must, however, be brought within a period of six years under Art. 120 of Sch. I to the Limitation Act. Failing such a suit, however, the party aggrieved would be entitled to block the windows from his own side of the premises. B IMAMBHAI KAMRUDIN *v.* RAHIMBHAI USMANBHAI, 27 Bom. L. R. 503; (1925) A. I. R. (B.) 373; 49 B. 586 977

Co-sharers—*Ejectment suit, when maintainable—Ouster, proof of.*

Ordinarily one tenant-in-common cannot maintain an ejectment against another tenant-in-common, because the possession of one tenant-in-common is the possession of another and to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But where the claimant tenant-in-common has not been in participation of the rents and profits for a considerable length of time and other circumstances concur, it may be presumed that there has been an ouster.

Every case must, however, depend upon its own facts and the Court of fact is entitled to find whether a certain set of facts presented before it does or does not amount to ouster. C HANGSESWAR KUNDU *v.* SURJYA NARAIN MONDAL 336

Co-sharers—concld.

——— *Exclusive possession—Ouster—Easement over joint property, whether can be acquired.*

Exclusive possession by co-sharers of portions of undivided estates is a common thing. Such exclusive possession does not amount to an ouster of the other co-sharers. Every joint owner has a right to use any portion of the joint lands so long as he does not exclude the other co-sharers from it.

A person who alleges himself to be a co-sharer in certain property can have no right of easement in it. Pat KAMESHWAR NARAIN SINGH *v.* JANARDHAN PRASAD NARAIN SINGH, 3 Pat L. R. 81; (1925) A. I. R. (Pat.) 492 736

——— *Joint possession, decree for.*

Where a party is entitled to joint possession, he should be granted the relief, and to entitle him to it, it is not necessary that he should have been in possession before and should have been dispossessed later on. But from this it does not follow that in every case where there are joint claimants and joint owners it is the duty of the Court to grant a decree for joint possession. In certain cases a Court would be entitled to refuse a decree for joint possession, for instance, where a co-sharer has been in peaceful possession of certain plots of land as his *khudkasht* for a number of years before the suit is instituted, the other co-sharers will ordinarily be not entitled to a decree for joint possession. A GAJRAJ SINGH *v.* RAM ANJORE SINGH, L. R. 5 A. 286 Rev.; L. R. 6 A 47 Rev. 59

——— Khudkasht *plots, dispossession from—Possession, decree for, whether can be obtained.*

When a co-sharer in a village has rightfully acquired land as his *khudkasht* and is in separate physical possession of it, and another co-sharer forcibly dispossesses him, the former is entitled to a decree for physical possession of the land from which he has been dispossessed and not merely to a decree for joint possession. A BHAGWAT PRASAD *v.* BALDEO PRASAD, L. R. 6 A. 313 Civ. 679

Court Fees Act (VII of 1870), s. 5—*Taxing Officer, whether has jurisdiction to determine valuation.*

Held, per *Curiam* (*Das, J.*, dissenting).—The Taxing Officer or the Taxing Judge, as the case may be, is under s. 5 of the Court Fees Act the proper person to determine the fee payable on a memorandum of appeal presented to the High Court, and for this purpose he may investigate the question of proper valuation of the subject-matter of the appeal and his decision on the point is final. Even if he should make a manifest mistake in the exercise of his jurisdiction his decision is not subject to an appeal to, or review by, the Court itself.

Per *Miller, C. J.* and *Mullick, J.*—It is desirable that the Taxing Officer in determining questions of valuation should not, as a rule, base his decision merely upon allegations in the plaint as to the annual profits of the property to be valued. In order to arrive at a proper decision of such questions it is better that the parties should be called upon to produce, in such manner as may be convenient, such documentary or other evidence as they may be prepared to tender to enable him to decide the question.

Per *Mullick, J.*—Where the High Court has delegated its jurisdiction to a Taxing Officer, it has no jurisdiction left to do any of the acts which it could otherwise have performed, and if the Taxing Officer cannot decide a question of valuation no other authority can discharge that duty.

Per *Jawala Prasad, J.*—In order that the decision of the Taxing Officer or Taxing Judge should be final there must be a contest between the officer whose duty it is to see that proper Court-fee is paid and the suitor, and an opportunity must be given to the parties to the contest, namely, the suitor and the Government, to be heard. The decision cannot be final if the question is determined *ex parte* and without giving an opportunity to the suitor to show, by adducing evidence or otherwise, what the value of the subject-matter of the appeal, and consequently the amount of Court-fee payable, should be.

Per *Das, J.*—The Taxing Officer has no jurisdiction to decide a question relating to valuation for the purpose of determining the amount of Court-fee payable by the appellant either on his plaint or on his memorandum of appeal, and if he assumes jurisdiction to decide such a question the Court may ignore his decision. **Pat** KRISHNAMOHAN SINHA *v.* RAGHUNANDAN PANDEY, (1925) Pat. 65; 6 P. L. T. 262; (1925) A. I. R. (Pat.) 392; 4 Pat. 336 **137**

——— **ss. 7 i, ii, 12**—*Maintenance, arrears of, suit to recover—Court-fee payable—Decision of First Court, whether final—Appeal, whether lies.*

Section 12 of the Court Fees Act only applies to a decision as to the valuation of a suit which falls within a particular class, and not to a decision as to the particular class in which a suit falls, that is to say, if there is no doubt as to the class in which a suit falls and the section of the Court Fees Act which applies to it, the decision of the First Court, as to valuation, which depends on the value of the property in suit, is final; but if there is a dispute as to the class in which the suit falls, that is to say, the section of the Court Fees Act, which applies to it, an appeal will lie from the decision of the First Court.

A suit to recover arrears of maintenance, in which there is no prayer for declaration as to a right to future maintenance, falls within cl. 1 of s. 7 of the Court Fees Act. **N** GOBIND *v.* VITHABAI **911**

——— **s. 7 ii, iv (c)**—*Suits Valuation Act (VII of 1887), s. 8—Suit for declaration as to ownership of annuity, valuation of—Court-fee payable—Value for purposes of jurisdiction.*

A suit for a declaration that the plaintiff is the owner of the Toda Giras Hak, as the heir of a deceased recipient of the Hak, and is as such entitled to recover it, falls within the purview of s. 7 iv (c) of the Court Fees Act, and not within s. 7 ii of the Act, and Court-fee thereon is payable according to the amount at which the relief sought is valued in the plaint. In such a suit the value for purposes of jurisdiction is under s. 8 of the Suits Valuation Act, the same as for Court-fees. **B** BHIMSANGJI CHHATRASANGJI *v.* DOLATSANGJI HAMIRSANGJI, 27 Bom. L. R. 247; (1925) A. I. R. (B.) 282 **801**

——— **s. 7 iv (c)**—*Suits Valuation Act (VII of 1887), s. 8—Suit for declaration and consequential relief—Valuation of reliefs—Court-fee payable.*

In a suit falling under s. 7 (iv) (c) of the Court Fees Act the valuation for purposes of Court-fees is to be determined first and that for the purposes of jurisdiction must follow on the same; but the plaintiff in such a suit cannot at one and the same time obtain the services of the highest Tribunal for the determination of his claim and evade the payment of *ad valorem* Court-fees. If for the purposes of jurisdiction he sets a high value on the relief by way of declaration and a merely nominal value on the relief by way of injunction, it is doing him no injustice to hold that the "relief sought", on which the Court-fee must be levied, is the sum total of the two reliefs.

Plaintiff brought a suit on behalf of two idols for a declaration that the defendant had no power to supervise and manage the properties of the idols and that he was the lawful manager of the idols, and for an injunction restraining the defendant from supervising and managing the properties of the idols and for recovery of the moveables belonging to the idols. He valued the declaratory relief at Rs. 25,000, the relief for injunction at Rs. 1,000 and the relief for recovery of the moveables at Rs. 500. He paid *ad valorem* Court-fees on the reliefs with regard to the injunction and the recovery of the moveables but paid only Rs. 10 with regard to the declaratory relief:

Held, that the suit was one for a declaratory decree with consequential relief and fell within the purview of s. 7 iv (c) of the Court-Fees Act, and that the plaintiff having valued the different reliefs at Rs. 26,500 he was bound to pay *ad valorem* Court-fees on that sum and that the Court-fees payable on appeal must also be determined on the same basis. **A** MANNI LAL *v.* THAKUR RADHEY GOPALJI, 23 A. L. J. 344; L. R. 6 A. 258 Civ.; 47 A. 501 **190**

——— **ss. 7 iv (c), 12, Sch. II, Art. 17 iii**—*Decision as to category of suit, whether final—Hindu Law—Joint family—Alienation by co-parceners—Suit for declaration—Court-fees payable.*

A decision as to the category to which a suit or appeal belongs is not final under s. 12 of the Court Fees Act.

The determination of the category to which a suit belongs must depend upon the relief which the plaintiff prays for, because Court-fees must be determined with reference to the prayer contained in the plaint. The Court must ascertain what the plaintiff actually asks for in his plaint and must not speculate what may be the ulterior effect of his success.

Where a plaintiff is bound to ask both for a declaration and the setting aside of a document but prays merely for declaration, the suit must be treated for purposes of Court-fee as one for a declaration. It is not for the Court to say that the plaintiff should have framed his plaint differently and that if he had done so a higher Court-fee would have been payable and that, therefore, the plaint before the Court should be treated as containing a prayer which it does not in truth contain. If a plaintiff contents himself with asking for a declaration, where he ought to ask for a declaration and consequential relief, the suit is liable to be dismissed not by reason of the improper valuation of the suit, but because it infringes the provisions of s. 42 of the Specific Relief Act.

A suit by a member of a joint Hindu family for a declaration that a mortgage executed by his undivided father and brother is not supported by consideration and not binding upon him falls within the purview of Art. 17 *iii* of Sch. II and not of s. 7 *iv*, (c) of the Court Fees Act. **M** VENKATA RAMANI IYER *v.* NARAYANASWAMI IYER, (1925) M. W. N. 276; 48 M. L. J. 688; 21 L. W. 649; (1925) A. I. R. (M.) 713 **660**

——— **s. 7 xi (e)**. *See* LANDLORD AND TENANT **1002**

——— **Sch. II, Art. 17 (6)**—*Civil Procedure Code (Act V of 1908), ss. 92, 115—Trust—Scheme suit—Relief for refund of misappropriations—Delivery of*

possession of properties to new trustees—Court-fee payable—Revision.

A suit under s. 92, C. P. C., praying that the defendant trustee should refund to the trust a specified amount misappropriated by him and also that certain properties should be handed over to the new trustees to be appointed under the scheme to be framed by the Court falls under Art. 17, cl. (6) of Sch. II to the Court Fees Act.

Where the Trial Court wrongly directs a higher fee to be paid on such a plaint, it is competent for the High Court to interfere in revision under s. 115, C. P. C., even though a remedy by way of appeal is open. M SUDALAIMUTHU PILLAI *v.* PERIA SUDARAM PILLAI, (1925) M. W. N. 104; 48 M. L. J. 514; (1925) A. I. R. (M.) 722 25

Criminal case—*Weakness of defence.*

A conviction must stand or fall on the strength of the prosecution and not on the weakness of the defence. L NATHA SINGH *v.* EMPEROR, 6 L. L J. 579; (1925) A. I. R. (L.) 282; 26 Cr. L. J. 949 101

Criminal Procedure Code (Act V of 1898), ss. 54 (7), 497. *See* EXTRADITION ACT, 1903, ss. 10 (4), 23 100

——— **s. 107**—*Security proceedings—Assault case, evidence and judgment in, whether can be considered—Security, when can be demanded—Amount of security, how to be fixed.*

Where a Magistrate is trying a security case and an assault case on the same day against the same persons, there is no harm if he uses his knowledge of the one to govern his judgment in the other, and makes such use appear in his judgment. The logical result, if the persons in both the cases are the same, ought to be that if the Magistrate convicts them in the assault case and thinks that they ought to be bound over he ought to bind them over as part of the decision of the assault case. The result of that would be that when the assault case is upset in appeal, the binding over would be upset too.

Where, however, the persons accused in the assault case are not identical with the persons against whom security proceedings are being taken, the proceedings and judgment in the assault case cannot be taken into consideration in arriving at a conclusion with regard to the security proceedings.

Where there are old standing feuds between two parties or two branches of a family which in the course of events have come to a head by a very serious and heavy litigation, it does not necessarily follow that a Magistrate ought to assume a possibility of a breach of the peace, and bind over one party or the other to keep the peace under s. 107 of the Cr. P. C.

Where orders under s. 107 of the Cr. P. C. are made against certain persons who have been acting on behalf of their masters, the amount of security required should not be fixed in such a way as to leave the masters no alternative except on the one hand to lose their servants by refusing to become sureties for them so that the men would have to go to jail or, on the other, to be bound hand and foot by very onerous securities for the conduct of men who might leave their masters the next day and pursue at the instigation of the other side a consistent course of legalized blackmail upon their former masters. A DIN DAYAL *v.* EMPEROR, 23 A. L. J. 300; (1925) A. I. R. (A.) 443; 26 Cr. L. J. 981 517

——— **ss. 112, 117**—*Accused, admission by—Enquiry, whether necessary—Qualifications of sureties, whether can be altered.*

Even where a person against whom an order under s. 112, Cr. P. C., has been made, on its being read over to him, admits the allegations in the said order, it is incumbent on the Court to proceed to make an inquiry as provided by s. 117 of the Cr. P. C.

A Magistrate has no right to introduce new qualifications while deciding on the suitability of sureties offered by the accused.

Quære.—Whether an order committing a person to prison on default of security being furnished, for a period to be specified later on is legal. S ALLAHDITO *v.* EMPEROR, 26 Cr. L. J. 1041 961

——— **s. 145**—*Order, whether binding on persons not parties—Remedy—Breach of peace, likelihood of, grounds for.*

An order under s. 145 of the Cr. P. C. is not binding against persons who are not parties to the proceedings under the section and their remedy is not by an application for revision against the order.

A Magistrate has no jurisdiction under s. 145 of the Cr. P. C. to make any enquiry as to possession still less any final order, unless and until he is satisfied of the likelihood of a breach of the peace and it is absolutely essential that the facts and the grounds of his being so satisfied should appear in his first order directing issue of notice and the ground must be such as to satisfy a Court of Revision. N RAMCHANDRA *v.* GANPAT, 26 Cr. L. J. 1035 923

——— **ss. 145, 426**—*Dispute relating to immoveable property—Sale by one of the parties of his interest, effect of—Jurisdiction of Magistrate—Stay of proceedings by High Court—Matter brought to notice of Magistrate—Duty of Magistrate—Procedure.*

Once proceedings pending in the Court of a Magistrate are stayed by the High Court and the matter is brought to the notice of the Magistrate before whom the proceedings are pending it is his duty to stay his hands and stop further proceedings. If in spite of such notice the Magistrate proceeds with the matter any order passed by him must be treated as passed without jurisdiction and cannot stand.

Where in a proceeding under s. 145 of the Cr. P. C. proper opportunity is not given to one of the parties to represent his case and to cross-examine the witnesses examined on behalf of the opposite party or to produce his documentary evidence, he is entitled to have the proceedings transferred to the Court of some other Magistrate.

Where a Magistrate receives information from any source that there is a likelihood of a breach of the peace relating to the possession of immoveable property, he is entitled to initiate proceedings under s. 145 of the Cr. P. C., even although it appears that one of the parties has already sold the property provided he has not delivered possession to the purchaser and still claims to be in possession of the property. Pat GOURI SHANKER *v.* COLLECTOR OF MUZAFFARPUR, 6 P. L. T. 215; 26 Cr. L. J. 965; 3 Pat. L. R. 127 Cr.; (1925) A I. R. (Pat.) 553 421

——— **ss. 146, 438**—*Order under s. 146, operation of, extent of—Order when comes to end—Record of Rights, entry in, whether final adjudication by competent Court—Reference under s. 438, form of.*

A reference under s. 438 of the Cr. P. C. should always be made in the form prescribed for such references by r. 139 of Chap. I of the General Rules and

Circular Orders of the Calcutta High Court, Criminal Appellate Side.

Once an order under s. 146 of the Cr. P. C. has been passed by a Court it can come to an end only under one of two circumstances, the first being that there is no longer any likelihood of a breach of the peace in regard to the subject-matter of the dispute, in which case the Magistrate would be competent to withdraw the order of attachment, and he can do so at any time at which he is satisfied that there is no further any such likelihood, and, secondly, it is competent for a Magistrate to release the subject-matter of the dispute from attachment if a competent Court has determined the rights of the parties to the proceedings or the person entitled to possession of the subject-matter of the dispute.

An entry in the Record of Rights cannot be regarded as constituting a final adjudication by a competent Court within the meaning of s. 146 (1) of the Cr. P. C. **C** KUTISWAR MONDAL *v.* JITENDRA NATH SEN, 26 Cr. L. J. 1055 **975**

——— **ss. 192, 202, 203, 204**—*Cognizance taken by Magistrate—Order directing investigation—Transfer of case for consideration of report, validity of.*

Sub-section (1) of s. 192 of the Cr. P. C. empowers a Magistrate to transfer a case for enquiry or trial, but it does not empower him to transfer a case simply for the purpose of considering the report of an investigation under s. 202 of the Cr. P. C., which he has himself ordered.

The provisions of s. 192 or of s. 202 of the Cr. P. C. do not entitle a Magistrate after he has proceeded under the latter section to make an order under the provisions of the former section transferring the case to another Magistrate for the purpose of being dealt with under s. 203 of the Code without a fresh investigation as contemplated by s. 202 of the Code. **C** MAHABIR SINGH *v.* GIRIBALA DASSI, 29 C. W. N. 508; (1925) A. I. R. (C.) 742; 26 Cr. L. J. 990 **526**

——— **s. 195 (1)**—*Penal Code (Act XLV of 1860), ss. 182, 211—Charge under s. 211—Alteration into one under s. 182—Complaint, absence of—Conviction, legality of.*

The essence of an offence under s. 182 of the Penal Code is not the falseness of the information, as it is the essence of an offence under s. 211 of the Code, but the contempt of the lawful authority of the public servant, and unless and until the public servant concerned chooses to move in the matter, the Court has no authority to do so *suo motu*, by whatever process it reaches that result.

A Court taking cognisance of an offence under s. 211 of the Penal Code, does not *ipso facto* take cognisance of one under s. 182 of the Code.

Where, therefore, a charge against an accused person is altered from one under s. 211, Penal Code, into one under s. 182 a conviction under the latter section is bad in the absence of a complaint by the public servant concerned. **M** *In re* MUTHU GOUNDAN, (1925) M. W. N. 108; (1925) A. I. R. (M.) 400; 21 L. W. 661; 26 Cr. L. J. 962 **418**

——— **s. 195 (6)**—*Sanction, grant of—Refusal to revoke sanction—Period of six months, commencement of.*

A sanction cannot be said to have been "given" within the meaning of cl. (6) of s. 195 of the Cr. P. C., by a Court which did not originally grant the sanction but which merely refused to revoke that sanction when it had been granted. The period of six months

mentioned in the clause, therefore, begins to run from the date of the order granting the sanction and not from the date of the order of a superior Court subsequently refusing to revoke the sanction. **O** MAKHDUM THATER *v.* EMPEROR, 1 O. W. N. 752; 26 Cr. L. J. 995 **595**

——— **s. 203**—*Discharge, whether bars second complaint—Procedure—Duty of complainant.*

An order of discharge does not operate as an acquittal and leaves the matter at large for all purposes of judicial enquiry. There is jurisdiction still vested in all Magistrates including the one who made the previous enquiry, just as before, but all Magistrates, and especially the one who formerly discharged the accused, are bound to exercise due discretion to take that discharge into account in dealing with the case, and it is the duty of the complainant to inform the Magistrate before whom the case comes up on the second occasion that he had previously filed a similar complaint which has been dismissed, because when the Court to which the second complaint is made becomes aware that a similar complaint has already been dismissed it must exercise greater care in considering how to deal with the case. **B** *In re* MAHADEV LAXMAN SATARDEKAR, 27 Bom. L. R. 352; (1925) A. I. R. (B.) 258; 26 Cr. L. J. 991 **527**

——— **s. 247**—*Complainant, absence of—Acquittal, right of, when accrues—Revival of criminal case—Adjournments, frequent, undesirability of.*

An application or order for revival of a criminal case can only be made on the supposition that the case is over and not pending. A case which is pending cannot be revived.

Under s. 247 of the Cr. P. C. the right to an order of acquittal accrues to the accused upon two conditions, and is dependent, firstly, on the absence of the plaintiff and, secondly on the Court not adjourning the case. If a case is not taken up at all, it cannot be said that the second condition is fulfilled, for there is no knowing in what way the Court's discretion would have been exercised if the case had been taken up.

Frequent adjournments of a case at the request of the prosecution disapproved. **C** RASH BEHARY KARURY *v.* CORPORATION OF CALCUTTA, 26 Cr. L. J. 1050 **970**

——— **s. 250**—*Compensation, order directing payment of, when to be made—Vexatious charge—Falsity of charge, whether must be established.*

In order to justify an order for payment of compensation to the accused person under s. 250 of the Cr. P. C. there must be a finding that the charge against the accused is false, besides being frivolous or vexatious. A vexatious charge may be partly true and the idea conveyed by the word is that the object of the person making the accusation should be primarily to harass the accused person. **N** BHAU *v.* SYED CHAND, 26 Cr. L. J. 1033 **921**

——— **ss. 256, 257, 342**—*Examination of accused, when to be made—Cross-examination after charge, whether part of examination of prosecution witnesses.*

The examination of a witness means his examination-in-chief, cross-examination and re-examination, and the expression "after the witnesses for the prosecution have been examined", which occurs in s. 342 of the Cr. P. C, includes any cross-examination of the witnesses for the prosecution after the charge has been framed. It is, therefore, imperative for a Magistrate under this section to examine an accused person after

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the prosecution witnesses have been, if so desired by the accused, further cross-examined after the charge.

The prosecution case does not close until all the prosecution witnesses have been discharged after their examination, cross-examination, further cross-examination, if so desired by the accused, and re-examination and it is only after the prosecution witnesses have been discharged that the stage for the obligatory examination of the accused under s. 342 of the Cr. P. C. arrives. N LOCAL GOVERNMENT *v.* MARIA, 20 N. L. R. 174; (1925) A. I. R. (N.) 44; 26 Cr. L. J. 971 427

——— ss. 256 (2), 344—*"Remaining witnesses," meaning of—"Remaining witnesses" not in attendance—Complainant's right to claim postponement—"Reasonable cause" for demand—Postponement discretionary.*

The witnesses whom prosecutor may wish to examine, after the cross-examination and re-examination of prosecution witnesses already examined, are "remaining witnesses" within the meaning of s. 256 (1), Cr. P. C.

If the "remaining witnesses" are not in attendance the complainant has no right to insist on a postponement for their examination.

Even when there is a "reasonable cause," it is discretionary with the Court to postpone or adjourn a case. Therefore, a Magistrate is within his discretion if (being of the opinion that the complainant is unnecessarily wasting time and protracting proceedings) he refuses to postpone a case for the examination of "remaining witnesses." S ALI SHER *v.* MIR MAHOMED, 26 Cr. L. J. 958 110

——— s. 259—*Dismissal of complaint—Fresh complaint, whether entertainable.*

A complaint dismissed under s. 259, Cr. P. C., can be revived on a fresh complaint as the dismissal does not amount to an acquittal. The fresh complaint need not be filed before the same Magistrate who dismissed the previous complaint but may be entertained by any other Magistrate having jurisdiction to entertain it. N ASHGAR ALI *v.* AKBAR ALI, 26 Cr. L. J. 1040 928

——— s. 264—*Summary trial—Notes of evidence, whether part of the record—Important matter—Magistrate, duty of—Proper procedure—Ports Act (XV of 1908), s. 54—"Disobedience", meaning of.*

Under s. 264 of the Cr. P. C. the judgment is the one and the only record in cases which are tried summarily and in which appeal lies and the rough and incomplete notes of evidence taken by the Magistrate cannot and should not be transcribed and attached to the record.

Where owing to the bulk of evidence or the complication of the matters or owing to the difficult nature of points at issue, it is not possible for the Magistrate to keep in his mind without making exhaustive notes the evidence of important facts, then, even though the offence may be technical and be punishable only with a slight sentence, the Magistrate is not acting properly if he applies the summary procedure to such a trial and should he in so important a case apply the summary procedure, then, no doubt, the appellate or revisional Court will re-direct the re-trial of the case in a more appropriate form.

The word "disobey" in s. 54 of the Indian Ports Act does not mean "intentional disobedience." S RAHIMTULLAH IBRAHIM *v.* EMPEROR, 26 Cr. L. J. 1026 914

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——— s. 297—*Penal Code (Act XLV of 1860), s. 147—Rioting—Trial by Jury—Question of title to land, direction to ignore—Misdirection.*

Where in a case of rioting the question of title to a certain property is of importance and the Sessions Judge in his charge to the Jury asks them to arrive at their verdict irrespective of that question, his action amounts to a misdirection which vitiates the trial. C AHED FAKIR *v.* EMPEROR, 26 Cr. L. J. 946 98

——— s. 297—*Penal Code (Act XLV of 1860), s. 368—Charge to Jury—Knowledge and suspicion of accused, distinction between—Misdirection.*

Section 368 of the Penal Code requires "Knowledge" on the part of the accused and not merely suspicion or belief.

The proper way to charge a Jury in a case under s 368 of the Penal Code is to place before the Jury the direct evidence of the knowledge of the accused as to the abduction, to point out the strength and weakness of that evidence, to tell the Jury that this is the only evidence relating to knowledge, and then to place before them the circumstances, if any, which might raise an inference of knowledge on the part of the accused of the abduction and lastly to ask the Jury to draw their own conclusion on the question.

A charge which places before the Jury indiscriminately direct evidence as to the knowledge of the accused, the evidence as to suspicion having been aroused in the mind of the accused and evidence which shows that a suspicion should have arisen in the mind of the accused, without making any distinction, is defective on a crucial point and is likely to vitiate the verdict. C GADADHAR SARKAR *v.* EMPEROR, 26 Cr. L. J. 1021 845

——— ss. 297, 298—*Sessions trial—Mixed Jury on communal basis, whether can be allowed—Vague allegation against Juror—Discharge of Jury—Charge to Jury, essentials of—Material omission—Misdirection.*

The law does not provide for a mixed Jury on a communal basis and an accused person is not entitled to ask for such a Jury.

The Court has inherent jurisdiction to discharge a Jury on the ground of misconduct or necessity which must be established in fact; but a vague allegation unsupported by any affidavit alleging that a Juror has told an outsider that he has already formed an opinion regarding the case, without giving any details, is not such on which the Court ought to act.

The failure of the Judge in a Sessions trial to present in his summing up to the Jury the First Information Report in its true perspective, which affects the complicity of the different accused persons in the offence, as also the credibility of the evidence given by some of the important witnesses in the case, constitutes a serious misdirection sufficient to vitiate the verdict of the Jury.

The summing up contemplated by law is a fairly full and distinct statement of the evidence with such advice as to the legal bearing of that evidence and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest. The Judge must formulate and specify simple issues for the consideration of the Jury, and collate the evidence *pro* and *con* bearing upon the issues in order to assist the Jury to arrive at a correct decision thereon Merely summarising the evidence, examination-in-chief, cross-examination and re-examination of the

different witnesses who have deposed at the trial and putting before the Jury all that has been said by the witnesses or by the lawyers appearing on the two sides, and huddling together important facts as well as trivial points without any attempt at discrimination, instead of aiding the Jury only confuses them and does not comply with the object which the law has in view. Where there are several accused persons in a case the strength or weakness of the evidence of the witnesses as against each accused individually should be pointed out to the Jury. **C** JESSARAT *v.* EMPEROR, 29 C. W. N. 526; (1925) A. I. R. (C.) 729; 26 Cr. L. J. 1009 **833**

——— **ss. 307, 439**—*Trial by Jury—Disagreement between Judge and Jury—Reference to High Court, when to be made—Failure to make reference—Power of High Court to direct that reference should be made.*

It is ordinarily a matter entirely within the discretion of the Sessions Judge as to whether he should or should not make a reference to the High Court under s. 307 of the Cr. P. C. This discretion, however, should always be exercised when the Judge thinks that the verdict is not supported by the evidence; it is the only way in which a miscarriage of justice by a perverse verdict of a Jury can be remedied by the High Court. It is not necessary that before making a reference the Sessions Judge should be satisfied that the verdict is perverse, it is sufficient that he should be clearly of opinion that a reference is necessary for the ends of justice If in a case in which for the ends of justice a reference is necessary the Sessions Judge fails to make the reference and thus deprives the High Court of an opportunity to deal with the case on its merits, he does something more than merely acting in the erroneous exercise of his discretion. He fails to exercise his jurisdiction and this failure operates to the prejudice either of the Crown or of the accused, and it is well within the power of the High Court under s. 439 of the Cr. P. C. to direct the Sessions Judge in such a case to submit the case to the High Court for its consideration under s. 307 of the Cr. P. C. **C** SARODA CHARAN MISTRI *v.* EMPEROR, 41 C. L. J. 320; (1925) A. I. R. (C.) 795; 26 Cr. L. J. 1006 **606**

——— **s. 337**—*Pardon—Offences exclusively triable by Sessions Court—Pardon relating to other offences, validity of—Commitment, whether can be quashed on ground of want of evidence.*

A pardon can be granted under s. 337, Cr. P. C., by a Magistrate enquiring into a case exclusively triable by a Court of Session along with one not so triable, and the fact that there may be other offences which are not so triable will not invalidate the pardon granted in respect of the offence exclusively triable by the Sessions Court. But once the pardon is granted the approver is an approver with regard to the whole case and not with regard to some of the accused only.

A commitment can be quashed on a point of law only, and not on the ground that there is no evidence on the Committing Magistrate's record to sustain the charge. **N** ISMAIL *v.* EMPEROR, 26 Cr. L. J. 1045 **965**

——— **s. 342**—*Examination of accused, mode of.*

It is impossible to lay down any hard and fast rule as to the nature of the examination of an accused person under s. 342 of the Cr. P. C. It is not necessary, nor is it desirable, to examine the accused in great deal or to force him to disclose his defence so as to enable the prosecution to take advantage of it when the witnesses for the accused are examined.

Where the act with which the accused is charged is of a simple nature and the accused is examined before the charge is framed, and, after the charge has been framed and prosecution witnesses have been further cross-examined, he is asked whether he has any further statement to make and he replies in the negative, it cannot be said that the requirements of s. 342 of the Cr. P. C. have not been complied with. **Pat** MOHAMMAD NASIRUDDIN *v.* EMPEROR, 4 Pat. 459; 26 Cr. L. J. 954; 6 P. L. T. 588 **106**

——— **ss. 342, 364**—*Examination of accused—Statement made by Pleader, whether compliance with section—Omission to comply with provisions of s. 364, effect of.*

One of the essential points for which s. 342 of the Cr. P. C. provides is that the accused himself should have an opportunity of making his statement directly to the Court and not through the intervention of a Pleader. A statement made by the Pleader on behalf of an accused person does not constitute compliance with the provisions of that section.

The provisions of s. 364 of the Cr. P. C., are mandatory and an omission to comply with those provisions vitiates a trial. **C** MESER BEPARI *v.* EMPEROR, 29 C. W. N. 939; 26 Cr. L. J. 1032 **920**

——— **ss. 345, 435**—*Record called by District Magistrate for transfer of case to another Magistrate—Magistrate, former whether has jurisdiction to record composition.*

When a District Magistrate calls for the papers of a case under s. 435 of the Cr. P. C. with a view to withdraw the case from the file of the Magistrate before whom it is pending and to refer it for trial to another Magistrate, the case is no longer on the file of the former Magistrate and his jurisdiction over the case is suspended. An order made by that Magistrate recording a composition of the offence and acquitting the accused under s. 345 of the Cr. P. C. after the order of the District Magistrate calling for the record is void and of no effect. **B** *In re* MARCTI VITHU, 27 Bom. L. R. 350; (1925) A. I. R. (B.) 247; 49 B. 533; 26 Cr. L. J. 996 **596**

——— **s. 360**—*Deposition of witnesses read over by clerk, validity of—Failure to comply with provisions of section, effect of.*

The depositions of the witnesses in a criminal trial, as soon as they were completed, were read over to the witnesses by the clerk and their signatures were taken, while the Court was recording the statements of other witnesses in the case:

Held, that the procedure was not warranted by law and did not amount to a compliance with the provisions of s. 360 of the Cr. P. C.

The omission to comply with the provisions of s. 360 of the Cr. P. C., vitiates a trial. **C** ADILADDI *v.* EMPEROR 26 Cr. L. J 1016 **840**

——— **s. 360**—*Deposition read over by witness himself and admitted correct—Section, whether complied with.*

The fact that the deposition of a witness is read over by the witness himself and is admitted by him to be correct, does not amount to sufficient compliance with the provisions of s. 360 of the Cr. P. C. **C** *In re* SAHORALI MOLLA, 26 Cr. L. J. 951 **103**

——— **s. 403**—*Penal Code (Act XLV of 1860), ss. 120-B, 193, 467, 471—Trial for offence under s. 193*

—Acquittal—Charge under ss. 467, 471 on identical facts, whether can be proceeded with.

Accused was charged with an offence under s. 193 of the Penal Code and was acquitted after a careful trial. He was subsequently charged under ss. 467 and 471 read with s. 120-B of the Penal Code upon facts which were wholly inseparable from the facts upon which the previous case against him had proceeded:

Held, that the present charge could not be proceeded with in view of the previous trial. **C** CHERAGALI BEPARI *v.* SATISH CHANDRA GHOSE, 26 Cr. L. J. 1023 **847**

——— **s. 423**—*Madras Local Boards Act (XIV of 1920), ss. 159 (1), 163 (1)—Conviction under s. 159—Appeal—Conviction, whether can be changed to one under s. 163.*

Petitioner was convicted of an offence under s. 159 (1) of the Madras Local Boards Act. On appeal the Appellate Court found that the section under which the accused had been convicted had no application but it went on to convict the accused under s. 163 (1) of the Act. On revision:

Held, that the petitioner not having been charged with or tried for or convicted of an offence under s. 163 (1) of the Madras Local Boards Act, the Appellate Court had no jurisdiction to change the conviction to one under that section. **M** *In re* THIRUPPAL KADALNATHA PILLAI, 21 L. W. 520; (1925) A. I. R. (M.) 706; 26 Cr. L. J. 1036 **924**

——— **s. 423**—*Penal Code (Act XLV of 1860), ss. 147, 323—Charge and conviction under s. 147—Appeal—Conviction, whether can be altered to one under s. 323.*

In the absence of a charge under s. 323 of the Penal Code framed against an accused person during the trial, a conviction under s. 147 of the Penal Code cannot be altered in appeal to one under s. 323 of the Code. **C** RAKHAL CHANDRA BISWAS *v.* JAMINI KANTA BANERJEE, 26 Cr. L. J. 1018 **842**

——— **ss. 423, 439**—*Penal Code (Act XLV of 1860), s. 302—Appeal, admission of—Enhancement of sentence, notice of, when to be given—Practice—Murder—Death sentence not inflicted by Sessions Judge—Revision—Interference by High Court.*

Where a case comes to the knowledge of the High Court by an appeal being filed against a conviction it is not desirable, if the appeal is admitted, to issue a notice at the same time for enhancement of the sentence under s. 439 of the Cr. P. C. It is incongruous that the Court in the same breath should admit the appeal of the accused, and should issue notice calling upon him to show cause why the sentence should not be enhanced, especially where the sentence proposed to be inflicted in the notice to enhance is the sentence of death. The proper procedure is to deal first with the appeal and then to consider whether a notice to enhance should be issued.

If after an appeal has been heard on its merits and dismissed, a notice to enhance the sentence is issued, the accused has still the right under sub-s. (6) of s. 439 of the Cr. P. C. to show cause against his conviction, but any attempt to set aside the conviction would not have much chance of success.

It is only in very rare cases that the High Court will interfere with the order of a Sessions Judge sentencing a man convicted of murder to transportation for life because the circumstances of the case appear to him not to demand the sentence of death. The High Court will interfere only in cases in which the sentence of death is the only possible sentence to be inflicted. **B** MANGAL NARAN *v.* EMPEROR, 26 Cr. L. J. 968; 27 Bom. L. R. 355; 49 B. 450; (1925) A. I. R. (B.) 268 **424**

——— **s. 436**—*Discharge of accused—Further enquiry, when to be directed—Revision.*

A District Magistrate or a Sessions Judge has power to order a further enquiry under s. 436 of the Cr. P. C., even when the Magistrate has recorded all the evidence for the prosecution.

Where a Sessions Judge after going carefully through the evidence comes to the conclusion that the finding of the Magistrate is either perverse or manifestly at variance with the evidence which he had recorded, and makes an order for further enquiry under s. 436 of the Cr. P. C., the order directing a further enquiry is not illegal, improper, and incorrect and cannot be interfered with in revision. **O** KARHLEY *v.* JAGANNATH PRASHAD, 10 O. & A. L. R. 576; 11 O. L. J. 611; (1925) A. I. R. (O.) 180; 1 O. W. N. 302; 26 Cr. L. J. 959 **111**

——— **s. 439.** *See* PENAL CODE, 1860, s. 417 **426**

——— **s. 476.** *See* EVIDENCE ACT, 1872, s. 30 **593**

——— **s. 476.** *See* LIMITATION ACT, 1908, s. 12 SCH. I. ART. 154 **417**

——— **s. 476**, *applicability of—Statement made to Magistrate in his executive capacity—Magistrate, whether can take action—Intended bigamous marriage—Magistrate, whether can stop.*

Section 476 of the Cr. P. C. applies only when a false statement is made in the course of judicial proceedings.

A Magistrate has no jurisdiction to stop an impending bigamous marriage. **S** SHAFI MOHAMED *v.* EMPEROR, 26 Cr. L. J. 1044 **964**

——— **ss. 476, 476-B**—*Application for order directing prosecution—Appeal—Death of applicant pending appeal, effect of—Right, whether survives.*

Where a private person moves a Court to take action under s. 476 of the Cr. P. C., but the Court refuses to take such action, and the applicant files an appeal but dies during the pendency of the appeal, the right to carry on the appeal does not survive to his legal representatives or to anybody else. **A** NEHAL AHMAD *v.* RAMJI DAS, L. R. 6 A. 85 Cr., 47 A. 359; 26 Cr. L. J. 1008 **608**

——— **s. 488**—*Maintenance of wife and children—Neglect to maintain—Offer to maintain children effect of.*

With regard to the maintenance which can be directed to be paid to a wife under s. 488 of the Cr. P. C. in case of her husband's negligence or refusal to maintain her, there is a special proviso to the section that if the husband offers to maintain his wife on condition of her living with him, and she refuses to live with him, the Magistrate may consider any grounds of refusal stated by her and may make an order under the section notwithstanding such offer if he is satisfied that there is just ground for so doing.

With regard to the maintenance of children, however, it is sufficient under sub-s. (1) of s. 488 of the Cr. P. C. if neglect or refusal to maintain them is proved. On such proof the Magistrate can make an order for the payment of a monthly allowance for the maintenance of each child to such person as the Magistrate from time to time directs. An offer to maintain the children in future is not sufficient of

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itself to debar the Magistrate from making the order. The Magistrate will be entitled to consider the circumstances in which the offer is made, and whether it is right and proper that the children, if not in the custody of the father, should be handed over to him. **B** DAVID SASSOON *v.* EMPEROR, 27 Bom. L. R. 359; (1925) A. I. R. (B.) 259; 26 Cr. L. J. 975; 49 B. 562 431

——— **s. 488 (3)**—*Maintenance order—Application for execution—Objection, whether can be considered—"Sufficient cause," meaning of.*

The language of cl. (3) of s. 488 of the Cr. P. C. contemplates a person, against whom an order for maintenance has been made, coming into Court when execution of the order is applied for and showing cause why the order should not be executed. The Court is then bound to consider the sufficiency of the cause alleged by him and to refuse execution of the order if it is satisfied that the cause is sufficient and to grant execution if it is not so satisfied.

The Legislature has deliberately used the expression "sufficient cause" in cl. (3) of s. 488 of the Cr. P. C., intending that the Magistrate before whom the matter comes up should be in a position to use his judicial discretion having regard to all the circumstances and that such judicial discretion should not be fettered or limited by any definite rules. The expression is wide enough to include all possible considerations that may be submitted to the Magistrate in such circumstances. **M** THEETHARAPPA PILLAI *v.* MEENAKSHI AMMAL, 48 M. L. J. 494; 21 L. W. 702; 26 Cr. L. J. 953; (1925) A. I. R. (M.) 715 105

——— **ss. 523, 524**—*Magistrate when can act on his own authority—Limitation, whether applies to possessor of property.*

The period of six months prescribed by s. 523 of the Cr. P. C. applies only to a person other than the original possessor.

Under s. 523 the Magistrate to whom a report is made is competent to act on his own authority and it is only when action is contemplated under s. 524 that orders of a Magistrate of the class mentioned therein are to be obtained. **S** YARU *v.* EMPEROR, 26 Cr. L. J. 1048 968

——— **s. 526**—*Transfer of case—Hindu-Muhammadan case—European Magistrate, desirability of.*

Where a Hindu-Muhammadan question is involved in a criminal case it is desirable that the case should be heard by a European Magistrate. **L** MANGAT *v.* EMPEROR, 26 Cr. L. J. 1056 976

——— **ss. 526, 528**—*Transfer application—Procedure.*

The High Court will not ordinarily entertain an application for a relief which could equally well be granted by a subordinate Court until recourse has first been had to that Court. It will not, therefore, entertain an application for transfer unless the District Magistrate or the Sessions Judge has been moved in the first instance.

Where, however, notices have been issued and the matter has been argued the matter may be dealt with on the merits in order to avoid unnecessary repetition. **A** RAVI CHANDER SAHAI *v.* SUNDAR SINGH, L. R. 6 A. 87 Cr.; 26 Cr. L. J. 960 112

——— **ss. 537, 540**—*Criminal trial—Additional evidence called by Court after close of defence case—Opportunity of rebuttal, absence of—Procedure.*

After the close of the defence evidence in a criminal case the Magistrate called the Sub-Inspector of Police as a Court witness as he considered him a material witness to help him in the elucidation of the case. After recording the evidence of this witness in the absence of the Counsel of the accused, who were not asked as to whether they wished to rebut this additional evidence, the Magistrate proceeded to deliver judgment on the same day without hearing any further arguments:

Held, that the omission of the Magistrate to give an opportunity to the accused to call evidence in rebuttal of the additional evidence and to hear arguments thereon, was an illegality which was not curable under s. 537 of the Cr. P. C., and which vitiated the trial. **L** SHUGAN CHAND *v.* EMPEROR, 26 Cr. L. J. 1035 923

Criminal trial—*Charge, proof of—Liability for act of agent—Benefit of doubt—Penal Code (Act XLV of 1860), s. 409—Criminal breach of trust—Intention—Proof.*

An important principle of Criminal Law is that the guilt of an accused person must not only be proved beyond any reasonable doubt but that it must be proved strictly in accordance with the law. An accused person is on his trial in respect of a particular charge and to import matters into the trials not relevant to the charge is equivalent to trying him as to matters on which he has no opportunity to defend himself.

The criminal intention necessary to be proved in order to sustain a conviction under s. 409 of the Penal Code is a matter of inference from the facts proved.

There can be no criminal liability for the act of an agent.

Where the conduct of the accused is as much consistent with his guilt as with his knowledge of the guilt of another and the anxiety to protect him, the benefit of the doubt must be given to the accused. **O** BISHAMBHAR NATH BAJPAI *v.* EMPEROR, 26 Cr. L. J. 1042 962

——— *Defence witness, evidence of, whether can be treated as evidence in support of prosecution.*

The evidence of a defence witness cited by a co-accused cannot be treated as prosecution evidence against the other accused in the case. **A** BAHORU *v.* EMPEROR, 26 Cr. L. J. 1018 842

Custom—*Benares District*—Haq chaharum, *right to recover—Judgment in which right admitted, value of*—Halat dehi, *entry in, value of.*

The District of Benares is a permanently settled District and there was no Regular Settlement in that District in 1883, but there was a revision of Settlement in that year and in substitution for a proper *wajib-ul-arz* a document called the *halat dehi* was prepared. In addition to the record of other matters it contains a memorandum of existing customs as ascertained by Settlement Officials during the course of the Settlement operations. An entry in such a record that *haq chaharum* was realised by the proprietor of a *mahal* on sale of houses is of considerable importance in proving the existence of the custom.

The mere fact that in a suit to recover *haq chaharum* the vendor confessed judgment and the vendee allowed the case to be decreed without contest does not establish that the judgment is of no weight as an instance in which the right to recover *haq chaharum* was held to exist. If the existence of the custom is well-known the vendor and the vendee may very well not think it worth their while to contest the case. **A** SRI LAL GOAIKA *v.* KESHO DAS, L. R. 6 A. 93 Rev. 368

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——— *Non-proprietor, sale of house by—Suit by some proprietors to recover possession—Decree, form of.*

Where a non-proprietor sells his residential house in the village, and a suit is brought by some of the members of the proprietary body to recover possession of the site from the purchaser, the plaintiffs are entitled to a decree for possession of the site jointly with the other co-sharers in the village as against the purchaser, together with an injunction directing the latter to remove the materials of the house within a reasonable period. L JHANDU MAL *v.* SINGH RAM, (1925) A. I. R. (L.) 380 **123**

——— *Partition, effect of*—Wajib-ul-arz *prepared in partition proceedings—Minor co-sharer, whether bound.*

A custom of pre-emption recorded in a *wajib-ul-arz* is not necessarily abrogated by the partition of the village. It is open to the co-sharers to adopt that custom in its entirety or to modify it in order to adapt it to the altered constitution of the village.

It must be presumed that a minor co-sharer was duly represented during partition proceedings by some lawful guardian, who looked after his interests, and a *wajib-ul-arz* prepared in the partition proceedings must, therefore, be held to be binding on all the parties to the partition proceedings. A KHUDAYAR KHAN *v.* RAHAT KHAN, L. R. 6 A. 269 Civ.; (1925) A. I. R. (A.) 446; 47 A. 494 **415**

——— *Widow's estate—Succession, when opens.*

It cannot be laid down as a general proposition that the right of a widow of a life-estate without power of alienation must mean that the succession opened at the date of the husband's death and not at the date of the widow's death. O MOHAMMAD GHAFOOR KHAN *v.* MEHDI HASAN KHAN, 12 O. L. J. 253; (1925) A. I. R. (O.) 523 **356**

——— **Gift**—*Collateral allowed to take possession of land with consent of other collaterals, effect of—Extinction of line of donee—Reversion of land to heirs of donors.*

After the death of a proprietor his collaterals permitted one of themselves, who had married the widow of the deceased to take possession of the land belonging to the deceased, without receiving any consideration:

Held, that the transaction must be regarded as a gift by the collaterals in favour of the second husband of the widow of the deceased, and that, on the extinction of the latter's line, the property must revert to the heirs of the donors. L HARPHUL *v.* BHAG MAL **370**

——— **Landlord and tenant**—*Tenants, whether entitled to sell site of house—Mixed question of law and fact—Custom, whether reasonable—Village Pandauli, Ghazipur District.*

The question whether by custom a tenant is entitled to transfer the site of his house in the village *abadi* is a mixed question of law and fact and in second appeal the question of sufficiency or insufficiency of the evidence in support of such a custom may be gone into.

Such a custom is really only a question of title and no question of the reasonableness or unreasonableness of the custom can arise.

Ordinarily in a pure agricultural village the *zemindar* is owner of every bit of land in the village and whoever asserts that a mere resident in the village, not being a co-sharer, is entitled to sell the site of his house must prove his case by weighty evidence.

In village Pandauli in the Ghazipur District the occupiers of village sites are entitled to sell their houses as they stand, *viz.*, the sites as well as the materials thereof. A RAFIQ *v.* SHANKAR LAL, L. R. 6 A. 109 Rev **749**

——— **Pre-emption**—Mahal *becoming property of single proprietor—Pre-emption, right of, whether can be enforced.*

The "*dastur dehi*" of a village prepared at a certain settlement provided that if any co-sharer desired to transfer his property he must offer it first to co-sharers who were near relations and then to co-sharers in the *patti*, *mahal* or village, and that if none of these persons were desirous of acquiring the property he was at liberty to transfer to a stranger. At the time when the Settlement took place and for some years afterwards one of the *mahals* of the village was the exclusive property of a single proprietor, but subsequently it became divided among several proprietors. One of these proprietors made a sale in favour of a stranger and some of the other proprietors in the *mahal* brought a suit to pre-empt the sale:

Held, that the mere fact, that at one time the *mahal* was the property of a single owner, did not indicate the disappearance of the entire village community and that under the terms of the "*dastur dehi*" the plaintiffs were entitled to pre-empt the sale. A DALIP *v* KHAZAN SINGH, 23 A. L. J. 249; L. R 6 A. 256 Civ.; (1925) A. I. R. (A.) 362 **340**

——— *Proof of custom* — Wajib-ul-araiz, *successive, entries in, value of—Presumption—Burden of proof—Period during which proof of custom necessary—Later entries, amplifying categories of pre-emptors, effect of—Partition, effect of—Suit brought at instigation of strangers, whether liable to be dismissed—Houses and buildings, whether appertain to* zemindari.

A period of one hundred years, and even of fifty five years, is not necessarily too short for the growth of a custom of pre-emption in the United Provinces where such a custom is well-known to be very common.

A village was owned by a single proprietor between the years 1818 and 1820. The *Wajib-ul-arz* of 1833, however, contained an entry recognizing the existence of the custom of pre-emption in the village. The entry was repeated with fuller details in the *Wajib-ul-arz* of 1860 and again in the *Wajib-ul-arz* of 1885. The *Wajib-ul-arz* of 1833 recognized only one category of pre-emptors, but that of 1860 recognized three categories including the one mentioned in the earlier *wajib-ul-arz*, and the *Wajib-ul-arz* of 1885 recognized four categories, also including the one mentioned in the *Wajib-ul-arz* of 1833. In a suit for pre-emption brought by a person who belonged to the category of pre-emptors which was recognized in all the three *wajib-ul-araiz* as against a stranger:

Held, (1) that in order to prove the existence of a custom of pre-emption the plaintiff was entitled to rely on the entry in the *wajib-ul-arz* of the last Settlement of 1885, which raised a *prima facie* presumption that there was a custom of pre-emption existing in the village, and could supplement this evidence by the entries in the earlier *Wajib-ul-araiz* of 1860 and 1833 as corroborative evidence;

(2) that as the entries in these *wajib-ul-araiz* raised a *prima facie* presumption in favour of the plaintiff

the burden lay on the defendant to show the contrary by producing evidence to rebut that presumption;

(3) that the mere fact that more than one hundred years prior to the suit and about fifty five years prior to the last Settlement the village was owned by a single proprietor was not sufficient to rebut the presumption arising from the entries in the successive *wajib-ul-araiz*;

(4) that the preferential right of the plaintiff having been recognized in all the *wajib-ul-araiz*, the addition of new categories of pre-emptors in the *Wajib-ul-araiz* of 1860 and 1885 did not negative the existence of a custom of pre-emption in favour of a person belonging to the category recognized in all the *wajib-ul-araiz*

The mere fact that an entry with regard to pre-emption in later *wajib-ul-araiz* is fuller than an earlier one does not raise a presumption that the *wajib-ul-araiz* do not constitute a record of custom, for the later *wajib-ul-araiz* may very well be mere amplifications of the previous *wajib-ul-arz*. The case may, however, be different where the entries in the later *wajib-ul-araiz* absolutely contradict the entries in the previous *wajib-ul-araiz* and cannot be reconciled with them.

An entry in the *wajib-ul-arz* of an exclusively Hindu village situate within the Gorakhpur District made in the Settlement of 1885, with regard to the existence of a custom of pre-emption, is entitled to special weight and the Court is entitled to presume that the Settlement Officer, before making the entry, was fully satisfied of a custom of pre-emption having existed in the village.

Where a fresh *wajib-ul-arz* is not prepared at a partition, it does not necessarily follow as a matter of law or principle that the custom or contract in force before the partition is no longer to have effect or operation. In the absence of a contract to the contrary the old custom would continue even after the partition. The partition, however would have the effect of confining the right to the new physical units created at the time of the partition. Under the pre-existing custom persons who were jointly liable for payment of Government revenue would have had a right of pre-emption as against a stranger. After the partition those proprietors whose shares are situated in another *mahal* are no longer under any joint liability to pay such a revenue. Owners of one *mahal* can, therefore, in no sense be called co-sharers of a vendor *qua* the share sold in another *mahal*. In order, therefore, to establish that a right of pre-emption exists in such a case it is not sufficient for a plaintiff to show merely that previous to the partition a custom of pre-emption existed in the village. It is necessary for him to show, either on the construction of the *wajib-ul-arz* or by other evidence, that the custom of pre-emption which obtained in the unpartitioned *mauza* had survived on partition of that *mauza* into separate *mahals* so as to give a sharer in one of the new *mahals* a right to pre-empt property in another of those *mahals*, in which he was not a sharer at the date of the sale.

The mere fact that a plaintiff has instituted a suit for pre-emption at the instigation of other persons would not by itself disentitle him from getting a decree. If the plaintiff has a legal right to pre-empt, it is unnecessary for the Court to consider from what source he is going to procure the pre-emption money. If after obtaining a decree he allows any stranger to come in or attempts to transfer the property to such stranger it would be open to the co-sharers of the village to bring a suit for pre-emption.

In the absence of evidence to the contrary houses or buildings situate within the area of a *zemindari* appertain to the *zemindari* and are included in and pass with it. A ABHAINANDAN PRASAD *v.* PASHPAT NATH PANDE, 23 A. L. J. 283; (1925) A. I. R. (A.) 449; 47 A. 470 298

——— **Pre-emption** -Wajib-ul-arz, *entry in, construction of - Sale in favour of co-sharer in different* thok—*Co-sharers in same* patti, *whether entitled to pre-empt.*

A *wajib-ul-arz* provided that a co-sharer desiring to sell his property must offer it first to his own brothers, then to his cousins and nephews, then to co-sharers in the same *patti*, then to co-sharers in the *thok* and then to co-sharers in the village, and that if none of these persons were desirous to take the property, the vendor would then be at liberty to sell to a stranger. A sale was effected by a co-sharer in favour of a co-sharer in a different *thok*, and a suit was brought to pre-empt the sale by persons who were co-sharers in the same *khewat* and *patti* with the vendor:

Held, that the entry in the *wajib-ul-arz* provided for pre-emption *inter se* between the various classes of pre-emptors specified therein and that the plaintiffs were, therefore, entitled to a preferential right of pre-emption as against the vendee. A KAMODA SINGH *v.* RAM CHAND, L. R. 6 A. 281 Civ. 434

——— **Succession**—Wajib-ul-arz, *entry in, construction of- Widow, whether owner or life-tenant—Evidence Act (I of 1872), s. 48—Custom, evidence of—Accepted interpretation of* wajib-ul-arz, *relevancy of.*

A *wajib-ul-arz* laid down that on the death of a proprietor his widow would be entitled to his share whether the deceased was separate from his brother or joint, but that the widow would not have any right of transfer. The widow was not given a right to adopt which was given to male owners, and it was further provided that the share of the deceased would be obtained by that person who was nearer in degree:

Held, (1) that the widow having been specifically made a successor to her husband and it not being stated that she would only have the usufruct she must be regarded as a full owner with certain restraints put on her rights of ownership;

(2) that where a widow succeeded to her husband no property devolved on the other heirs of the deceased and succession to the deceased opened out on the death of the widow and that the person nearest in degree to the deceased at the time of the death of the widow was entitled to succeed to the exclusion of all other heirs.

Where the interpretation of a clause of a *wajib-ul arz* is accepted by certain members of a family, the fact is admissible in evidence in a subsequent suit between the members of the family to show how a custom applying to the family was interpreted by members of that family. O SHARFUDDIN *v.* NIAMAT ALI 8

Declaration of title and possession, *suit for—Plea of tenancy—Title, proof of—Procedure—Form of decree.*

In answer to a suit for declaration of title to and recovery of possession of a certain piece of land the defendant pleaded that he was in possession of the land in dispute under a lease granted to him by one of the co-sharers of the plaintiff's vendor, to whose

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share the land in dispute had fallen on a partition, and that he was, therefore, not liable to ejectment. It was found that the plaintiff had established his title to the land in dispute but his suit was dismissed on the ground that he had failed to prove that the defendant was not a tenant or that the tenancy had been lawfully determined:

Held, (1) that the plaintiff having established his title to the land in dispute it was the duty of the defendant who set up a tenancy from one of the co-sharers of the plaintiff's vendor to establish such a tenancy, and to show that the nature of the tenancy was such that it was binding upon the plaintiff;

(2) that if the defendant failed to prove the existence and the binding nature of his tenancy the plaintiff's suit must be decreed;

(3) that if the defendant was successful in establishing a tenancy which would be binding against the plaintiff, the plaintiff would still be entitled to a decree declaring his title to the property and the liability of the defendant to pay rent to the plaintiff. **C** ANU BISWAS *v.* GOPAL SHEIKH **642**

Decree-holder, *one of several, purchasing property at auction-sale in lieu of decretal amount—Purchase, whether on behalf of all decree-holders—Presumption.*

Ordinarily if one of several decree-holders purchases property belonging to the judgment-debtor at the auction-sale in lieu of the decretal amount, the purchase, in the absence of anything positive to the contrary, must be deemed to have been made on behalf of all the interested decree-holders. The conduct of some of the decree-holders may, however, preclude such a presumption in a particular case. **A** MAKHAN LAL *v.* SOHAN LAL, 23 A. L. J. 257; (1925) A. I. R. (A.) 331 **665**

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15-D. *See* C. P. C., 1908, s. 11 **716**

Easements Act (V of 1882), s. 4—*Easement, definition of—Easement and freehold right, distinction between—Adverse possession—Projection over neighbour's land—Right acquired, nature of.*

Where any part of the house of one owner projects over the soil of a neighbouring owner, the right acquired by the first owner is in the nature of possession of the column of air occupied by the said projection and the right is in the nature of the diminution of the freehold of the neighbouring owner and not merely in the nature of an easement.

The right of easement as defined by s. 4 of the Easements Act is something less than the right of freehold and that something can be acquired for the benefit of the freehold under certain circumstances as laid down in the Easements Act, but this does not mean that whatever is for the benefit of the dominant owner must necessarily be an easement and nothing else.

The shutters of the windows of the plaintiff's house opened on the defendant's land and the plaintiff also had certain weather-frames attached to his windows which projected over the defendant's land. The shutters and the weather-frames had existed for a period of over twelve years:

Held, that the plaintiff had acquired a right to maintain the shutters and the weather-frames by adverse possession and that he was entitled to restrain the defendant from building on his land so as to interfere with the right of the plaintiff to open

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the shutters on the defendant's land or to interfere with the weather frames. **B** BAHADARMAL GURMUKHRAI NEMNI *v.* MOHANLAL SUCHAND, 27 Bom. L. R. 536; (1925) A. I. R. (B.) 335 **1008**

——— **ss. 22, 27**—*Easement, exercise of—Dominant and servient owners, duties of.*

Although under s. 22 of the Easements Act, the dominant owner must exercise his right of easement in the mode which is least onerous to the servient owner, the owner of the servient tenement must not, under s. 27 of the Act, so deal with the servient tenement as to render the easement incapable, or more difficult, of enjoyment by the owner of the dominant tenement. **N** VENKATRAO *v.* BAPU **899**

Estates Partition Act (V B C of 1897)—*Batwara papers. See* EVIDENCE ACT, 1872, ss. 11 **694**

——— **ss. 5, 119**—*Proprietor in possession of fractional share in estate—Allotment on partition—Jurisdiction, meaning of—Error in mode of partition—Civil suit, whether maintainable.*

Sub-clause (3) of s. 5 of the Estates Partition Act applies only to cases where a proprietor has an undivided share held in common tenancy in specific *mouzas* forming part of the parent estate but where he has no interest which extends over the whole estate; in other words, it applies only to proprietors who have an interest in some out of the total number of villages constituting the estate.

A proprietor of a *mahal* which is composed of two *mouzas* and who is in possession of a fractional interest in each is not entitled to claim an allotment in each *mouza* representing his assets in that *mouza*.

A Court is said to exercise jurisdiction when it exercises its power to adjust any jural relationship between the parties before it.

A Court has jurisdiction to decide rightly as well as wrongly and if a Deputy Collector has, in making a partition, disobeyed the provisions of sub-cl. (3) of s. 5 of the Estates Partition Act and, instead of making an allotment under that sub-clause, has proceeded under sub-cl. (5), then that error cannot be remedied in a Civil Court. Section 119 of the Act would be a clear bar. **Pat** RADHAKANTO PARHI *v.* MATHURA MOHAN PARHI, 2 Pat. 403; (1924) A. I. R. (Pat.) 187 **274**

——— **ss. 7, 83, 99**—*Ejectment suit—Tenure, existence of—Burden of proof—Private arrangement, effect of.*

Where after a partition under the Estates Partition Act a proprietor brings a suit for ejectment and the defendant pleads the existence of a tenure in answer to the suit and proves such existence, it is for the plaintiff to make out circumstances which would entitle him to a decree. That is to say, he must make out a case under s. 99 of the Act, and in order to do so he must prove that the estate that has been partitioned was held in common tenancy and that the tenure was not created by him. If he succeeds in proving this he will get a decree for *khas* possession or joint possession with the defendants to the extent of his share, according as he is the sole owner or only a co-sharer in the estate from which he seeks to eject the defendant. The fact that the estate was held in common tenancy has to be proved by the plaintiff. The existence of the tenure has to be proved by the defendant. The plaintiff has to prove that the tenure was not created by him. If the defendant can prove that it was created by any other proprietor of the estate, it will hold good as regards

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the land finally allotted to the share of such proprietor.

There is no presumption in law that because an estate has been partitioned under the Estates Partition Act, it must necessarily have been held by the proprietors in common tenancy and not in severalty.

The private arrangement described in s. 7 of the Estates Partition Act is not necessarily the same private arrangement that would prevent the application of s. 99 of the Act. If it is found that the estate was held not in common tenancy but in severalty in pursuance of some private arrangement amongst the parties, s. 99 will not have any application.

Unless the plaintiff who is suing in ejectment can bring his case within s. 99 of the Act, he must take his estate subject to the tenure of the defendant. C BAMA CHARAN KAR *v.* PYARI MOHAN GANTAM 581

Evidence Act (I of 1872), s. 11—*Estates Partition Act (V B. C. of 1897)*—Batwara *papers, entries in, admissibility of, as against stranger to proceedings.*

Entries in *batwara* papers are in no way binding upon strangers to the proceedings under the Estates Partition Act.

So far as a stranger is concerned the only way in which these papers can be treated as evidence would be under s. 11 of the Evidence Act. C RAHIMUDDIN SARKAR *v.* UMESH CHANDRA KHASNABISH 594

——— **ss. 11, 13, 21**—*Landlord and tenant—Suit for rent—Order for delivery of possession—Statement as to rent, admissibility of.*

A statement contained in an order for delivery of possession as to the rent payable in respect of the land, is not admissible in evidence in a suit between the landlord and the tenant in which the rent payable is in dispute. C CHANDRA MOHAN TALUKDAR *v.* SHAIKH ELIM 512

——— **ss. 25, 26, 167**—*Confession made to Police Officer in foreign territory, whether admissible—Conviction—Appeal—Conviction, whether can be upheld.*

For the purpose of applying the provisions of s. 26 of the Evidence Act it is immaterial whether the accused was in Police custody in British territory or in foreign territory at the time when he made the confession which is sought to be put in evidence against him.

Where a confession has been improperly admitted in evidence it is permissible for an Appellate Court under s. 167 of the Evidence Act to uphold the conviction, if independently of the confession the Court is of opinion that there is sufficient evidence on the record to justify the conviction, but where the Court is unable to say how far the judgment of the Trial Court and the opinion of the Assessors was influenced by the improper admission of the confession and where it is probable that if the Assessors had not known of the confession at all they might have looked at the rest of the evidence in an entirely different light, the conviction cannot be upheld.

Per *Fawcett, J.*—There is no qualification of the expression "Police Officer" in s. 25 or s. 26 of the Evidence Act and a confession made to a Police Officer whoever that Police Officer may be, and whether he is a Police Officer in British territory or a Police Officer in foreign territory, is inadmissible. B MHABLI RAMA SAIL *v.* EMPEROR, 26 Bom. L. R. 706; (1924) A. I. R. (B.) 480; 26 Cr. L. J. 984 520

Evidence Act—contd.

——— **s. 30**—*Criminal Procedure Code (Act V of 1898), s. 476, inquiry under—Confession made during inquiry, whether admissible against co-accused.*

An enquiry was commenced under s. 476 of the Cr. P. C. with a view to ascertain whether a complaint should be lodged against an accused person with regard to a document produced by him in the course of certain judicial proceedings. In the course of the enquiry the accused made a confession, implicating himself and certain other persons in the commission of the offence. As a result of the confession the accused and the persons named by him were placed on their trial for forgery and cognate offences :

Held, that the confession made by the accused in the course of the enquiry under s. 476 of the Cr. P. C. was made by him while he was in the position of an accused person, and was admissible in evidence against him under s. 30 of the Evidence Act. B ANAJI VENKATESH MUJUMDAR *v.* EMPEROR, 26 Bom. L. R. 614; (1924) A. I. R. (B.) 445; 26 Cr. L. J. 993 593

——— **ss. 35, 79**—*Death register, entries in, admissibility of—Official document—Certified copy—Presumption of correctness.*

A death register kept at a Police station is an official book and the entries in it are admissible in evidence under s. 35 of the Evidence Act.

The correctness of a certified copy of an official document must be presumed under s. 79 of the Evidence Act.

Decrees of Courts are not to be lightly treated on a mere suspicion or on a mere supposition based on no special evidence that they are collusive. A SHIB DEO MISRA *v.* RAMPRASAD, 22 A. L. J. 690; 46 A. 637; (1925) A. I. R. (A.) 79 988

——— **ss. 41, 42, 43**—Judgment not *inter partes*, admissibility of. *See* HINDU LAW—MITHILA SCHOOL 849

——— **s. 48.** *See* CUSTOM—SUCCESSION 8

——— **s. 91**—*Stamp Act (II of 1899), s. 35—Unstamped transfer deed—Secondary evidence, admissibility of.*

No secondary evidence can be given of the contents of a letter of assignment of a debt which is admitted to have been unstamped. M DORAISWAMI MUDALIAR *v.* DORAISWAMI IYENGAR, (1925) M. W N. 180; 48 M. L. J. 432; (1925) A. I. R. (M.) 753 382

——— **s. 92.** *See* C. I. F.. CONTRACT, INCIDENTS OF 67

——— **s. 92**—*Deed executed by manager of joint Hindu family—Members of family, whether parties to deed.*

Where a Hindu father, as manager of a joint family, executes a deed of transfer of family property as representing all the members of the family who are joint with him, such other members must be treated as parties to the document within the meaning of s. 92 of the Evidence Act. B RAMCHANDRA HANMANT DESHPANDE *v.* KASHINATH LAXMAN DESHPANDE, 27 Bom. L. R. 241; (1925) A. I. R. (B.) 288 804

——— **s. 92**—*Mortgage of several items of property—Sale of one item—Oral agreement between mortgagee and purchaser to release item purchased from mortgage, whether can be proved.*

A mortgagee of several items of property agreed with a subsequent purchaser of one of the items to release that item from the mortgage security. In a suit by the mortgagee to enforce the mortgage against all the items mortgaged:

Evidence Act—contd.

Held, that the purchaser of the item released was not precluded by the provisions of s. 92 of the Evidence Act from giving evidence of the oral agreement between himself and the mortgagee whereby the latter agreed to release the item purchased by the former from the mortgage.

Section 92 of the Evidence Act has no application if only some of the representatives-in-interest of the parties to a document are parties to the later oral agreement. M NARRA SRI SALIM *v.* KOGANTI BHUSHAYYA, 48 M. L. J. 280; (1925) M. W. N. 214; (1925) A. I. R. (M.) 775 246

——— s. 92—*Registered deed, cancellation of, mode of—Oral evidence of agreement or conduct, admissibility of.*

A registered deed has to be cancelled by a registered deed and evidence of an oral agreement to rescind it or of conduct relied on as showing that the parties considered the registered transaction at an end is shut out by s. 92 of the Evidence Act. N NARBADJI *v.* GOPAL 29

——— s. 92, proviso (3)—*Agreement in writing—Condition suspending obligation, whether can be orally proved.*

In answer to a suit on a promissory note the defendant pleaded that he had executed a mortgage in favour of the plaintiff and that the promissory note in suit was passed to secure the plaintiff against any claim that might be made by a prior mortgagee who had been paid off but from whom the defendant had failed to obtain a re-conveyance:

Held, that the alleged agreement was not one to postpone an existing liability, but amounted to a suspension of the obligation attaching under the note until the necessity for enforcing the indemnity arose and could be proved orally under proviso (3) to s. 92 of the Evidence Act. B AHMED SAHEB BAPU SAHEB KAPRE *v.* UBHAIYA HARSI, 25 Bom. L. R. 867; (1924) A. I. R. (B.) 44 37

——— s. 115. *See* AGRA PRE-EMPTION ACT, 1922, s. 14 414

——— s. 115. *See* SUCCESSION ACT, 1865, ss. 173, 174, 175, 176 404

——— s. 115—*Estoppel—Compromise of suit—Holding liable to sale in default of payment—Execution—Objection that holding is not transferable, whether can be taken.*

A rent suit was compromised and one of the terms of the agreement was that in case of default of payment of the decretal amount by the judgment-debtor the decree-holder would be entitled to realise the amount by the sale of the judgment-debtor's holding. There was default in payment and the decree-holder proceeded to attach the judgment-debtor's holding. The judgment-debtor objected that the holding was not transferable and was, therefore, not liable to sale:

Held, that a representation having been made by the judgment-debtor to the decree-holder that his holding was attachable and the decree-holder having acted upon that representation and having changed his position to his detriment, the judgment-debtor was estopped from contending that the holding was transferable and was not liable to attachment. Pat NIDHI PARIDA *v.* KARUNAKAR PADHAN, 1 Pat. 153; (1922) A. I. R. (Pat.) 483 250

——— s. 115—Estoppel—Religious status, whether can be established by estoppel. *See* HINDU LAW—ADOPTION 357

Evidence Act—contd.

——— s. 115—*Lease—Representation by lessor that lease conferred permanent rights upon lessee—Erection of buildings by lessee—Ejectment—Estoppel.*

Plaintiff granted a lease to the defendant which contained the following clause:—"Whereas land is required by *R.* for the purpose of erecting buildings, putting up presses, etc., for trading, I agree to give a lease of 4 *bighas* of land to the aforesaid *R.* for the above purpose from year to year at an annual rental of Rs. 45 per *bigha* or total annual rental of Rs. 180." Some years afterwards defendant wanted to erect a substantial building on the land leased to him. He approached the plaintiff for the latter's express permission to put up the building. After certain negotiations the plaintiff informed the defendant that the lease granted to the latter was a permanent lease and gave him the right to erect buildings but that it did not entitle him to hold at a fixed rate and that the rent was liable to enhancement after proper legal notice. The defendant paid a *nazarana* for the permission to raise the structure and thereupon the plaintiff issued a "*parwangi*" to the defendant giving his sanction for the erection of the building. This document was in *hindi*, a language which the defendant did not understand, and contained a recital that the rights which were possessed under the lease would remain intact and that no other right would be created under the permit. The defendant put up the structure and the plaintiff subsequently sought to evict the defendant from the land leased on the allegation that the lease was only a lease from year to year:

Held, that the statement contained in the plaintiff's letter to the defendant, that the lease was a permanent one and gave the defendant the right to erect buildings, was a statement of fact and not merely an expression of opinion, and that the plaintiff was consequently estopped from seeking to evict the defendant from his holding, inasmuch as the defendant had been induced by the plaintiff's representation and conduct to believe that he had a fixity of tenure, although not of rent, in the land that had been leased to him.

If a man under a verbal agreement with a landlord for a certain interest in land, or under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such a promise or expectation. P C A. H. FORBES *v.* L. E. RALLI, 23 A. L. J. 548; 6 P. L. T. 404; 27 Bom. L. R. 860; (1925) A. I. R. (P. C.) 146; 49 M. L. J. 48; 41 C. L. J. 543; L. R. 6 A. (P. C.) 119; (1925) M. W. N. 453 (P. C.) 318

——— s. 115—*Transfer of non-transferable holding—Plea of non-transferability, whether can be taken by transferor—Estoppel.*

Where the Legislature has declared an occupancy holding to be non-transferable, a tenant who has effected a transfer of such a holding is not estopped from setting up the plea of non-transferability of the holding as against his transferee. O PRATAB BALI *v.* SURESH DUTT, L. R. 6 A. (O.) 73; 2 O. W. N. 325; 12 O. L. J. 329; (1925) A. I. R. (O.) 475 1030

——— s. 116—*Landlord and tenant—Estoppel.*

Evidence Act—concld.

A person who has been let into possession of premises as a tenant cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord. Even where the title to the premises rests with a third person if the defendant has been put into possession by the plaintiff the defendant would be estopped from denying the plaintiff's title. O DHANI RAM *v.* MAIKOO LAL, 1 O. W. N. 857 286

Execution of decree. *See* LIMITATION ACT, 1908, s. 20, SCH. I, ART. 182 (5) 989

——— *Decree against several defendants—Death of one defendant before decree, effect of—Decree, whether nullity—Contract Act (IX of 1872), s. 43.*

Where a decree declares that the defendants are all jointly liable for the decretal sum, each defendant is liable by virtue of the provisions of s. 43 of the Contract Act for the whole debt, and it is open to the decree-holder to proceed against one judgment-debtor or all according as he pleases. The fact that one of the defendants happened to be dead at the time the decree was made does not affect the right of the decree-holder to recover the money in execution of the decree from all or any of the survivors.

Per *Miller, C. J.*—A decree passed against a deceased person is a nullity in so far as that deceased person is concerned. Where, however, one of several defendants happens to die before a decree is passed and no one is substituted in his place the whole decree passed in ignorance of his death is not a nullity. The decree is perfectly valid so far as the other defendants in the suit are concerned. **Pat** NATHUNI NARAYAN SINGH *v.* ARJUN GIR, (1925) A. I. R. (Pat.) 434; 4 Pat. 187; 6 P. L. T. 526 47

——— *Dismissal of proceedings for default, erroneous—Revival of proceedings—Sale—Private sale by judgment-debtor—Priority.*

Certain property belonging to a judgment-debtor was attached in execution of a simple money decree. A sale proclamation was issued but before the sale could take place the execution proceedings were dismissed on the ground that the decree-holder had failed to pay the cost of the proclamation. But the order distinctly stated that the attachment would continue. Four days later the decree-holder again applied for execution and the Court, holding that its previous order dismissing the execution proceeding for default of the decree-holder was wrong, proceeded with the execution from the stage at which matters stood on the date of its previous order, and the property was sold in due course, being purchased by the decree-holder himself. In the meantime, that is to say, after the order passed on the second application of the decree-holder, but before the sale could be held, the defendant purchased the property from the judgment-debtor. In a suit by the decree-holder purchaser to recover possession of the property from the defendant:

Held, that the decree-holder had obtained a complete title to the property and that the defendant having purchased the property in the teeth of the orders of the Execution Court, stating that the attachment still subsisted and that the execution could proceed from the stage at which it had arrived on the date on which the proceedings were erroneously dismissed for default had obtained no title to the property at all and that, therefore, the plaintiff's suit must succeed.

Where an execution case is dismissed for default of the decree-holder an order directing the attachment to subsist is an improper order, but it is not a nullity and is binding on the parties to it. **A** MULAK *v.* BAL GOBIND, L. R. 6 A. 275 Civ.; (1925) A. I. R. (A.) 456 349

——— *Erroneous decree—Damages, action for.*

No action will lie against any person for issuing execution or otherwise acting in pursuance of a judgment or order of a Court of Justice even though it is erroneous. A valid order, however erroneous in law or in fact, is a sufficient justification for any act done in pursuance of it. **B** BACHOO BHAIDAS *v.* VELJI BHIMSEY & Co., 25 Bom. L. R. 595; (1924) A. I. R. (B.) 191 165

——— *Power of Executing Court to question decree—Interpretation of Statutes—New Act, whether can affect validity of decree passed before commencement.*

An objection to the validity of a decree cannot be entertained by an Executing Court.

An Act cannot affect the validity of a decree passed before it came into operation, nor can an Act be made applicable to the case of such a decree, simply because an application for its execution is made after the commencement of the Act. **N** DURGAPRASAD *v.* THAKURPRASAD 72

——— *Sale of property together with arrears of rent—Decree for arrears of rent, whether included in sale.*

An arrear of rent which is unpaid is still rent even though it has been merged into a decree. If money is still due, the mere obtaining of a decree does not change the nature of the arrear of rent, and the money due under the decree must still be regarded as an arrear of rent.

The applicant purchased certain property in execution of a decree "together with all moneys due from tenants in respect of arrears of rent and cesses or otherwise payable to the proprietors." Prior to the sale the judgment-debtors had obtained a decree for arrears of rent against certain tenants. The applicant sought to execute that decree by virtue of his purchase:

Held, that the decree represented arrears of rent and was included in the purchase of the applicant and that the applicant was, therefore, entitled to execute it. **C** JATINDRA NARAIN BHADURI *v.* CHANDRA NATH PRAMANIK 742

Extradition Act (XV of 1903), ss. 10 (4), 23—*Criminal Procedure Code (Act V of 1898), ss. 54 (7), 497—Bombay City Police Act (IV of 1902), s. 33 (g)—Arrest without warrant—Detention for purposes of extradition—Magistrate, jurisdiction of, to entertain application for bail.*

Where a person is arrested in pursuance of the provisions of s. 54 (7) of the Cr. P. C. or under s. 33 (*g*) of the Bombay City Police Act, without an order from a Magistrate and without a warrant, and is detained under the provisions of s. 23 of the Extradition Act, the Magistrate under whose orders he is detained has jurisdiction to entertain an application for his bail.

Per *Fawcett, J.*—Section 23 of the Extradition Act covers the case of an arrest under s. 33 (*g*) of the Bombay City Police Act. **B** *In re* SHRIRAM SHAMBHUDAYAL, 26 Bom. L. R. 984; (1925) A. I. R. (B.) 104; 26 Cr. L. J. 948 100

Forest Act (VII of 1878), s. 25 (d)—*Berar Grazing Rules—Grazing license—Cattle belonging to licensee trespassing into reserve forest—Licensee, whether criminally liable.*

There is nothing in the Grazing Rules for Berar framed under the Forest Act, that imposes criminal liability on a licensee for grazing for the acts of his servant.

A person who has obtained a grazing license under the Forest Act cannot be convicted of an offence under s. 25 (*d*) of the Act in the absence of evidence that he pastured the cattle in the reserve forest himself or permitted them by some overt act or negligent omission to trespass in the reserve forest. N FAKIRA SAMBHAJI *v.* EMPEROR, 26 Cr. L. J. 1030 **918**

Fraud—*Compromise signed by some of defendants—Decree against all defendants—Suit to set aside decree, whether maintainable.*

A compromise was put in during the pendency of a suit signed by all the parties to the suit, except one of the defendants, but the Court proceeded to pass a decree on the basis of the compromise against all the defendants. The defendant who had not signed the compromise subsequently brought a suit for a declaration that the decree passed against him was void on the ground that it had been obtained by fraud:

Held, that it was the duty of the Court in the previous suit to satisfy itself that all the parties had consented to the compromise and that the failure of the plaintiff in the previous suit to inform the Court that one of the defendants had not joined in the compromise did not amount to fraud so as to entitle the defendant in the present suit to succeed. L PANNA LAL *v.* BALWANT, (1925) A. I. R. (L.) 431 **250**

———*Shares in Company, application for—Misrepresentation, nature of—Deception, proof of—Shares to be taken up by Directors, Agents, etc., meaning of—"Friend," meaning of.*

In order to succeed in an action for deceit, a plaintiff must prove that he was actually deceived by the misrepresentation complained of.

Where the prospectus of a Company states that a certain number of shares are to be taken up by the Directors, Agents and their friends, the statement only means that the Directors, Agents and their friends are ready and willing to take up that number of shares, and not that at the date of the prospectus the stated number of shares has actually been taken up and allotted to the Directors, Agents and their friends. A person applying for shares in a Company on the assumption that the number of shares stated in the prospectus to be taken up by the Directors, Agents and their friends has actually been allotted to the Directors, Agents and their friends acts on a misreading of the prospectus and not on the faith of the representation which is actually made in the prospectus and cannot subsequently complain that he was induced to apply for the shares by a misrepresentation.

The word "friend" in such prospectus means not only a social but also a business friend. The business friend who applies for shares because in the course of his business dealing with the Directors he acquires a knowledge of the project, is correctly described in a prospectus as a "friend."

Where a certain number of shares are reserved for a particular person on the understanding that he will take up some of them himself and dispose of the rest among his friends, it is not a misrepresentation to state in the prospectus that the shares reserved for that particular person are to be taken up by him. B BANSIDHAR DURGADATT *v.* TATA POWER CO., LTD., 27 Bom. L. R. 330; (1925) A. I. R. (B.) 272 **547**

Fraud—concld.

Gift—*Muhammadan Law—Bonus to employee—Entry in account books, effect of—Contract—Implied consideration.*

Plaintiff, a godown keeper in the employ of a Muhammadan firm, was credited with a bonus of a sum of money out of the profits of the firm in consideration of the good services rendered by him and of the profits made by the firm. Plaintiff alleged that the bonus was carried to his credit in the firm's books some years before and that in the following year he was allowed to draw out a portion of it, but that the defendant firm had since refused in spite of his demand to pay the balance:

Held, that on the facts stated the plaint disclosed a cause of action; there was a completed gift and a transfer of ownership in favour of the plaintiff; and, if ownership in the bonus was completely transferred and there was more than a mere promise without consideration to give the plaintiff a bonus, it was immaterial that the amount was originally of the nature of a bonus.

Per *Srinivasa Iyengar, J.*—It is well-known that apart altogether from the salary paid to the servants in Muhammadan firms the expectation is held out to them according to practice, that, if they should render exceptionally good service during the period of the settlement, they would be rewarded at the time of the settlement by the grant of a substantial bonus. If, in these circumstances, the servants put forth extra work which the masters find satisfactory and, in consideration thereof, a bonus is promised to them, it is really in law a promise for past consideration which is good under the Indian Law; and even apart altogether from any question of gift completed or not, the servant has a case on the footing of a contract which is clearly sustainable. M KANAKASABAPATHY MUDALIAR *v.* OOSMAN SAHIA, 47 M. L. J. 791; 20 L. W. 910; (1925) A. I. R. (M.) 192; (1925) M. W. N. 279 **760**

Government of India Act, 1915 (5 & 6 Geo. V, c. 61), ss. 79, 107. *See* U. P. MUNICIPALITIES ACT, 1916, ss. 19 to 27 **51**

——— **s. 107**—*Civil Procedure Code (Act V of 1908), s. 24—Transfer of case, application for—Dismissal by District Judge—High Court, power of.*

The High Court has general powers of superintendence over all inferior Courts and in the exercise of such powers it can direct the transfer of a case, where a District Judge has refused to exercise the power vested in him by law under s. 24 of the C. P. C. C SOROJ BASHINI DEBI *v.* GIRIJA PROSHAD BHATTACHARJEE **170**

Guardians and Wards Act (VIII of 1890)—*Order appointing guardian—Order directing third person to make payment for minor's support, legality of.*

There is nothing in the Guardians and Wards Act which entitles a Court when appointing a person guardian of a minor to order a third party, who is not in possession of any property belonging to the minor, to pay anything towards the minor's support. L MANSA RAM *v.* NAURATI, (1925) A. I. R. (L.) 427 **650**

——— **s. 13**—*Application for appointment of guardian—Procedure—Evidence, opportunity to produce.*

The appellant, who was one of the paternal uncles of a minor Muhammadan girl, made an application for

appointment as guardian of the girl. The other uncles of the girl objected to the appointment on the ground that the minor's father had appointed the objectors guardians of the minor by Will, and that at the time of the application the appellant was prosecuting a suit against the minor in which he sought a decree that the minor had no share in her father's property. On the basis of these allegations, and without giving the appellant any opportunity of producing evidence, the Court dismissed the appellant's application. Under the Will relied upon by the objectors the whole of the property of the deceased had been left to them and nothing had been left to the minor. The appellant alleged that the Will was a forgery :

Held, (1) that the appellant should have been given an opportunity to prove his allegations and to rebut the allegations made by the objectors ;

(2) that if the Will was in fact a forgery it was not desirable to appoint the objectors as guardians of the minor ;

(3) that in any case the Court could not have made an order relying on the genuineness of the Will without taking evidence in support of the Will ;

(4) that, therefore, the order dismissing the appellant's application must be set aside and the case remanded to the lower Court for a fresh decision after giving parties an opportunity to produce evidence. L YUSAF ALI MAMOONJI *v.* ALIBHOY 646

——— **s. 17**—*Guardian, appointment of -Litigious disposition, whether disqualification.*

The mere fact that a person who is otherwise a fit and proper person to be the guardian of a minor is of a litigious disposition is not a sufficient cause for refusing to appoint him guardian of the minor. O SARWARJANG BAHADUR *v.* WAKAR ALI BEG, 12 O. L. J. 281; 2 O. W. N. 246; (1925) A. I. R. (O.) 398 902

——— **ss. 19, 25**—*Father, whether can be appointed guardian—Custody of children, application for, whether maintainable.*

By virtue of the provisions contained in s. 19 of the Guardians and Wards Act, a father cannot be appointed the guardian of his minor children, but as their natural guardian he can take proceedings under s. 25 of the Act. O AHMAD AGHA *v.* ZOHRA BEGAM, 2 O. W. N. 242; 12 O. L. J. 441; (1925) A. I. R. (O.) 421 1024

——— **s. 30**—*Sale of minor's property by guardian —Sanction of Court, absence of, effect of—Subsequent sale in execution of decree—Priority.*

The certificated guardian of a minor sold certain property which the minor had inherited from her father without obtaining the permission of the Court for the sale. Subsequently a person who held a decree against the father of the minor attached and sold the property in execution of his decree and the auction-purchaser obtained possession of the property. The successor-in-interest of the purchaser from the guardian thereupon brought a suit to recover possession of the property from the auction-purchaser :

Held, (1) that the sale by the guardian without the permission of the Court was voidable at the instance of the minor who would be entitled on coming of age to file a suit to get the unauthorised sale set aside, but that as long as such a suit was not brought and as long as no one obtained a better title to the property, the sale by the guardian in favour of the plaintiff would continue to be a valid sale ;

(2) that at the time of the auction sale the property

could not be treated as the property of the minor which she had inherited from her father as it had already been sold and that, therefore, the auction-purchaser obtained no title under his sale ;

(3) that the right of the minor to sue to get the unauthorized sale set aside could neither be attached nor sold and that consequently the purchaser at the auction-sale could not resist the suit of the purchaser from the guardian or of his successor-in-interest, although the sale by the guardian was not sanctioned by the Court. B NARSINGACHARYA GOPALACHARYA *v.* TULSABAI RAMBHAT DANDAVATI, 27 Bom. L. R. 483; (1925) A. I. R. (B.) 320 712

——— **ss. 30, 47**—*Order cancelling alienation by guardian—Appeal, whether lies.*

No appeal lies from the order of a District Judge, made under s. 30 of the Guardians and Wards Act, cancelling an alienation made by the guardian of a minor in contravention of the sanction of the Court. A LACHMI PRASAD *v.* BALDEO DUBE, 20 A. L. J. 390; 44 A. 458; (1923) A. I. R. (A.) 14 251

——— **ss. 31, 48**—*Guardian, certificated, whether can alienate minor's property without sanction of Court—Benefit of minor—Natural guardian—Sanction of Court—Procedure, defective, effect of.*

Once a person, whether he is a natural guardian or a stranger, is appointed guardian of a minor by order of the Court passed in accordance with the provisions of the Guardians and Wards Act, he is clothed with all the obligations imposed by that Act in dealing with the ward's property. It is not in his power to throw off those obligations by the exercise of his own volition and to pose as a natural guardian and act in that status.

An alienation of the minor's property by his guardian without the sanction of the Court cannot be upheld on the ground that the guardian happened to be the father of the minor and that the alienation was for the benefit of the latter.

An order passed by a Court in violation of such rules of procedure, however mandatory, as relate merely to the form of the order cannot be treated as a nullity. The omission to follow such rules of procedure can amount to no more than a mere irregularity or material irregularity in the circumstances of a particular case. On the other hand, an order passed by a Court in violation of such rules of procedure, the observance of which alone invests the Court with jurisdiction to pass the order, is a nullity.

The violation of the procedure prescribed by sub-s. (2) of s. 31 of the Guardians and Wards Act for recording an order granting permission to a guardian to alienate the minor's property, cannot be made the ground for brushing aside the finality of the order sanctioning the alienation which is provided for by s. 48 of the Act. The only condition by which the finality prescribed by s. 48 can be avoided is to establish that the order granting the permission was a nullity.

A transferee of a minor's property from the guardian of the minor cannot be made to suffer for defects in the procedure relating to the sanction of the alienation by the Court. The order of the Court granting the sanction is sufficient for his protection. O RAMESHWAR BAKSH SINGH *v.* RIDH KUER, 1 O. W. N. 775 238

Gujrat Talukdars' Act (VI of 1888), ss. 11, 15, 16.
See C. P. C., 1908, ss. 11, 100 588

Hindu Law, *application of*— Gonds — Raj-Gonds, *whether governed by Hindu Law — Succession— Widow, estate taken by—Custom, proof of—Berar Waste Lands, Rules of 1865—Lease of village—Proprietary or* patelki *rights, acquisition of, mode of— Surrender by widow, whether can be challenged.*

Gonds are not Hindus and as such are not governed by the Hindu Law.

Raj-Gonds are not the offspring of inter-marriages between *Gonds* and *Rajputs*, and though they have adopted the manners, customs and dress of the Hindus and worship Hindu deities, they are not governed by the Hindu Law.

On the death of a *Raj-Gond* his widow succeeds to his property as a full owner.

In order to establish a custom it must be shown to be ancient, certain and invariable.

It is open to a lessee of a village under the Berar Waste Lands Rules of 1865, to accept the proprietary or *patelki* rights under certain conditions, either during the continuance or at the expiry of the lease or to transfer the lease with the permission of the Deputy Commissioner. To constitute proprietary rights it is necessary that there should be an election by the lessee followed by an application and an agreement to abide by the conditions and the grant of a *sanad* conferring proprietary rights. The mere fact that on the expiry of a lease the assessment is raised and the lessee pays the enhanced assessment for some time is not enough to confer such rights on him.

An alienation by a widow can be challenged by her heirs only when it is an alienation of family property.

Where the widow of the lessee of a village under the Berar Waste Lands Rules elects not to apply for proprietary rights, but surrenders the lease for a consideration, that is not such an alienation as can be challenged by her heirs. N JANKUBAI *v.* PARVATI **1036**

——— *Berar* — Stridhan — *Property inherited by woman from father—Succession.*

Under the Hindu Law prevalent in Berar a woman takes an absolute interest in property inherited by her from her father, and on her death it devolves on her daughter in preference to her son. N KRISHNA *v.* BAYAJI **1010**

——— Money received by father—Pious duty of sons to re-pay amount received. *See* C. P. C., 1908, s. 11, EXPL. IV **1017**

——— **Adoption** —*Adoptive father and adopted son belonging to different sub-castes, effect of.*

Under the Hindu Law for the purposes of inheritance each primary caste must adopt within its own limits and an adoption would not be invalid so long as the adoptive father and the adopted son belong to sub-castes of the same primary caste. A SHIB DEO MISRA *v.* RAMPRASAD, 22 A. L. J. 690; 46 A. 637; (1925) A. I. R. (A.) 79 **938**

——— Brahmins—*Adoptive father and son belonging to different* gotras—Datta Homam, *performance of, whether necessary.*

Under the Hindu Law the ceremony of *datta homam* is essential to validate an adoption amongst *Brahmins* unless the adoptive father and son belong to the same *gotra*. B GOVINDAPRASAD *v.* RINDABAI, 27 Bom. L. R. 365; (1925) A. I. R. (B.) 289; 49 B. 515 **472**

——— *by widow, effect of.*

Under the Hindu Law the moment an adoption is made by a widow she is divested of her estate and the adopted son gets the whole of the property. M SUBBAMMA *v.* PAPAYYA, 48 M. L. J. 425; (1925) A. I. R. (M.) 748 **187**

Hindu Law—contd.

——— **Adoption** *of married person—Succession— Daughter of adopted son, rights of.*

Where a married Hindu, who has a daughter, and is the sole owner of ancestral property, is adopted, his daughter does not pass into the adoptive family along with her father and is entitled to succeed to the property of her father as his heir, as in such a case the property goes to the heirs of the person adopted, as he was the last male holder, and not to the heirs of his father or any other ancestor. B MANIKBAI VISHNUDAS GUJJAR *v.* GOKULDAS RAMDAS KARADGI, 27 Bom. L. R. 414; (1925) A. I. R. (B.) 363; 49 B. 520 **816**

——— *of orphan, validity of—Agarwallas, views of—Evidence Act (I of 1872), s. 115—Estoppel —Religious status, whether can be established by estoppel.*

Under the Hindu Law it is essential to the validity of an adoption that the adopted child should be "given" to the adopter by the father or, if he be dead, by the mother of the child. No other person has the right to give the child in adoption, nor can such right be delegated to anybody else. Therefore, a boy who has lost both his parents cannot be adopted.

Agarwallas generally adhere to Jainism and repudiate the Brahminical doctrines relating to obsequial ceremonies, the performance of *shraddh* and the offering of oblations for the salvation of the soul of the deceased, nor do they believe that a son, either by birth or by adoption, confers spiritual benefit on the father. An adoption among them is a mere temporal arrangement and has no particular spiritual object. Among them the qualifying age for adoption extends to the 32nd year; and the only ceremony consists in tying a turban round the head of the young man who is being adopted, in the presence of the principal men of the community and giving them a feast.

An Agarwalla Hindu purported to adopt an orphan and died shortly afterwards. His brother made representations to the effect that the adoption had taken place. Two years afterwards the brother also died. In a suit by the latter's daughter against the adopted son of her uncle to recover the property of her father, the defendant set up the plea that the plaintiff's father was estopped from challenging the defendant's adoption and that the plaintiff was consequently bound by the estoppel:

Held, that the representations of the plaintiff's father that the defendant had been adopted by his brother did not estop him or the plaintiff, who was his daughter, from challenging the validity of the adoption on the ground that the adoption being that of an orphan was invalid under the Hindu Law.

Quære:—Whether a status that rests on religious rules and religious sanctions and involves the performance of religious duties can be acquired by mere estoppel. P C DEARAJ JOHARMAL *v.* SONIBAI, 23 A. L. J. 273; (1925) A. I. R. (P. C.) 118; 2 O. W. N. 335; L. R. 6 A. (P. C.) 97; 27 Bom. L. R. 837; 21 N. L. R. 50; 52 C. 482; 49 M. L. J. 173 (P. C.) **357**

——— **Alienation** *by Hindu widow—Improvements by transferee—Transferee, whether entitled to value of improvements—Transfer of Property Act (IV of 1882), s. 51.*

A person dealing with a Hindu widow would ordinarily be aware that she has only a life-interest, and he is expected to make enquiries, for instance, in the case of a mortgage, as to whether there is any legal necessity for the mortgage and any right in

the widow to make the transfer. Section 51 of the Transfer of Property Act has no application to such a case. A RAJ RUP KUNWAR *v.* GOPI, 23 A. L. J. 207; L. R. 6 A. 206 Civ.; (1925) A. I. R. (A.) 261; 47 A. 430 44

——— **Alienation** *by step-mother of minor, validity of—Subsequent alienation by minor after attaining majority—Mortgage by step-mother, whether antecedent debt.*

A previous mortgage debt, if it created a good debt due from the mortgagor, would be an antecedent debt which would bind the estate and could form the consideration of a subsequent alienation.

The ordinary rule of Hindu Law is that no relation, except the parents, is entitled as of right to the guardianship of a minor and failing the parents another relative must derive his authority from the Court.

Under the Hindu Law the right of a *bona fide* encumbrancer who has taken from a *de facto* manager a charge on lands created honestly for the purpose of saving the estate or for the benefit of the estate is not, provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager, affected by the want of union of the *de facto* with the *de jure* title.

A mortgage of property belonging to a Hindu minor executed by his step-mother who is not the *de facto* manager of the property is void, and cannot be subsequently ratified by the minor on attaining majority. If the minor subsequently alienates the property and the amount due under the mortgage executed by his step-mother is included in the consideration for the alienation, the amount represented by the previous mortgage cannot be regarded as an antecedent debt or as in any way justified by legal necessity. L CHANDU LAL *v.* MUKANDI, 26 P. L. R. 120; (1925) A. I. R. (L.) 503 40

——— ——— *by widow—Necessity — Marriage of daughter.*

The marriage of the daughter of a deceased Hindu is a duty cast on the estate of the deceased. Where the widow of the deceased has not in her hands enough money from her deceased husband's estate for the purpose of celebrating the marriage of her daughter, she is entitled to sell a sufficient portion of the estate of the deceased to provide funds for the marriage. Even though the widow has in her hands money of her own she is still entitled to employ the money of the estate for the purpose. She is not obliged to spend her own money and only to employ the money of the estate if her own is not sufficient. C SATISH CHANDRA NAG *v.* HARIPADA DE, 41 C. L. J. 209; (1925) A. I. R. (C.) 689 43

——— ——— *by widow—Widow, whether can challenge alienation.*

The restrictions imposed by the Hindu Law on a widow's power of alienation of her husband's estate are inseparable from her estate and their existence does not depend on that of heirs capable of taking on her death. Therefore, a Hindu widow is entitled to restrain an alienation of immoveable property held by another widow on the usual life-tenure, where the former is entitled to succeed to the estate on the death of the latter. L SURJO *v.* DALELO, 2 L. C. 105 937

——— **Custom**—*Succession—Daughter-in-law, right of*—Aroras *of Kasur, Lahore District.*

There is no custom among the *Aroras* of Kasur in the Lahore District whereby the widow of a predeceased son succeeds to the property left by her father-in-law in preference to the latter's reversioners,

in contravention of the general rule of Hindu Law. L GOKAL CHAND *v.* NIHAL DEVI 3

——— **Damdupat**, rule of, applicability of. *See* MORTGAGE—SUIT 719

———, *rule of, applicability of, to mortgage to which one party is non-Hindu—Assignment by non-Hindu debtor in favour of Hindu, effect of.*

The rule of *damdupat* is not applicable to the case of a mortgage where only one of the parties thereto is a Hindu and the other is a non-Hindu. This rule cannot be let into the prejudice of a Hindu creditor by a non-Hindu debtor assigning his equity of redemption to a Hindu. N NARAYAN *v.* HAFIZ, (1925) A. I. R. (N.) 21 264

——— **Gift** *during illness, validity of*—Marz-ul-maut, *doctrine of, applicability of.*

Under the Hindu Law, a deed of gift executed by a person during illness is not invalid. The principles of the Muhammadan Law of *marz-ul-maut* are not applicable to the Hindu Law. O SAT NARAIN *v.* KRISHNA DUTT, 12 O. L. J. 275; 2 O. W. N. 243; (1925) A. I. R. (O.) 383 900

——— **Idol,** *nature of—Legal status* — Shebait, *position and powers of*—Shebaitship, *devolution of —Removal of idol, whether permissible.*

A Hindu idol is a "juristic entity." It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager, with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir.

A person founding a deity and becoming responsible for the duties attached to its worship is *de facto* and in common parlance called *shebait*. This responsibility is discharged by a pious Hindu, either by the personal performance of the religious rites or by the employment of a *Brahmin* priest to do so on his behalf. The founder or his successor may confer the office of *shebait* on another.

Under the Hindu Law when the worship of a Thakur has been founded, the *shebaitship* is invested in the heirs of the founder, in default of evidence that he has disposed of it otherwise or that there has been some usage, course of dealing, or some circumstances to show a different mode of devolution.

There may be difficulties in adjusting the legal status of an idol to the circumstances and requirements of its protection and location and there may also be a variety of other contacts of such a "*persona*" with mundane ideas, but a family idol cannot be reduced to the position of a mere moveable chattel.

The Will of an idol in regard to its location must be respected. If in the course of a proper and unassailable administration of the worship of the idol by the *shebait*, it be thought that a family idol should change its location, the Will of the idol itself, expressed through his guardian must be given effect to. It is open to an idol acting through his guardian, the *shebait*, to conduct its worship in its own way, at its own place, always on the assumption that the acts of the *shebait* expressing the Will of the idol are not inconsistent with the reverent and proper conduct of its worship by those members of the family who render service and pay homage to it. P C PRAMATHA NATH MULLICK *v.* PRADYUMNA KUMAR MULLICK, 23 A. L. J. 537; (1925) A. I. R. (P. C.) 139; 49 M. L. J. 30; (1925) M. W. N. 431; 41 C. L. J. 552; 2 O. W. N. 557; 27 Bom. L. R. 1064 (P. C.) 305

Hindu Law—contd

——Jains — *Adoption by widow—Agreement between widow and adopted son, validity of—Direction to pay certain sum of money to widow's relative, whether can be enforced—Family arrangement, what amounts to—Specific Relief Act (I of 1877), s. 23—Persons not parties to agreement, whether can enforce agreement.*

Per *Mukerji, J.*—A deed of adoption is more often than not executed after the ceremony of adoption has taken place. The law does not require that an adoption should be evidenced by a registered-deed. But as a precautionary measure, people do execute such deeds. In such a case any agreement that may have taken place before and as a consideration for the adoption between the adopter and the adoptee would find place in the deed of adoption and in any deed that the adoptee may himself execute.

Among Jains adoption is more a matter of custom than of spiritual necessity. Even a married man may be adopted among them.

Section 23 of the Specific Relief Act does not purport to be and is not exhaustive of the cases in which specific performance of a contract may be granted in favour of a person. The section itself simply says that specific performance of a contract may be obtained by the persons mentioned therein. It does not say that specific performance of a contract cannot be obtained by any person other than those mentioned in the section.

Per *Lindsay, J.*—There is no rule of general application in India which enables persons to bring suits upon contracts to which they are no parties. There could be no right of suit by a stranger to an agreement unless it can be shown that there has been a charge created in his favour or that under the agreement he is entitled to some beneficial interest as a *cestui que trust.*

A Hindu widow about to make an adoption to her husband cannot stipulate for gifts of her husband's estate to be made to her relations and to strangers by the adopted son after he is taken in adoption. An arrangement which makes the adoption conditional upon the adopted son agreeing to carry out the adoptor's directions to make such gifts cannot be recognised as valid. To allow an arrangement of this nature to be carried out would be to allow a Hindu widow to do indirectly what the law forbids her to do directly and such an arrangement cannot, therefore, be enforced. Any attempt to bind the adopted son by such conditions must fail; the conditions are void and the son takes the estate free from them.

In the United Provinces the consent of the husband is essential in order to enable a widow to make an adoption and while it might be conceded that consent so given would justify the widow in imposing reasonable conditions upon the adopted son for the protection of herself and the estate from which she is entitled to draw maintenance, it would not be assumed that the husband consented to arrangements made by the widow at the time of the adoption whereby extensive portions of his estate can be transferred by way of gift to members of his wife's family. The invalidity of such conditions cannot be cured by showing that the adopted son, a person of full age, assented to them. The invalidity arises out of the inherent disability of the widow under the Hindu Law to give away portions of her husband's estate and an attempt to impose conditions which would lead indirectly to such alienations being made is absolutely void as being *ultra vires.*

Hindu Law—contd.

Even if it can be assumed in such a case that the assent of the adopted son to such conditions creates a trust, the purpose of the trust being unlawful the trust cannot be enforced.

A family arrangement is an arrangement arrived at by members of the same family in settlement of doubtful claims, where there being uncertainty as to the rights of the various claimants, the dispute is composed by a settlement based upon acknowledgment of pre-existing title in the parties concerned. There must be a dispute, the parties must belong to the same family and the property which constitutes the subject-matter of the dispute must be the property of the family to which the parties belong.

A *Jain* widow adopted the defendant and shortly afterwards executed a deed of adoption wherein she directed the defendant to pay a certain sum of money to the plaintiffs, who were the brothers of the widow. The deed further provided that in case the defendant refused to pay the sum directed by the widow the money might be realized from her estate if necessary by the auction-sale of her property. Two days later the defendant himself executed a document in which he recited that he had been adopted in pursuance of instructions from the widow's deceased husband and that the widow had made certain arrangements concerning her property according to the directions of her husband. He declared that he would abide by all the conditions laid down in the deed executed by the widow and that his adoption was conditional on his acceptance of the stipulation contained in the deed. He bound himself to carry out the terms of the deed and declared that in case of his failure the conditions might be enforced in Court. In a suit by the plaintiffs to recover from the defendant the sum mentioned in the deed of adoption as being payable to them:

Held, Per *Mukerji, J.* (1)—that the agreement entered into by the defendant with the widow was supported by consideration and that the consideration was good and enforceable in a Court of Law;

(2) that the arrangement between the widow and the defendant might be regarded as a family arrangement and that the plaintiffs were, therefore, entitled under s. 23 of the Specific Relief Act to sue to enforce the arrangement as being beneficially entitled thereunder;

(3) that even if s. 23 of the Specific Relief Act was not applicable the plaintiffs were entitled to sue to enforce the arrangement inasmuch as the defendant had bound himself to carry out the arrangement and a trust had been created in favour of the plaintiffs;

(4) that the sum which was directed to be paid to the plaintiffs had been made a charge on the estate and that the plaintiffs were, therefore, entitled to a declaration that the estate in the hands of the defendant was charged with such payment.

Per *Lindsay, J.*—(1) that the arrangement between the widow and the defendant did not amount to a family arrangement;

(2) that the plaintiffs not being parties to the arrangement were not entitled to sue to enforce the arrangement;

(3) that the arrangement was void and *ultra vires* having regard to the provisions of the Hindu Law with regard to the power of a widow to make alienations of her husband's estate. A MITTAR SAIN v. DATA RAM 724

———— **Joint family**—*Alienation by co-parcener, whether can be challenged by successors-in-interest —Widow, decree obtained against, whether binding on reversioners—Collusion—Burden of proof.*

A Hindu co-parcener has no absolute right to transfer family property without legal necessity. A transfer of family property by a co-parcener which is not supported by legal necessity is not binding on the estate and is liable to be challenged by the other co-parceners or by the successors-in-interest of the alienor.

A Hindu widow represents the estate for the time being though her rights are to a certain extent qualified. If she fights a case against a third party, she represents the estate and fights the case in a representative character on behalf of all the subsequent reversioners. A decree fairly and properly obtained against her in the absence of any fraud or collusion would be binding on the reversionary heirs. It is only when the decree relates to a matter personal to her, that it would not be so binding. It is immaterial, however, that the decree is an *ex parte* decree, unless there is anything special which would suggest that it was not fairly and properly obtained. In the absence of any such evidence an *ex parte* decree obtained against the widow would be binding on the reversioners.

A Hindu executed a simple mortgage of certain property. After his death the mortgagee obtained an *ex parte* decree on the mortgage against the widow of the deceased. Plaintiff, who was the next reversioner to the estate of the deceased, brought a suit for a declaration that the mortgage was without necessity and that the decree was not binding on him:

Held, that in order to succeed the plaintiff must prove not only that there was no legal necessity for the mortgage, but also that the *ex parte* decree obtained against the widow was not binding on him owing to collusion or some other circumstance which would take away its binding character. **A** SARJU PRASAD ROUT *v.* MANGAL SINGH, 23 A. L. J. 254; 47 A. 490; L. R. 6 A. 201 Civ.; (1925) A. I. R. (A.) 339 294

———— *Alienation by manager—Benefit to family—Alienation, whether can be challenged.*

Under the Hindu Law a transfer of family property can be made by the manager of the family either for legal necessity or for the family benefit.

Where by an alienation of family property it is intended to get rid of an estate which is inconveniently situated, which has no *sir* land attached to it, and which is not sufficiently profitable, and to substitute for it something that is likely to yield a larger income by an extension of the family business then being carried on, the transaction cannot be challenged. **A** JAGMOHAN AGRAHRI *v.* PRAG AHIR, 23 A. L. J 209; 47 A. 452 27

———— *between daughter's son and maternal grandfather, whether possible.*

There is no rule of Hindu Law under which a daughter's son and his maternal grandfather can be deemed members of a joint Hindu family. **A** DANGAR *v.* JAHANGIR, L. R. 6 A. 87 Rev. 698

———— *Deposit of title-deeds by manager—Suit to enforce mortgage—Receiver, appointment of —Discretion of Court.*

The members of a joint Hindu family, along with others, formed a limited Company. The manager of the family made a deposit of title-deeds of property belonging to the family to secure an over-draft upon the banking account of the limited Company. The adult members of the family were aware of the deposit of title-deeds and a large portion of the over-draft was used for the purposes of the joint family business. In a suit to enforce the equitable mortgage created by the deposit of the title-deeds, a Receiver was appointed in respect of the mortgaged property. On appeal:

Held, that an inference could be drawn from the circumstances under which the deposit was made that the money was raised for legal necessity and that, therefore, it could not be said that the discretion of the lower Court in appointing a Receiver was exercised wrongly or in a manner which was not judicial. **C** RAM KUMAR LAL *v.* CHARTERED BANK OF INDIA, AUSTRALIA & CHINA, 41 C. L. J. 203; (1925) A. I. R. (C.) 664 375

———— **Joint family**—Eldest brother, whether represents minor brothers. *See* LIMITATION ACT, 1908, s. 7, SCH. I, ART. 144 177

———— *Mortgage by co-parcener—Minor co-parcener, whether bound by mortgage—Previous mortgage by father, paid off by subsequent mortgagee, effect of.*

Plaintiff was a minor co-parcener in a joint Hindu family. His mother, acting in the capacity of his guardian, joined with his uncle in executing a mortgage of family property. The mortgagee redeemed a previous mortgage on the property which had been effected by the father of the minor. In a suit by the minor it was held that the mortgage executed by his mother and uncle was not binding on the minor, and it was not shown that the money borrowed under the mortgage effected by the minor's father, which had been paid off by the subsequent mortgagee, was borrowed for any legal necessity or to satisfy any antecedent debt:

Held, that the minor was not liable for the amount of the mortgage-money due under the mortgage effected by his father which had been paid off by the subsequent mortgagee. **O** PARTAB SINGH *v.* SHAMSHER BAHADUR SINGH, 10 O. & A. L. R. 1389; 1 O. W. N. 694 66

———— *Mortgage by father — Necessity—Recital in mortgage deed, value of—Father, whether represents family in litigation—Suit against father —Sons, whether necessary parties—Limitation Act (IX of 1908), s. 22—Civil Procedure Code (Act V of 1908), O. I, r. 9.*

The father of a joint Hindu family is competent to represent the family for purposes of litigation in suits.

A mortgagee of joint family property from the father brought a suit to recover possession of the property against the father. The Trial Court directed that the sons of the mortgagor should be brought on the record as defendants, and when they were so brought the suit was dismissed as barred by limitation on the ground that the sons were made parties to the suit more than twelve years after the date of the mortgage:

Held, (1) that the suit could be carried on properly against the father alone who represented the joint family for the purposes of the litigation and to whom it was open to raise the defence that though he admitted the execution of the mortgage deed the money due thereunder could not be recovered by sale of the joint family property unless the plaintiff proved legal necessity for the debt or payment of antecedent debts out of the loan;

Hindu Law—contd.

(2) that, therefore, the sons were not necessary parties to the suit and the suit could not be dismissed as barred by time.

A recital in a deed of mortgage executed by the father of a joint family that the money has been borrowed for family necessity is merely a piece of evidence and in the absence of any other evidence it does not amount to proof of family necessity. O RAJVANTA *v.* RAMESHAR, 12 O. L. J. 235; 2 O. W. N. 225; (1925) A. I. R. (O.) 440 180

——— **Joint family** — *Mortgage by manager — Interest, high rate of—Necessity—Burden of proof—Appeal, second—Finding of fact.*

Where money is borrowed by the manager of a joint Hindu family on the security of family property at an unusually high rate of interest, the burden lies on the mortgagee to prove that there was necessity to borrow at so high a rate.

Where in such a case the lower Appellate Court having rightly appreciated the question of the burden of proof arrives at the finding that the necessity was sufficiently urgent to account for the rate of interest charged, the finding cannot be interfered with in second appeal. O SAGAR SINGH *v.* MATHURA PRASAD 1035

——— ——— *Mortgage by manager—Mortgage-suit —Necessity, absence of—Prayer for personal decree made at late stage, whether can be entertained—Privy Council appeal—Respondent lodging case but failing to appear at hearing—Costs—Practice.*

In a suit to enforce a mortgage executed by the manager of a joint Hindu family it was found that the money had not been borrowed for legal necessity and the suit was dismissed. In an appeal before the Privy Council it was contended that the manager who had executed the mortgage was liable on the personal covenant for the debt contracted by him and it was prayed that a simple money decree may be passed against him:

Held, that having regard to the fact that no such claim had been made in the Courts below the claim for a simple money decree against the manager could not be entertained, as the entertainment of any such claim would require an amendment of the plaint, and the case was not such in which their Lordships were prepared to exercise their discretion to allow an amendment.

In a Privy Council appeal, where the respondent lodges a case, but does not appear at the hearing, and the appeal is dismissed, the respondent is entitled to costs up to the lodging of the case. PC GAJADHAR MAHTON *v.* AMBIKA PRASAD TEWARI, 41 C. L. J. 450; 27 Bom. L. R. 853; (1925) A. I. R. (P. C.) 169; L. R. 6 A. (P. C.) 126; 49 M. L. J. 238; (1925) M. W. N. 532; 22 L. W. 306; 47 A. 459 (P. C.) 292

——— *Person other than* karta, *whether can sue and be sued in representative capacity.*

Even where a person is not the *karta* of a joint Hindu family there may be circumstances which would entitle a Court to hold that such person sued or was sued as representing the entire joint family. The question, however, whether the entire family was or was not represented by the person suing or the person who was sued is one of fact to be determined on the particular circumstances of each case. O ANPURNA KUAR *v.* JAGESHAR MISRA, 1 O. W. N. 842 208

——— *Property sold in execution of decree against father—Sons, whether bound—Immoral debts —Burden of proof.*

Hindu Law—contd.

Where property belonging to a joint Hindu family has been sold in execution of a simple money-decree obtained against the father alone, the sons cannot get rid of the sale without proving that the debt in respect of which the decree was obtained in execution of which the property was sold had been incurred by the father for what the Hindu Law would call an immoral purpose. A RANJIT SINGH *v.* RAMMAN SINGH 654

——— **Joint family**—*Sale by co-parcener—Possession obtained by purchaser, whether wrongful—Mesne profits, liability for.*

Although the purchaser of a particular portion of joint family property or of the interest of one of the members of the family in any particular item of joint property may not be entitled to possession, yet if he gets possession his possession cannot be considered as wrongful against the other members of the family and he is not liable to account for the mesne profits. All that the law allows is that a co-parcener is entitled to recover possession from an outsider of the joint family property or any portion of it. But if he stands by and allows an outsider to remain in possession, then although his share in that property or interest in that property is not thereby affected, he is not entitled to demand an account for the past profits. B GANGABISAN JEEVANRAM MARWADI *v.* VALLABHDAS SHANKARLAL, 26 Bom. L. R. 464; (1924) A. I. R. (B.) 433; 48 B. 428 703

——— ——— Stridhan, *succession to—Property inherited, whether joint family property—Survivorship.*

When the *stridhan* property of a woman devolves on her sons who form a joint Hindu family at the time of the mother's death, the sons take the property as co-owners or tenants-in-common without benefit of survivorship, and on the death of one of the sons the property so inherited by him goes to his widow and not to his surviving brothers. A JAMNA DAS *v.* KUNWAR BAI, L. R. 6 A 243 Civ.; (1925) A. I. R. (A.) 447 440

——— **Lex loci** *in Berar — Mitakshara and Mayukha, priority between.*

In Berar, following the Bombay Deccan, the Mitakshara is paramount and the 'Mayukha' is of secondary consideration, being only relied upon when the Mitakshara is silent or doubtful. N NARAYAN *v.* TULSIRAM, (1925) A. I. R. (N.) 329 979

——— **Maintenance**—*Wife living separately from husband, whether entitled to maintenance—Heirs of husband, liability of.*

A Hindu wife left her husband's house on account of the ill-treatment and indignities to which she was subjected and, after several years, during which she made unsuccessful attempts to be received back into the house of her husband, she brought a suit for arrears of maintenance against her husband and the other members of his family. During the pendency of the suit the husband died:

Held, (1) that the plaintiff had not under the circumstances of the case become disentitled to maintenance on account of her voluntary separation from her husband;

(2) that the plaintiff's right to maintenance was not put an end to by the death of her husband pending the suit but survived against his heirs-at-law whether they succeeded by right of survivorship or by inheritance.

Hindu Law—contd.

Per *Spencer, Offg. C. J.*—The obligation of a Hindu husband to maintain his wife is one arising out of the status of marriage. It is a liability created by the Hindu Law in respect of the jural relations of the Hindu family. Where there is no contract between the parties to a marriage, as among the Hindus, a suit by the wife for maintenance is not a suit based upon contract but is a suit arising out of a civil relation resembling with a contract which is specially provided for in Art. 128 of Sch. I to the Limitation Act. The heirs of a Hindu who is liable for maintenance are equally bound by the obligation which binds him.

Per *Sirinivasa Iyengar, J.*—Under the Hindu Law the wives of co-parceners are also members of the joint family, though they may not be entitled to shares in the estate of the family or to enforce partition thereof, and the family is bound to maintain all the members of the family. It is true that the Hindu Law imposes an obligation on a Hindu husband to support his wife without reference to any property or share possessed by him, but when the joint family is possessed of property a claim by a wife against her husband need not be regarded merely as a suit for enforcement of any personal obligation but may well be regarded as a suit against the family itself, represented by the husband through whom alone, so long as he is alive, she has to obtain the relief. On his death the true legal representatives in the action would be the surviving co-parceners of the family, if any, or else the personal legal representatives of the deceased husband.

The arrears of maintenance due and payable to a wife by her husband may be regarded as a debt within the meaning of the Hindu Law which is binding on the family. M BOMMADEVARA RAJA LAKSHMI DEVI AMMA *v.* B. NAGANNA NAIDU, 21 L. W. 461; (1925) A. I. R. (M.) 757 **571**

——— **Marriage** *in approved form—Presumption —*Asura *form—Test—Marriage by exchange, whether* asura*—Married sister, whether legal guardian—Limitation Act (IX of 1908), Sch. I, Art. 44, scope of —Alienation by person not* de jure *guardian, how far binding on minor—Right to impeach void alienations, whether personal.*

The presumption under Hindu Law is that a marriage is in an approved form.

The essence of the *Asura* form of marriage is the taking of a price for the bride.

In the case of a marriage by exchange, where a girl from one family is married to a boy of another family and *vice versa*, there being no question of the price for a bride, the marriage is in an approved form and not in the *asura* form.

Under the Hindu Law the married sister is not the guardian of her unmarried sister.

Article 44 of the Limitation Act has no application to a sale effected not by a guardian but by a wholly unauthorized person.

A person who is not a *de jure* guardian but purports to assume the guardianship of the estate of a minor Hindu is not in a better position than a stranger and has no authority to make any alienation.

The right of a minor to set aside an alienation which is void is not personal but is also available to the transferee or the heir of the minor. N PUNJABRAO *v.* ATMARAM **1018**

——— **Mitakshara** *family—Presumption of jointness—Separation—Agreement between co-parceners*

Hindu Law—contd.

—Ascertainment of shares—Separation, whether can be inferred—Revision—Construction of document—Inference as to intention of parties.

A Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated.

The co-parceners in a joint family can by agreement amongst themselves separate and cease to be a joint family, and on separation are entitled to partition the joint family property amongst themselves.

But the mere fact that the shares of the co-parceners have been ascertained does not by itself necessarily lead to an inference that the family had separated.

A member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and the remaining co-parceners, without any special agreement amongst themselves, may continue to be co-parceners and to enjoy as members of a joint family what remained after such a partition of the family property.

If a joint Hindu family separates the family or any members of it may agree to re-unite as a joint Hindu family, but such a re-uniting is for obvious reasons, which would apply in many cases under the law of the Mitakshara, of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved.

The fact that any member of a joint family has separated himself from his co-parceners may be proved by his suing for a partition of the joint family property, and if the suit is decreed the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted.

In a suit for partition which proceeds to a decree which is made, the decree for a partition is the evidence to show whether the separation was only a separation of the plaintiff from his co-parceners or was a separation of all the members of the joint family from each other.

In construing documents the Court is entitled to draw all legitimate inferences as to the intention of the parties to them, and the inferences so drawn are findings of facts. P C PALANI AMMAL *v.* MUTHUVENKATACHALA, (1925) A. I. R. (P. C.) 49; 48 M. L. J. 83; 6 P. L. T. 133; 21 L. W. 439; (1925) M. W. N. 330; 3 Pat. L. R. 126; 27 Bom. L. R. 735; 29 C. W. N. 846; 23 A. L. J. 746; L. R. 6 A. (P. C.) 143; 48 M. 254 (P. C.) **333**

——— **Mitakshara**—*Inheritance—Sisters, contest between—Poor sister, priority of—Test.*

In order to apply the rule of the Mitakshara that in succession to the estate of their father a sister who is "unprovided for" shall take precedence over a sister who is "enriched", each case must be looked at from the point of view of comparative poverty or wealth of the parties, and it is not essential that the poor sister should point to some definite acquisition of property by the rich sister. It is sufficient that her surroundings are such that she can be regarded as a rich woman, for instance, that she is married into a family of position and wealth. A MANKI KUNWAR *v.* KUNDAN KUNWAR, 23 A. L. J. 183; 47 A. 403; (1925) A. I. R. (A.) 375 **121**

——— *Property acquired jointly, whether joint family property—Presumption—Intention.*

Under the Hindu Law where the members of a joint family acquire property by or with the assist-

Hindu Law—contd.

ance of joint family funds or by their joint labour, such property is the joint property of the persons who have acquired it, whether it is an increment to ancestral property or whether it has arisen without any nucleus of descended property.

If a single individual acquires a fortune by his own exertion, without any assistance from ancestral property, his issue would take no interest in such property. Where, however, several brothers acquire property by their joint exertions in the absence of any indication of an intention to the contrary, the property would be owned by them as joint family property, and in that case their male issue would necessarily acquire a right in it by birth, for under the Mitakshara system there can be no joint family property in respect of which the male issue of the joint owners do not take a share by birth. If there is satisfactory evidence of an intention to treat the property not as joint family property but as joint property only, *i. e.*, as the joint self-acquisition of the acquirers, such intention will be given effect to. But the presumption is in favour of its being regarded as joint family property. N MOTILAL *v.* HAJIMAL 809

——— **Mithila School**—*Mitakshara, authority of —Gift by husband to wife—Estate taken by wife—Alienation, power of—Consent of husband, effect of—Construction of deed*—Benami—*Burden of proof—Grant of property* ba farzandan naslan bad naslan, *effect of—Transfer of Property Act (IV of 1882), ss. 2, 8, applicability of—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—Mortgage-decree—Sale—Objection by judgment-debtor, dismissal of —Legal representatives, whether can maintain suit to recover property—Evidence Act (I of 1872), ss. 41, 42, 43—Judgment not* inter partes, *admissibility of—Limitation Act (IX of 1908), Sch. I, Arts. 95, 142—Suit for possession—Plaintiff not bound by decree—Decree, whether must be set aside—Limitation—Muhammadan Law*—Heba-bil-ewaz, *whether gift or sale.*

Plaintiffs' father executed a document described as a *heba-bil-ewaz* in favour of his wife transferring the property in dispute to her in consideration of a certain sum of money which he received from her and with which he paid off a decree which had been obtained against him and in execution of which the property in dispute was about to be sold. The document contained the following recital:—"Although I, the executant, tried to procure money from creditors, etc., for payment of the decretal amount to the said decree-holder, I could not get it and I see no means to safeguard my *milkiat* properties from sale as mentioned in the inventory. As the sale will entail loss of the said two *milkiat* properties on sale, belonging to me, the executant, my share of 7 annas $8\frac{3}{4}$ *gandas* situate in Taluka Laheri *asli* with *dakhli*, *Pergana* Jabdi, T. N. 1522 appertaining to Registration Office, District Darbhanga and Sub-District Madhubani and *Thana* Lockhe, with trees fruit-bearing and non-fruit-bearing and *ahar*; and *pokhar* and reservoir and tank and *cucha* and *pucca* wells, and *sair*, and salt *sair* and houses occupied by tenants, and all my *zemindari* rights which up to now have been in my possession without the co-partnership of any one to my wife *Musammat* Anuragin Bahuasin, having taken Rs. 41,532-6-8-16 cr. 16 ms. in cash, I have made of my free-will and accord, *heba-bil-ewaz*, and having with the said amount paid up the amount

Hindu Law—contd.

of the decree of the aforesaid decree-holder and got the property released from sale have put the aforesaid *Musammat* in possession of the subject of the *heba*. The aforesaid *Musammat* should by becoming possessed of the subject of the *heba* spend the produce of the property with sons generation after generation (*ba farzandan naslan bad naslan*). I, the declarant, or my heirs and representatives (*quam moqaimain*) shall have no right or concern in demanding the subject of the *heba* or the consideration money from the aforesaid *Musammat* or her heirs and representatives. Should I, the executant, my heirs and representatives make any claim or put forward any demand in respect of the gift properties or the consideration thereof the same will be deemed null and void. I have, therefore, given in writing these few words in the shape of a *heba-bil-ewaz* so that it may be of use when required." The donee obtained possession of the property under the deed of gift. Some years afterwards the donor and the donee together mortgaged the disputed property to the defendant to secure the re-payment of a certain sum of money which was then due by the donor to the defendant. The defendant obtained an *ex parte* decree against the donor and the donee upon his mortgage took out execution and purchased the property in execution of the decree. The judgment-debtors applied for setting aside the sale but the donee died during the pendency of the application and the plaintiffs were substituted in the record as her representatives. Eventually the application was refused and the sale was confirmed. On the death of their mother the plaintiffs entered upon possession of the disputed property and in 1906, they instituted a suit for confirmation of their possession on the ground that the mortgage-bond had been obtained from their mother without her knowledge and that the mortgage-decree was fraudulent. Their father was a *pro forma* defendant in the case. The cause of action was stated as having arisen a few months before the institution of the suit when the frauds therein stated had been discovered. That suit was withdrawn with liberty to bring a fresh suit. The plaintiffs' father died shortly after. On the 24th July 1918 the plaintiffs instituted the present suit for recovery of possession of the disputed property from the defendant and for mesne profits on the allegation that the property belonged to their mother and that their father had no right to execute a mortgage-bond in respect of it and that the rights of their mother and of themselves were not affected by the mortgage-suit, the decree, the sale and the delivery of possession. The cause of action was stated to have arisen on the 10th of December 1906, when possession had been obtained by the defendant as auction-purchaser. It was admitted that the plaintiffs and their father and mother were governed by the *Mithila* School of Hindu Law:

Held, per *Das, J.*, (1) that it was not open to the plaintiffs, who had been substituted as the legal representatives of their mother in the application to set aside the auction-sale, to re-agitate the questions which could have been raised in that application in a regularly constituted suit between the parties;

(2) that inasmuch as the plaintiffs' mother in spite of the dismissal of her application to set aside the auction sale might still have maintained a suit for setting aside all the proceedings as a fraud upon her from start to finish, it was open to the plaintiffs to maintain such a suit, but that such a suit would

be barred by time under Art. 95 of Sch. I to the Limitation Act;

(3) that it was not open to the plaintiffs' mother to object to the validity of the mortgage on the ground that the property was inalienable inasmuch as she could not claim adversely to her own deed, and that her failure to set up the inalienability of the property as an answer to the mortgage-suit did not operate as constructive *res judicata* so as to preclude the plaintiffs from setting up the inalienability of the property as a ground for the declaration that the mortgage and the decree and sale following upon it were not binding upon them, and that consequently the plaintiffs were entitled to maintain the suit and to show that the property in dispute was inalienable in the hands of their mother;

(4) that if the property in dispute was inalienable the plaintiffs were not bound by the decree and the sale and could treat those proceedings as a nullity without the intervention of any Court and that the suit was governed by Art. 142 of Sch. I to the Limitation Act and having been brought within twelve years of the date of the plaintiffs' dispossession was within limitation;

(5) that the application made by the plaintiffs' mother to set aside the auction-sale was one under O. XXI, r. 90 of the C. P. C., and not under s. 47 of the Code and that the latter section was not, therefore, a bar to the maintenance of the present suit;

(6) that the transaction of *heba-bil-ewaz* was a genuine transaction-and operated as a transfer of the property to the plaintiffs' mother;

(7) that the transaction was one of gift and not of sale;

(8) that under the *Mithila* School of Hindu Law the gift being one by the husband to the wife subsequent to marriage must be regarded as the *stridhan* of the wife and was a *saudayica* gift of the husband to the wife;

(9) that the plaintiffs were, therefore, entitled to succeed to the property after the death of their mother as her heirs and not as the heirs of her husband;

(10) that the property in dispute being immoveable property taken as a gift by the wife from her husband was heritable but was not alienable by the wife except for legal necessity and that there being no such necessity in the present case the donee had no power to alienate it;

(11) that the donee having acted in passive obedience to her husband's direction in joining in the execution of the mortgage-deed, the deed was not obtained with her consent and was not binding upon the plaintiffs;

(12) that under the deed of gift the plaintiffs' mother was not given any power of alienation which she did not possess under the *Mithilá* School of Hindu Law;

(13) that the property in dispute in the hands of the plaintiffs' mother was inalienable even with the consent of her husband, and that consequently the mortgage-bond, the decree and the sale were not binding upon the plaintiffs and that plaintiffs' suit must be decreed.

Per *Foster, J.* (1) that the *heba-bil-ewaz* was not a *benami* transaction and operated to transfer the property to the plaintiffs' mother;

(2) that the transfer was in substance a gift and conferred an absolute estate upon the donee;

(3) that the plaintiffs were the heirs and legal representatives of their mother and inasmuch as they

claimed under her they were bound by the mortgage-decree and the sale which took place thereunder and they could not sue for possession unless they had cleared the way for such a suit by securing the annulment of the mortgage-decree and the sale;

(4) that a suit to set aside the decree being now barred by time the present suit was not maintainable.

Per *Das, J.*—An Appellate Court should allow a question of law to be argued before it which fairly arises on the allegations made in the plaint though it is not stated in that form in the plaint.

It is not necessary to set out an inference of law in the pleadings.

A grantor cannot dispute with his grantee his right to alienate the land to him.

Where a person is *prima facie* bound by a decree he cannot by suing ostensibly for possession ignore the decree and evade the operation of law; and where such a decree is an impediment in the plaintiffs' way in obtaining relief inconsistent with it, he must bring the suit within the period prescribed by law for setting aside a decree. Where, however, a person is not bound by a decree he can treat the decree as a nullity and can sue to recover the property affected by the decree without taking proceedings to set aside the decree.

An apparent transaction must be assumed to be real until the contrary is shown, and the onus is on the person who alleges that a transaction is not what it purports to be.

Judgments *qua* judgments or adjudications upon questions in issue and proofs of particular points therein decided are only admissible either as *res judicata* under s. 40 or as being *in rem* under s. 41 or as relating to matters of a public nature under s. 42 of the Evidence Act. Judgments, orders and decrees other than those admissible under ss. 40, 41 and 42 of the Evidence Act may be relevant under s. 43 of the Act. The cases contemplated by s. 43 are such as the section itself illustrates, namely, where the fact of any particular judgment having been given is a matter to be proved in the case.

A former judgment which is not a judgment *in rem* nor one relating to matters of a public nature is not admissible in a subsequent suit either as *res judicata* or as a proof of the particular point which it decided unless between the same parties or those claiming under them.

The decision of a Court should not rest upon suspicion but upon legal grounds established by legal testimony.

Benami transactions are very familiar in Indian practice and even a slight quantity of evidence to show that a transaction was a sham transaction may suffice for the purpose. A person, however, who impugns the apparent character of a transaction must not rely solely on probabilities; he must show something definite to establish that it is a sham transaction on the principle that the burden of proof lies upon a person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things.

The most important test to be applied in such cases is the source whence the consideration came.

Where, however, from the lapse of time direct evidence of a conclusive or reliable character is not forthcoming as to the payment of the consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts.

Hindu Law—contd.

Where a decree directs the sale of specific property, the Court executing the decree has no power to go behind the decree and to refuse to sell the property because the interest of the judgment-debtor in the property has come to an end.

A *heba-bil-ewaz* is a transaction made by mutual or reciprocal gifts between two persons each of whom is alternately the donor of one gift and the donee of the other.

In determining the real nature of a transaction it is not very material to consider how the parties described the transaction, if the Court knows what the transaction is, for it is the substance of the transaction and not the form of it to which it must have regard.

Under the *Mithila* School of Hindu Law a wife receiving a gift of immoveable property from her husband is incapable of alienating the gifted property except under circumstances which would enable a widow taking the property of her husband by inheritance to alienate it. In the absence of legal necessity or the consent of those persons who are entitled to succeed to property on her death, there is no power of alienation in a woman taking immoveable property by gift from her husband.

The Mitakshara is of authority in *Mithila* except in regard to those matters where there is a difference of opinion between *Vijnaneswara* and the *Mithila* commentators.

It is for the party founding title on an alienation by a limited owner to show necessity in respect of the alienation.

The consent of the husband who has gifted certain property to his wife and has thus parted with his proprietary interest in the property will not validate an alienation of the property by the wife, though the consent of the next heirs may raise a presumption of the existence of necessity.

The act of the husband in consenting to a transaction entered into by the wife for his benefit cannot be regarded as a consent which will validate the transaction. The control exercisable by the husband in regard to the dealings of the wife with property given to her by him is in no sense proprietary. It may be incidental to his status as the guardian of his wife; but if his control is to be put on that footing he is bound to exercise it for the protection of his wife and the preservation of his property. It is not within the power of a guardian to give validity to a transaction by the ward by consenting to it, when the transaction is wholly for the benefit of the guardian.

In construing a deed of gift executed by a Hindu in favour of his wife the Court must proceed on the assumption that a Hindu knows that as a general rule women do not take absolute estates of inheritance which they are enabled to alienate. This does not mean that where there are words of sufficient amplitude conveying in the terms of the gift in itself the fullest rights of ownership including the power to alienate, the Court will refuse to construe the deed of gift so as to deny to the donee the right to alienate. But in construing a deed of gift executed by a Hindu husband in favour of his wife, the Court would be right in leaning towards a construction which is in consonance with the ordinary notions and wishes of the Hindus with respect to devolution of property and in harmony with the law by which the parties are governed.

The words "*ba farzandan naslan bad naslan*" in the absence of anything showing a contrary intention, pass a general estate of inheritance according to

Hindu Law—contd.

Hindu Law. But the holder of such an estate might be prevented by personal incapacity from exercising the right of alienation; and a restraint on alienation might be imposed by family custom or local law. In other words, an estate of inheritance would not carry with it the right of alienation when such an estate is conveyed to a person suffering under a personal incapacity or subject to a family or local custom prohibiting alienation. Therefore, a right of alienation is not necessarily inherent in an estate of inheritance, and a grant of property to a person "*ba farzandan naslan bad naslan*" would not necessarily give that person the right to alienate the property though these words would confer upon him an estate of inheritance.

Gifts by a Hindu husband to his wife of immoveable property even though accompanied by express words of inheritance are not alienable unless distinctly declared to be so. It is the quality of such gifts that though they descend to the wife's heirs she cannot alienate them.

Section 8 of the Transfer of Property Act must be read subject to the provision in s. 2 of the Act which provides that nothing in the Second Chapter of the Act shall be deemed to affect any rule of Hindu, Muhammadan, or Buddhist Law. Section 8, therefore, does not affect the rule of Hindu Law, as understood in *Mithila*, that a gift by a Hindu to his wife does not carry with it the right to alienate.

Per *Foster, J.*—In determining the nature of the estate conveyed by a deed of gift executed by a Hindu in favour of his wife the Courts should examine the document of transfer with an eye to the ordinary Hindu's inclinations. He does not usually intend to make his wife absolute owner by a deed of transfer. If, however, by a construction of the document the grant of an absolute estate can reasonably be extracted; there is no need to insist on an express and distinct grant of an absolute estate. Express words are not essential, the fact that the donee is a *Mithila* wife is not fundamental; it is to be seen if the words are of sufficient amplitude to convey an absolute estate.

Under the *Mithila* School of Hindu Law a wife who has received immoveable property from her husband must preserve the corpus of the property while her husband lives, spending only the income subject to his permission, and after his death must preserve the property for her heirs. Pat HITENDRA SINGH *v.* RAMESWAR SINGH 849

——— **Partition**—*Grandsons, whether remain joint with their father—Presumption—Divided co-heirs, whether tenants-in-common or co-parceners.*

In ordinary cases of partition between a Hindu father and his sons, the grandsons, though they take an interest in the family property as from their birth can only derive that interest through their father, with whom the presumption is that they remain joint after partition.

A Hindu father has no right to release his son's interest in the family property while the grandfather is alive. Where, however, the father obtains his share in the joint family property from the grandfather and is released of his liability in respect of the debts of the family, the arrangement amounts to a partition between the father and the grandfather and the grandsons must abide by it unless it can be set aside on the ground of fraud or for other good reason.

Where a Hindu is succeeded by heirs who have already separated from each other, the heirs take the property as tenants-in-common and not as coparceners. B JADAVBAI LAKHICHAND *v.* MULTANCHAND HARAKHCHAND, 27 Bom. L. C. 426; (1925) A. I. R. (B.) 350 936

——— **Religious endowment**—*Deity, foundation of, worship of*—Shebaitship, *devolution of, rule of—Subsequent grant, effect of—Procedure—Person interested in worship of idol, whether can maintain suit for declaration.*

A person who is interested in the worship of an ancestral idol can maintain a suit for a declaration that certain properties are the *debuttar* properties of the idol.

When the worship of an idol has been founded, the *shebaitship* is vested in the founder and his heirs, unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution. If a donor subsequent to the foundation makes a grant of any property to the idol, it becomes the property of the idol, and unless conditions are attached to the gift, the existing *shebait* of the idol would have the power to manage that property on behalf of the idol. C DAYAMOYI *v.* SANKAR NATH MUKHOPADHAYA, 42 C. L. J. 30 159

——— **Reversioner** *recognising life-tenant as absolute owner—Alienation by life-tenant—Estoppel.*

Where a Hindu reversioner enters into an agreement with a female life-tenant whereby he recognizes the latter as the absolute owner of the property and entitled to deal with it as she pleases, he is estopped from subsequently questioning her power to alienate the property or the title of a transferee from her. A SAT NARAIN SAHU *v.* BINDESHRI PRASAD, L. R. 6 A. 210 Civ.; (1925) A. I. R. (A) 453 787

——— **Succession**—Bandhus—*Maternal uncle's son and maternal aunt's son, priority between.*

The rules to be applied for determining priority among the *atma bandhus* are

(1) that propinquity should be the governing factor;

(2) that if both are equal in degree the spiritual benefit conferred may be used as a test for preference.

A maternal uncle's son and a maternal aunt's son are *bandhus* in the same degree, but the former must be preferred to the latter on account of superior spiritual efficacy.

Rules relating to succession among *bandhus* explained. M RAMI REDDI *v.* GANGIREDDI, 21 L. W. 476; (1925) M. W. N. 335; (1925) A. I. R. (M.) 807 609

——— *Sons of pre-deceased son, whether entitled to succeed along with surviving sons—Agra Tenancy Act (II of 1901), s. 22.*

On the death of a separated Hindu his property must be divided among his sons and his grandsons by a predeceased son, the latter being entitled to the share to which their father would have been entitled had he been alive. The same rule applies to the devolution of the tenancy rights possessed by the deceased by virtue of the rule laid down in s. 22 of the Agra Tenancy Act. A RAMRUP PANDE *v.* SARJU PANDE, L. R. 6 A. 122 Rev. 668

——— **Widow,** *alienation by—Legal necessity—Consent of reversioner, effect of—Appeal, second—Finding of fact.*

Where a finding of lower Appellate Court with regard to the existence of legal necessity for an alienation made by a Hindu widow is based on a consideration of the evidence, coupled with the fact that the alienation was assented to by one of the reversioners, the finding cannot be challenged in second appeal. A ANANTOO *v.* RAM RUP TIWARI, L. R. 6 A. 284 Civ. 315

——— **Widow**—*Alienation by widow and next reversioner, effect of—Reversioner, whether can challenge alienation—Estoppel—Transfer of Property Act (IV of 1882), s. 43.*

Where a Hindu widow and the next reversioner join in conveying a property by which they transfer the absolute interest in the property, the reversioner is estopped, after he comes into possession, from challenging the transaction.

There is no distinction between the reversioner giving consent to a transfer by a widow and the reversioner joining the widow in the transfer. There is not much difference, for practial purposes, between a consent given by word of mouth or conduct or by attestation of a document and by joining in the conveyance with the widow which is sufficient evidence of consent. C AMAR KRISHNA DE *v.* RAJENDRA KUMAR DE 790

——— *Compromise by widow, whether amounts to alienation—Reversioner, whether bound.*

Whether a compromise entered into by a Hindu widow is *bona fide* and binding on the reversioners or amounts to an alienation depends upon the terms obtained by the widow in the compromise, *i.e.*, whether she was surrendering any portion of her rights as ascertained with reference to the facts, and how much, whether she was reserving any benefit for herself personally as opposed to the estate, and whether the real facts were known to her. The fact that the widow obtains a benefit under the compromise which is peculiar to herself would be good proof of want of *bona fides.*

Where a Hindu widow obtains under a compromise a portion of her husband's estate absolutely for herself, the enlargement of her personal estate does not bind the reversioners, and the antecedent title with reference to which she obtains the property being that of her husband the rights of the reversioners with regard to that property are not destroyed.

Where a compromise by which a Hindu widow surrenders property to which she is entitled on the true facts is held to be not *bona fide,* it amounts to an alienation and is not binding on the reversioners. M BACHU CHINNA NAGAPPA *v.* BACHU NARANAPPA, 48 M. L. J. 461; (1925) M. W. N. 311; (1925) A. I. R. (M.) 731 667

——— *Maintenance, arrears of, right to recover—Abandonment—Burden of proof—Rate of maintenance—Discretion of Court—Appeal, second—Interference by High Court.*

In a suit for arrears of maintenance by a Hindu widow, if the defendants want to plead that the plaintiff is disentitled from claiming maintenance, they must plead and prove circumstances amounting to an abandonment.

Where a Hindu widow whose husband died 27 years ago made a demand for maintenance only three year prior to suit:

Held, that the Court had a discretion, while not disallowing totally the arrears claimed by the plaintiff, to cut down the period for which arrears may be granted,

and that if the plaintiff was anxious to get the whole of the amount, it was for her to adduce evidence that she was in need of those arrears.

The rate of maintenance is entirely in the discretion of the lower Courts, and the High Court will not interfere in second appeal with the rate allowed by the lower Courts until it appears that the discretion has been perversely exercised by them. M LAKSHMAMMA *v.* VENKATASUBBIAH, 48 M. L. J. 266; (1925) M. W. N. 213; (1925) A. I. R. (M.) 795 210

——— **Widow,** *possession of—Adverse possession by widow—Possession during lifetime of male holder, continuance of—Appeal, second—Possession, whether adverse or in lieu of maintenance—Finding, whether binding.*

Where adverse possession in respect of property belonging to a male Hindu starts in his lifetime it will continue to run after his death during the tenure of his widow, but if adverse possession begins after the death of the last male-holder during the life-tenancy of the widow, the period of limitation against the reversioner would run from the date of the death of the widow.

Where a Hindu widow is entitled only to maintenance out of the estate of her deceased husband, her possession of the estate would be regarded as adverse to the reversioners unless they are able to prove that it was the result of some arrangement between the widow and the reversioners.

Whether the possession of a widow is only in lieu of maintenance or is adverse is a question to be decided by legal inferences drawn from documents, and where wrong conclusions have been formed from such inferences, they are open to be reversed in second appeal. O BHAGWAN DIN *v.* AJUDHIA 1021

———, *property acquired by, nature of—* Stridhan—*Property given to widow as maintenance—Alienation—Alienee, rights of.*

Property acquired by a Hindu lady by adverse possession becomes her separate *stridhan* property. If, however, the property is acquired by a Hindu widow claiming as the widow of her deceased husband the property becomes an accretion to her late husband's estate and on her death passes not to her heirs but to the heirs of the deceased husband.

An alienation by a Hindu widow of property which is her *stridhan* is binding not only against the heirs of her deceased husband, who have no right to the property at all, but against the whole world.

Where, however, property is given to a Hindu widow for her lifetime by way of maintenance, the only interest which she has in the property and the only interest which she can alienate is her interest for life and the alienation would enure to the benefit of the alienee only during the lifetime of the widow. **Pat.** JAGMOHAN SINGH *v.* PRAYAG NARAYAN SINGH, 6 P. L. T. 206; (1925) Pat. 140; 3 Pat. L. R. 251; (1925) A. I. R. (Pat.) 523 473

——— *Surrender, what amounts to—Gift in favour of reversioner, validity of—Family arrangement, scope of.*

In order to make a surrender of her estate by a Hindu widow with the consent of the next heir valid, the surrender must be total, not partial, and it must be a *bona fide* surrender, not a device to divide the estate with the reversioner.

A gift made by a Hindu widow even in favour of the next reversioner if it does not amount to a complete surrender of the widow's estate, is not valid according to Hindu Law and does not pass any title to the donee. It may be operative during the life-time of the widow but after her death it ceases to have any legal effect.

A family arrangement requires some consideration and under the guise of a family arrangement a party cannot enter into a transaction which he is not under the law competent to enter into and which may be beyond his disposing power. C INDRA NARAIN MANNA *v.* SARBASONA DASI, 41 C. L. J. 341; (1925) A. I. R. (C.) 743 930

Hindu Wills Act (XXI of 1870). *See* SUCCESSION ACT, 1865, ss. 50, 187 621

Inam—Karnam *service* inam — *Enfranchisement—* Patta, *grant of, to occupants of land, effect of—Subsequent delivery of possession to office-holder—Title, divesting of.*

Enfranchisement of a service *inam* confers full title on the grantee whether or not he was the actual holder of the office at the time of the enfranchisement.

Where at the time of enfranchisement, the actual holder of the office is refused the *patta* which is ordered to be issued in the names of persons in actual occupation of the *inam* land, the enfranchisement must be held to enure to the benefit not of the office-holder but of the grantees of the *patta.*

It is immaterial in such a case that after the enfranchisement proceedings are over, the holder of the office obtains possession of the lands. Such possession does not operate to divest a title which has been conferred by the grant of the *inam patta.* M VENKATA RAO *v.* MANGO RAO, 49 M. L. J. 376

Income Tax Act (XI of 1922), s. 4 (3) (vii)—*Income arising from business—Extraordinary transaction—Exemption from assessment.*

In order to take a case out of the exemption provided for by s. 4 (3) (*vii*) of the Income Tax Act it is not necessary that the receipts should arise from a business continuously carried on during the year. Even if they arose from a single adventure in business they would be liable to be taxed. The mere fact that the receipts arise from an extraordinary transaction although connected with the business of the assessee, which has only occurred owing to exceptional circumstances, and which would not be likely to occur again for many years, would not place the receipts in the same category as receipts entirely disconnected with the business or the profession or vocation or occupation of the assessee which might be considered of a casual and a non-recurring nature and, therefore, exempt from assessment under s. 4 (3) (*vii*).

The assessee, a cotton merchant was appointed under a power-of-attorney to dispose of a certain quantity of cotton for and on behalf of a firm after deducting his remuneration and to distribute the sale-proceeds in a certain manner. The transaction was of an extraordinary nature and was brought about by a crisis in the cotton market:

Held, that the remuneration earned by the assessee from the transaction was income arising from "business" within the meaning of s. 4 (3) (*vii*) of the Income Tax Act and was consequently not exempt from assessment. B COMMISSIONER OF INCOME-TAX *v.* PURSHOTTAMDAS THAKURDAS, 27 Bom. L. R. 478; (1925) A. I. R. (B.) 318 706

——— s. 66, *See* LETTERS PATENT, (CAL.), CL. 15 653

Income Tax Act—1922—concld.

——— **s. 66 (6)**—*Application to High Court for order directing. Commissioner to state case—Costs, award of—Discretion of Court—Procedure.*

Under s. 66 (6) of the Income Tax Act costs are in the discretion of the Court and once the Court has exercised its discretion it is *functus officio* and cannot re-open the matter.

All questions relating to costs and all submissions in which costs are involved must be argued and decided at the time of the hearing and before a final order is drawn up. A RAM GOPAL-MOOL CHAND *v.* INCOME-TAX COMMISSIONER, L. R. 6 A. 218 Civ.; (1925) A. I. R. (A.) 403 **797**

Injunction, *suit for—Possession—Title, proof of—Burden of proof.*

A plaintiff who proves a *prima facie* title coupled with possession is entitled to be protected against disturbance by an outsider unless such an outsider proves that he has a better title than the plaintiff. B TUKARAM *v.* BALABAI, 27 Bom. L. R. 474; (1925) A. I. R. (B.) 377 **696**

Interest—*Deposit, return of—Date from which interest can be claimed.*

Interest cannot be awarded by way of damages apart from the provisions of the Interest Act.

Plaintiff agreed to purchase a motar-car from the defendant and deposited a certain sum of money with him on account of the price of the car. The bargain fell through owing to the default of the defendant and plaintiff served a notice on the latter demanding a return of the deposit and intimating that if this was not done interest would be charged on the sum deposited from the date on which the deposit was made. The defendant failed to pay and plaintiff sued to recover the deposit with interest :

Held, that the plaintiff was entitled to interest from the date on which notice was given to the defendant and not from the date on which the deposit was made. B CAMPBELL *v.* WILLIAMS CHARD & Co., 25 Bom. L. R. 837; (1924) A. I. R. (B.) 131 **122**

Interpretation of Statutes—New Act, whether can affect validity of decree passed before commencement. *See* EXECUTION OF DECREE **72**

——— *Statutes limiting or extending common law rights—General words, construction of.*

It is a general rule of construction that Statutes which limit or extend common law rights must be expressed in clear or unambiguous language, and that general words are not to be so construed as to alter the common law, or the previous policy of the law, if a sense or meaning can be applied to them consistent with the intention of preserving the existing policy untouched. B NADERSHAW SHERIARJI RABADI *v.* SHIRINBAI BAPUJI MUSA, 25 Bom. L. R. 839; (1924) A. I. R. (B.) 264 **129**

Jurisdiction—*Consent, whether can confer jurisdiction—Religious endowment—Scheme framed by Privy Council—Temple Committee, appointment of—Power to make rules—Power conferred upon High Court to modify rules—Appeal, whether lies—Civil Procedure Code (Act V of 1908), s. 47.*

A scheme for the management of a Hindu temple was sanctioned by His Majesty in Council and it provided amongst other things for the appointment of a Temple Committee which was empowered to take the temple property into their custody and to make rules for the guidance of their business and for the management of the temple and for other purposes. It was further provided that the rules when sanctioned by the District Court should have the same force as if they were part of the scheme. One of the clauses of the scheme was as follows :—" The provisions of this scheme may be altered, modified or added to by an application to His Majesty's High Court of Judicature at Bombay." The Temple Committee having been duly appointed framed a body of rules which were, with certain alterations, sanctioned by the District Court. Certain persons who were interested in the management of the temple made an application to the High Court for modification of the rules sanctioned by the District Court under the clause which empowered the High Court to modify the rules. An appeal was also preferred to the High Court against the rules on the ground that the order of the District Court sanctioning the rules fell within the purview of s. 47 of the C. P. C. The High Court did not pass any orders on the application made under the clause of the scheme above referred to, but considered the appeal and passed orders thereon holding that the appeal was competent as no objection was taken thereto. On appeal to His Majesty in Council :

Held, (1) that the High Court had a power conferred upon it by the scheme, upon an application made to it with that object, to alter, modify or add to the rules sanctioned by the District Judge but that it had no other power in the matter ;

(2) that the High Court not having purported to act in the exercise of its power under the scheme and there being no jurisdiction in it to entertain an appeal from the order of the District Court, the appeal should have been rejected ;

(3) that there was no right of appeal to His Majesty in Council except on the ground that the judgment of the High Court was incompetent and should be set aside ;

(4) that the power given to the High Court under the scheme could, however, still be exercised by it upon an application properly made to it.

Parties cannot by acquiescence or consent confer upon a Court a jurisdiction which it does not possess. P C SEVAK JERNACHOO BHOGILAL *v.* DAKORE TEMPLE COMMITTEE, 23 A. L. J. 555; (1925) A. I. R. (P. C.) 155; 49 M. L. J. 25; L. R. 6 A. (P. C.) 117; (1925) M. W. N. 474; 2 O. W. N. 535; 41 C. L. J. 628; 22 L. W. 246 (P. C.) **313**

Jurisdiction of Civil and Revenue Courts—*Partition—Allotment of lands, whether can be questioned in Civil Courts.*

Where in a partition the directions given in the *tarz taqsim* are not complied with in the actual carrying out of the partition, the party aggrieved has a right of appeal. Subject to that, however, the final proceedings of the partition Court in the matter of the allotment of lands are conclusive and cannot be challenged in a Civil Court. O BHAWANI PRASAD DUBE *v.* BAIJNATH SINGH, 10 O. & A. L. R. 1140; L. R. 6 A. (O.) 1; 1 O. W. N. 658 **416**

Landlord and tenant—*Construction of document—* Kabuliyat—Raiyati *interest or tenure.*

A *kabuliyat* which was headed as a *raiyati kabuliyat* provided that the tenant shall plant 1000 betel-nut trees per *kani* of *bhiti* land belonging to the *raiyati* within five years and thereby reclaim the land. The total area of the land demised was a little over three

Landlord and tenant—contd.

kanis. The person who executed the *kabuliyat* did not belong to the cultivating class:

Held, that the *kabuliyat* read as a whole indicated that the tenancy was *raiyati* and not a tenure and that the mere fact that the person who executed the *kabuliyat* did not belong to the cultivating class was not enough to prove that he was a tenure-holder. C NABIN CHANDRA CHAKRABARTI *v.* RUSTOM ALI 903

——— *Construction of document*—Nimhowla pattah —*Enhancement of rent—Conduct of parties.*

A *zemindar* holding under the Permanent Settlement has a right from time to time to raise the rent of all rent-paying lands within his *zemindari* at the current rate, unless he is precluded from the exercise of that right by a contract binding on him or by the law in force.

A contract in one case should not be interpreted in the light of the view taken with regard to another contract which is differently worded and under consideration in another case.

A *nimhowla pattah* contained the following clause: "When Survey and *jamabandi* are made in respect of (the lands of) the other *howladars* and *nimhowladars* of the said *tappa*, the *nimhowla* will be measured and you will get reduction of proportionate area (*jigba rakba*) according to the practice in respect of the other *nimhowladars*, and upon *bandobast* (Settlement) according to the rates paid for other *nimhowlas*. If the rent is greater you will pay the same into my office, and if it is less you will get reduction." The parties treated the *pattah* for a long period of time as creating a tenure the rent of which was not liable to enhancement:

Held, that the terms of the lease were ambiguous and that as the conduct of the parties showed that they had been understood by the parties as creating a tenure of which the rent could not be enhanced, the rent of the tenure was not liable to enhancement. C RADHA GOBINDA BANIKYA CHOUDHURY *v.* HEM CHANDRA CHAKRAVARTY, 42 C. L. J. 172 758

——— *Denial of landlord's title, proof of—Forfeiture of tenancy—Burden of proof—Duty of Court.*

It is only in case of a tenant being inducted on the land by a landlord that the tenant cannot deny the title of his landlord at the inception of his tenancy. In cases where the landlord's title is merely derivative the tenant may, without incurring any forfeiture of his rights, put the landlord to proof of his title. In such a case it is the duty of the landlord who seeks to eject the tenant on the ground of forfeiture resulting from denial of the landlord's title to allege facts which would establish that the tenant had incurred forfeiture of his tenancy by such denial. This can only be done by proving the statement made by the tenant which is relied on as showing that he has denied the landlord's title. It is not enough for the landlord to bring forward merely a judgment pronounced in a former suit. It is necessary to prove the tenant's actual statement in order that the Court might judge what the tenant really meant to say and whether what he said amounted to a forfeiture. If such a statement is contained in a written document the primary evidence is the document itself which should be placed before the Court. The mere statement of the opinion of the landlord himself upon certain words used by the tenant that forfeiture has been incurred is no evidence at all for the purpose.

Courts of Equity do not usually lean towards giving relief on the ground of forfeiture. They will enforce a forfeiture only when the facts are clearly established that the forfeiture has been incurred. C MOHAMED GOLAM RABBANI *v.* TARANATH DEB 657

——— *Ejectment suit—Adverse possession, plea of—Entries in revenue papers describing defendant as tenant, effect of—Jurisdiction of Civil Courts.*

Where in a suit for ejectment the only evidence consists of entries in the revenue papers describing the defendant as tenant of the plaintiff, they must be deemed to represent correctly the relation between the parties to the effect that the defendant is the plaintiff's tenant and not in adverse possession by right of being a proprietor.

A tenant who claims to be in adverse possession of his holding can be ejected as a trespasser through the Civil Court. O NAGESHAR SINGH *v.* BALDEO SINGH, 2 O. W. N. 148; 12 O. L. J. 160; L. R. 6 A. (O.) 83; (1925) A. I. R. (O.) 442 183

——— *—Encroachment by tenant—Determination of tenancy—Tenant, whether bound to give up encroached land.*

At the determination of his tenancy a tenant is bound to give up to his landlord the land encroached upon by him and made part of his tenancy. C INDU BHUSAN BOSE *v.* ATUL CHANDRA BISWAS 630

——— *Lease deed, construction of*—Kayamgeni chit —*Provision as to surrender—Lease, whether permanent or terminable—Clause providing for re-entry, whether void for remoteness.*

Where under the terms of a lease deed styled a "*kayamgeni chit*," the lessee was to enjoy the land from generation to generation and the rent was a fixed one, with a clause providing that if the landlord required the property, the lessee was to take the value of the trees and surrender the property to him:

Held, (1) that on a construction of the document the lease was not a permanent one notwithstanding it was styled a *kayamgeni chit*;

(2) that the clause as to surrender was neither void nor bad for remoteness;

(3) that the lessor was bound to pay the lessee compensation for the trees as provided for in the deed. M RAMA RAO *v.* THIMAPPA, (1925) M. W. N. 157; 48 M. L. J. 463; (1925) A. I. R. (M.) 732 433

——— *Occupancy holding, non-transferable, whether can be sold in execution of decree—Consent of landlord, whether necessary.*

A non-transferable occupancy holding is liable to be sold at an execution sale at the instance of an ordinary creditor without the consent of the landlord. C GURUDAS SAHA *v.* HIRA GAZI 740

——— Putni Taluq—*Rent decree—Sale of properties, order of—Contract between parties, effect of.*

In passing a decree for arrears of rent of a *putni* tenure the Court is not entitled, in the absence of any contract to the contrary, to direct that the defaulting tenure should first be sold and that the balance of the decretal amount, if any, be realised from other properties of the judgment-debtor. Where, however, the parties have expressly contracted that the properties belonging to the judgment-debtor should be sold in a certain order to satisfy a rent decree passed against him, and such contract is not contrary to the provisions of the law, the Court is bound to give effect to it. C MONMOHAN SAHA CHOWDHURY *v.* SARIFANNESSA CHOWDHURANI 120

———, *relations between—Tenancy, how can be terminated—Suit by tenant for possession—Court Fees Act (VII of 1870), s. 7 (xi) (e)—Person inducted*

with land, whether necessary party—Overvaluing plaint, effect of—Costs, how assessed.

Where a tenancy has not terminated, or where on account of certain circumstances it is not open to a landlord to terminate a tenancy he cannot be allowed to dispossess his tenant without having recourse to law and then to retain possession which he could not obtain through a Court of Law. The tenant has a right apart from the provisions of s. 9 of the Specific Relief Act to sue to eject the landlord.

In India, the Common Law right of re-entry by a landlord does not exist, and even where a landlord has obtained possession of the premises let by him after the tenancy has been validly terminated, it is open to the tenant to institute a suit within six months of dispossession, under s. 9 of the Specific Relief Act.

A suit by the Secretary of State for India under s. 9 of the Specific Relief Act is governed by Art. 149 and not Art. 3 of the Limitation Act.

A suit for possession by a tenant against his landlord falls within cl. *xi*, sub-cl. (*e*) of s. 7 of the Court Fees Act.

A person inducted with land by the landlord is not in every case a necessary party to a suit between the dispossessed tenant and the landlord, but may be a proper party, and the fact that he is joined as a proper party does not take away the suit from the purview of cl. *xi*, sub-cl. (*e*).

The Court Fees Act being a fiscal enactment must in cases of ambiguity be construed in favour of the public.

Where a plaint is overvalued and excessive Court-fees paid, in the taxation of costs the plaintiff is only entitled to costs as taxed on the proper valuation. S SECRETARY OF STATE FOR INDIA *v.* DINSHAW NAVROJI 1002

——— *Suit for ascertainment of fair and equitable rent and for recovery of arrears of rent—Plea of* jus tertii*—Previous suit between landord and third person under whom tenant claims, decision in*—Res judicata*—Cause of action, accrual of.*

A certain *taluk* was sold for arrears of revenue and was purchased by the plaintiff. Some years afterwards the plaintiff brought a suit for possession of the lands in dispute against the owner of a neighbouring *taluk* and obtained a decree in execution of which he obtained symbolical possession of the lands. Subsequently he brought a suit against the defendants for ascertainment of fair and equitable rent and for recovery of arrears of rent. The defendants denied the title of the plaintiff and also denied the existence of the relationship of landlord and tenant between the plaintiff and themselves, alleging that the land belonged to the owner of the neighbouring *taluk*, against whom the plaintiff had already obtained a decree:

Held, (1) that the decision in the previous suit, irrespective of the fact whether it operated as *res judicata* against the defendants or not, was a strong piece of evidence as against the defendants on the question as to who was entitled to recover rent from them;

(2) that the plaintiff's cause of action as against the defendants arose when he took delivery of possession in execution of the decree obtained in the previous suit and thus became entitled to receive rent. C PURNA CHANDRA THAKUR *v.* RAMESH CHANDRA 753

——— *Suit for rent—Plea of* jus tertii*—Procedure—Title, question of, whether can be investigated.*

In a rent suit where the defendant pleads th right of a third party, the Court ought not to make such a third party a party to the suit and thus convert a suit for rent into a complicated title suit.

Where, however, the plaintiff's title is a derivative one and the defendant denies the existence of the relationship of landlord and tenant between the plaintiff and himself there must be an enquiry into the plaintiff's title in order to determine this question. The relationship of landlord and tenant is not established merely because the plaintiff alleges that he derives his title from a person to whom the tenant had attorned. C INDRA NARAIN MANNA *v.* SARBASONA DASI, (1925) A. I. R. (C.) 743; 41 C. L. J. 341 930

——— *Tenancy, transer of—Recognition by landlord*—Dakhilas *granted to transferee as* sarbarahakar, *effect of.*

In order to determine whether there has been recognition by the landlord of a transfer of tenancy, the Court should not look to the words used in the *dakhilas*, such as "*sarbarahakar*", etc., but has to consider whether in fact there has been a recognition. C JANENDRA NATH SINGHA ROY *v.* RAKHYAKALI DEBI 986

——— *Under-proprietary title—Mortgage of tenancy rights—Acceptance of rent—Estoppel—Appeal, second—Finding of fact—Evidence, absence of, effect of.*

Where there is an entire absence of evidence the High Court is entitled to interfere with a finding of fact in second appeal.

A landlord may accept rent from a mortgagee of tenancy land though the mortgage may be invalid under the law. The mere acceptance of rent in such a case does not indicate that the tenant was the owner of an under-proprietary holding, nor is the landlord estopped from contending that the tenant has no such title. O HARI KISHEN DASS *v.* MAIKU LAL 959

——— Wajib-ul-arz, *entry in, describing groveholders as owners of groves, effect of—Ejectment suit, whether maintainable—Suit for assessment of rent—Finding that defendant holds adversely to plaintiff—Adverse possession.*

The *wajib-ul-arz* of a village contained an entry that certain detached plots of land, which were stated to be groves or flower gardens, were in possession of persons other than the proprietors of the *mahal*, and that the possession of the owners was in their own right and that the *zemindars* had no right to interfere with them. The persons in possession of these plots were, however, entered in the village papers as occupancy tenants:

Held, (1) that the *wajib-ul-arz* recognized the full proprietary rights of the persons in possession of these plots and that they were, therefore, not liable to ejectment at the instance of the *zemindars*;

(2) that the mere fact that the owners of the groves were entered as occupancy tenants in the village papers did not override the provisions of the *wajib-ul-arz* and could not be pressed into service so as to put upon those provisions an interpretation which was contrary to the plain intention of the document.

Where a suit by a *zemindar* against certain persons for assessment of rent is dismissed on the ground that the defendants are not liable to assessment of rent as their possession has for many years been adverse to the *zemindar*, from the date of the decision at any rate, the possession of the defendants must be held to

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be adverse to the *zemindar* in the fullest sense of the word. A SAHU RAGHUNATH SINGH *v.* MAHABIR PRASAD, 23 A. L. J. 401; L. R. 6 A. 126 Rev.; (1925) A. I. R. (A.) 439 558

——— Watan *land—Fixity of rent, right of—Adverse possession.*

A person who is in possession of *watan* lands as a tenant of the *watandar*, cannot acquire a right by adverse possession to fixity of rent, so as to deprive the *watandar* of his right to enhance the rent. It may be that a tenant can acquire a right of fixity of rent as against the immediate holder of the *watan*, but that would not prevail against the next holder, where the latter brings a suit for enhancement of rent within 12 years of his succeeding to the *watan*. B VISHNU RAMCHANDRA DESHPANDE *v.* TUKARAM GANU BOGAR, 27 Bom. L. R. 449; (1925) A. I. R. (B.) 375; 49 B. 526 779

Lease—*Premises used as brothel—Overdue rent, whether can be recovered.*

If a landlord lets premises with the knowledge that they would be used as a brothel, the lease is void on the ground of public policy and the landlord cannot under those circumstances recover the overdue rent, but he can recover possession of the premises occupied by the tenant under a void lease. S GOBINDRAM UTTAMCHAND *v.* MAHOMED HUSSAIN 802

Legal practitioner—*Duty of, in subordinate Courts—Production of all available evidence on facts emphasised.*

In subordinate Courts the easy method of gripping a principle of law without much understanding is adopted by Counsel while the difficult method of collecting and carefully producing all the available evidence on facts is abandoned. It is enough in the subordinate Courts to ruin any case on facts only if some principle of law is dangled before the eyes of the learned Counsel. Every principle of law has to be applied to facts and there is no easy method of avoiding facts and deciding cases on easily available rulings. O ANPURNA KAUR *v.* JAGESHAR MISRA, 1 O. W. N. 842 208

Legal Practitioners Act (XVIII of 1879), s. 14—*Petition filed by legal practitioner, alteration of, without leave of Court—Unprofessional conduct—Punishment.*

A legal practitioner instituted certain proceedings under s. 144 of the Cr. P. C. with respect to a certain plot of land which belonged to him. In his petition the number of the plot was, owing to inadvertance, wrongly described. Instead of presenting to the Court a further petition for amendment of the first petition, he proceeded to effect an alteration in the petition which had been filed in Court and corrected the description of the number of the plot. On the alteration being discovered by the Court he was prosecuted for an offence under s. 466 of the Penal Code but was discharged. Thereafter proceedings were taken against him under s. 14 of the Legal Practitioners Act:

Held, that his conduct fell within the purview of s. 14 of the Legal Practitioners Act, but that inasmuch as there was no question of any dishonesty and he was guilty merely of a foolish act, the period of suspension already undergone by him was sufficient punishment for his conduct. C SECRETARY OF STATE FOR INDIA *v.* JOGENDRA CHANDRA DAS, 26 Cr. L. J. 1019 843

Letters Patent, (All.), cl. 11. *See* U. P. MUNICIPALITIES ACT, 1916, ss. 19 TO 27 51

Letters Patent, (Bom.), cls. 15, 36—*Division Bench, difference of opinion in—Appeal—Appellate Court, powers of.*

Where an appeal is preferred under cl. 15 of the Letters Patent (Bom.), owing to a difference of opinion among the Judges of the Division Bench, under clause 36 of the Letters Patent, the whole decree lies open before the Appellate Court, and it is not restricted to the consideration of the point on which the Judges constituting the Division Bench have differed. B VELJI BHIMSEY & Co. *v.* BACHOO BHAIDAS, 26 Bom. L. R. 349; (1925) A. I. R. (B.) 118; 48 B. 691 199

Letters Patent, (Cal.), cl. 15—*Income Tax Act (XI of 1922), s. 66—Reference to High Court—Opinion, whether "judgment"—Appeal, whether lies.*

The opinion pronounced by the High Court on a reference made to it under s. 66 of the Income Tax Act is merely advisory and is pronounced by the High Court in the exercise of its consultative jurisdiction and is not a "judgment", within the meaning of cl. 15 of the Letters Patent of the Calcutta High Court. No appeal, therefore, lies against such an opinion under this clause. C PROBHAT CHANDRA BARUA *v.* EMPEROR, 29 C. W. N. 398; (1925) A. I. R. (C.) 598; 52 C. 546 653

Limitation Act (IX of 1871), ss. 1, 29, Sch. II, Art. 148—*Mortgage — Redemption — Acknowledgment made after expiry of period of limitation, whether extends limitation.*

Plaintiff instituted a suit to redeem certain property situated in the Panch Mahals District said to have been mortgaged on 8th June 1761. The plaintiff relied upon an acknowledgment said to have been made by the descendants of the mortgagee in 1858. The Panch Mahals District became a part of British India in 1861 and the first Act of Limitation which applied to that District was Act IX of 1871:

Held, (1) that the suit not having been brought within two years of the coming into force of Act IX of 1871, the period of limitation applicable to it was that provided by Art. 148 of Sch. II to that Act;

(2) that limitation under Art. 148 of Sch. II to the Limitation Act of 1871 began to run from the date of the mortgage and that the suit was, therefore, barred by time;

(3) that the alleged acknowledgment made in 1858 having been made more than sixty years after the date of the mortgage did not operate to extend limitation. B INDURAI BHAURAI DESAI *v.* SHIVLAL NABHUBHAI, 27 Bom. L. R. 467; (1925) A. I. R. (B.) 339 699

Limitation Act (IX of 1908), s. 5—*Application filed beyond time—Extension of time—Ignorance of law, whether sufficient cause.*

An application for leave to appeal as a pauper was filed beyond the period of limitation and the applicant alleged that he did not know what the prescribed period of limitation for the application was:

Held, that ignorance of law could not be accepted as sufficient cause for not filing the application within time. L RAMJI LAL *v.* LAKSHMI CHAND-HINGAN LAL 952

——— **ss. 5, 14**, *applicability of—Transfer of Property Act (IV of 1882), s. 54—Sale in favour of joint vendees—Pre-emption, suit for, against one vendee—Vendee, other, impleaded after expiry of limitation—Limitation, extension of—Suit, whether maintainable.*

The Limitation Act must be taken to be exhaustive as regards extension of the period of limitation, and no equitable principle can be introduced which is not expressly recognized by the provisions of the Act.

Section 5 of the Limitation Act applies only to those proceedings which are specifically mentioned in that section, or to which the section may be made applicable by or under any enactment for the time being in force. A suit is not specifically mentioned in s. 5 nor are the provisions of that section made applicable to a suit by any enactment. The section has, therefore, no application to a suit.

Section 14 of the Limitation Act excludes time taken in a proceeding *bona fide* in a Court without jurisdiction against the particular defendant against whom the previous proceeding was taken. The provisions of the section cannot be availed of against a defendant against whom no previous proceeding was taken.

Where a sale is effected in favour of two vendees jointly and the sale-deed does not show the shares taken by the vendees in the property sold and no attempt is made to prove the share taken by each vendee, a suit for pre-emption against one of the vendees alone is not maintainable. The provisions of s. 45 of the Transfer of Property Act are not applicable to such a case. O RAM PHER *v.* AJODHIYA SINGH, 2 O. W. N. 144; 12 O. L. J. 66; (1925) A. I. R. (O.) 369 17

——— **s. 5, Sch. 1, Art. 166.** *See* C. P. C., 1908, O. XXI, R. 89 722

——— **s. 5, Sch. I, Arts. 171, 177.** *See* C. P. C., 1908, O. XXII, RR. 4, 9 632

——— **ss. 6, 8**—*Suit for possession—Minor entitled to sue, death of—Representative of minor, suit by—Period of limitation available.*

The effect of ss. 6 and 8 of the Limitation Act is that in the case of a suit for possession, where a minor dies before attaining majority, his representative would have either the total period of twelve years from the date of the accrual of the cause of action or three years from the date of the minor's death, whichever is the longer period. He is not entitled to claim the same period of limitation to which the minor would have been entitled if he had lived. Where, however, the representative is, at the date of the death of the minor, himself affected by any disability the rules contained in sub-ss. (1) and (2) of s. 6 must apply. A ANANTOO *v.* RAM RUP TIWARI, L. R. 6 A. 284 Civ. 315

——— **s. 7, Sch. I, Art. 144**—*Hindu Law—Joint family—Eldest brother, whether represents minor brothers—Decree against father—Sale of family property in execution of decree—Suit by sons to set aside sale—Limitation.*

Where several Hindu brothers constitute a joint family, the eldest brother represents the entire family and can give a valid discharge within the meaning of s. 7 of the Limitation Act on behalf of his minor brothers.

After a decree was passed against a Hindu the latter died and his minor sons were brought on the record as his legal representatives. In execution of the decree property belonging to the family was attached and sold. More than twelve years after the sale of the property but within twelve years of the delivery of possession, the sons brought a suit to have the sale set aside on the ground that they were not properly represented in the execution proceedings and that the property could not be sold because the father having died as a member of a joint Hindu family, the property had become the sole property of the sons by survivorship. At the date of the institution of the suit the eldest brother had attained the age of twenty-one years, while the youngest was just over eighteen years of age:

Held, that the suit was barred by limtation. A SHIAM LAL *v.* MOOL CHAND, L. R. 6 A. 299 Civ. 177

——— **s. 12**—*Appeal—Limitation—Time spent in obtaining copies of decree and judgment, deduction of—Copies, when to be applied for.*

Having regard to the provisions of s. 12 of the Limitation Act an appellant would be within time, if his appeal is filed within the total amount of periods granted to him, *viz.*, the initial period granted by Sch. I to the Act, plus the time requisite for obtaining a copy of the decree, plus the time requisite for obtaining a copy of the judgment. If, however, any of the two periods requisite for obtaining copies overlap each other, one of the overlapping periods will have to be left out of account.

Under the provisions of s. 12 of the Limitation Act it is open to an appellant to make an application for obtaining a copy of the judgment within the period of limitation as extended by the time spent by him in obtaining a copy of the decree and *vice versa*, and in such a case he is entitled to deduct from the period of limitation prescribed for the appeal the time spent in obtaining a copy of the judgment as well as the time spent in obtaining a copy of the decree. A RAMZAN BAKSH *v.* MUHAMMAD ISHAQ, 23 A. L. J. 342; (1925) A. I. R. (A.) 436; 47 A. 509 484

——— **s. 12**—*Appeal, period of limitation for, computation of—Periods for obtaining copies of judgment and decree—Separate periods, whether can be excluded.*

In computing the period of limitation prescribed for filing an appeal, the period spent in obtaining a copy of the judgment and the period spent in obtaining a copy of the decree appealed against must both be excluded under s. 12 of the Limitation Act, where the two periods are quite distinct from each other. B TIMAPPA GANPAT GUDGAR *v.* MANJAYA SUBRAYA HEBBAR, 26 Bom. L. R. 332; (1924) A. I. R. (B.) 425; 48 B. 433 545

——— **s. 12**—*Copies of judgment and decree—Different applications—Exclusion of time—Reasonable and proper steps.*

Under s. 12 of the Limitation Act an appellant is entitled to a deduction of the aggregate of the time taken in obtaining a copy of the judgment as well as of the decree, after deducting therefrom any overlapping period.

In order to get the benefit of s. 12 of the Limitation Act reasonable and proper steps to obtain a copy of the decree must be taken. This requirement is satisfied if the application is made within the time allowed by law for appealing. B MACMILLAN & CO. LTD., *v.* K. & J. COOPER, 25 Bom. L. R. 1309; 48 B. 292; (1924) A. I. R. (B.) 185 93

——— **s. 12, Sch. I, Art. 154**—*Criminal Procedure Code (Act V of 1898), s. 476—Application for order directing prosecution, dismissal of—Appeal—Limitation—Time spent in obtaining copy of order appealed against, whether can be excluded.*

Petitioner was plaintiff in a civil suit which was decreed. He subsequently made an application under s. 476 of the Cr. P. C. for an order to prosecute the defendants. The Trial Court rejected the appli-

cation. Petitioner filed an appeal under s. 476 (B) of the Code, and attached a copy of the order of the Trial Court rejecting his application to the appeal. His appeal was dismissed on the ground that it was barred by time and that he was not entitled to deduct from the period of limitation prescribed, the time spent by him in obtaining a copy of the order appealed against:

Held, that under the rules of the Court the petitioner was bound to file along with his appeal a copy of the order appealed against and that, therefore, under s. 12 of the Limitation Act he was entitled to deduct the period spent by him in obtaining a copy of that order from the period of limitation prescribed for the appeal and that consequently his appeal was within time and must be decided on the merits. A DAULAT RAM *v.* KANHAIYA LAL, 23 A. L. J. 297; L. R. 6 A. 109 Cr.; 26 Cr. L. J. 961; (1925) A. I. R. (A.) 419; 47 A. 462 417

——— **s. 18, Sch. I, Art. 166**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 90, O. XLIII, r. 1 (j)—Execution of decree—Sale, application to set aside—Limitation—Fraud—Burden of proof—Appeal, second, whether lies.*

When a judgment-debtor makes an application to have an execution sale set aside under r. 90, of O. XXI of the C. P. C., after the expiry of 30 days, he must bring his case within s. 18 of the Limitation Act, and to enable him to do so it is not enough for him to show that the execution proceedings were irregular and fraudulent, but he must carry the fraud further and show that the existence of his right to set aside the sale had been kept concealed from his knowledge by the fraud of the decree-holder or the auction-purchaser. Where, however, such fraud is proved it is for the opposite party to show that the judgment-debtor has had clear and definite knowledge of the fact constituting the fraud at a time which is too remote to bring the application within limitation. C NABIN CHANDRA HALDAR *v.* BIPAN CHANDRA HALDAR 555

——— **s. 19**—*Acknowledgment of liability, what amounts to—Letter admitting existence of running account—Precedents, value of.*

In every case in which the plaintiff claims exemption from the bar of limitation on the basis of an acknowledgment of liability made by the defendant, the document relied on as constituting the acknowledgment must be interpreted by its own language and it is not very helpful to cite rulings as to the meaning to be attached to a document in another case unless the wording of the documents, in both cases, is the same.

In a suit for accounts the plaintiff relied upon a letter written by the defendant in which the latter admitted the existence of a running account between himself and the plaintiff and went on to say that his representatives would compare the accounts and pay what was found to be due:

Held, that the letter contained an acknowledgment of liability within the meaning of s. 19 of the Limitation Act and gave a fresh start of limitation. A SANT LAL *v.* BANI PRASAD, 23 A. L. J. 248; (1925) A. I. R. (A.) 340; L. R. 6 A. 301 Civ. 985

——— **ss. 19, 20, Sch. I, Art. 132.** *See* TRANSFER OF PROPERTY ACT, 1882, s. 101 264

——— **s. 20**—*Part payment—Payment by cheque—Date of payment, determination of—Partnership—Goods supplied on inspection—Dissolution of partnership—Return of goods rejected—Suit to recover price of goods retained—Liability of partners.*

Where goods are sent to a partnership on inspection at a time when the partnership is subsisting, the fact of the subsequent dissolution of the partnership cannot have the effect of absolving the members of the firm at the time when the goods were sent, from liability in respect of the price of the goods, though the cause of action for a suit to recover such price may not have accrued until the return of the goods which were not required, which return takes place after the dissolution of the partnership.

When a payment is made by cheque and the cheque is received as payment by the payee it operates as a payment from the date on which it is delivered to the payee though this is subject to a condition subsequent that if upon due presentation the cheque is not paid the original debt revives.

Where a payment by cheque is relied upon as an acknowledgment or part payment within the meaning of s. 20 of the Limitation Act, the date of the acknowledgment or part payment must be taken to be the date on which the cheque was delivered to the payee and not the date on which the cheque was cashed. C MAURICE MAYAHAS *v.* W. MORLEY, 29 C. W. N. 496 508

——— **s. 20, Sch. I, Art. 181**—*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Payment towards interest, what amounts to—Mortgage-decree—Application for final decree—Limitation, commencement of—Application barred—Subsequent application by defendant to set aside preliminary decree, whether revives right of decree-holder to apply for final decree.*

In order to save limitation under s. 20 of the Limitation Act, a payment towards interest must be made "as such;" that is, it must be expressly made towards interest. The section has nothing to do with the general right of the creditor of appropriating a payment either towards interest or towards principal.

An application for a final decree under O. XXXIV, r. 5 of the C. P. C. is governed by Art. 181 of Sch. I to the Limitation Act, and the limitation begins to run from the expiry of the period for payment allowed by the decree. After the right of the decree-holder to make an application for a final decree has become barred by time, an application by one of the defendants to set aside the preliminary decree does not revive the right of the decree-holder to make an application for a final decree. C MAHAMAD KAMEL *v.* AHMAD ALI 746

——— **s. 20, Sch. I, Art. 182 (5)**—*Execution of decree—Deposit of money to credit of suit—Application for payment by decree-holder, whether step-in-aid of execution—Mortgagee from judgment-debtor—Direction to pay decree-holder—Payment into Court long after—Limitation, fresh start of.*

In order that an application for payment out of money in Court by a decree-holder may amount to an application to take a step-in-aid of execution under Art. 182 (5) of Sch. I to the Limitation Act, the money must have been realised in execution of the decree.

Where an amount of money is in Court to the credit of a suit and such amount has not been the proceeds of execution, an application for payment out cannot be said to be an execution application or an application in aid of execution. In such a case the plaintiff has only to apply to the Court for pay-

ment and the Court makes the payment without reference to the judgment-debtor in the suit. By asking for payment of the amount in Court, the plaintiff does not do anything to aid the execution of the decree.

An agent who can give the creditor the benefit of s. 20 of the Limitation Act has to act within the terms of his authority. If he exceeds his authority or does something which is not actually covered by his authority, he cannot bind the principal so as to give the creditor the benefit of s. 20.

Where a judgment-debtor executed a mortgage and directed the mortgagee to pay the mortgage amount immediately to the decree-holder and get a receipt but the mortgagee paid the money into Court more than a year thereafter and the decree-holder withdrew it:

Held, that the mortgagee was not a person duly authorized and that the payment by him did not fall under s. 20 of the Limitation Act so as to save the bar of limitation. M BALAGURUSWAMI NAICKEN *v.* GURUSWAMI NAICKEN, 48 M. L. J. 506; (1925) A. I. R. (M). 703 989

——— s. 22. *See* HINDU LAW—JOINT FAMILY 180

——— s. 23, Sch. I, Art. 115. *See* VENDOR AND PURCHASER 804

——— s. 26—*Easement, proof of—User, nature of—Pleadings—Claim of ownership and in alternative of easement, whether can be made.*

In order to establish a right of easement under s. 26 of the Limitation Act it is enough for a plaintiff to prove that he has been exercising the right without interruption, without express or implied permission of the owner of the servient tenement and without secrecy or stealth.

It is not inconsistent for a plaintiff to claim ownership in certain property and in the alternative a right of easement over the same. C BEHARI LAL MUKHERJEE *v.* ASUTOSH BANERJEE, 41 C. L. J. 379; (1925) A. I. R. (C.) 788 19

——— Sch. I, Art. 11—*Civil Procedure Code (Act V of 1908), O. XXI, r. 60, O. XXXVIII, r. 9—Attachment before judgment—Claim, dismissal of—Dismissal of suit, effect of—Appeal—Reversal of dismissal—Attachment—Fresh claim—Title suit—Limitation.*

It is obligatory upon the Court to withdraw an attachment before judgment upon the dismissal of a suit, and the reversal of the judgment of dismissal on appeal does not operate to revive the cancelled attachment.

Certain property was attached before judgment, and the plaintiff put in a claim under O. XXI, r. 60 of the C. P. C. which was disallowed. The claim under which the attachment was made was subsequently dismissed but was decreed in appeal. Defendants, who were the decree-holders, thereupon again attached the property which had been attached before judgment and the plaintiff put in another claim against the attachment. That claim was also disallowed and within one year of the order disallowing the claim but after more than one year of the date of the previous order by which the plaintiff's claim was disallowed, the plaintiff brought a suit for declaration of his title to the property in dispute:

Held, that the attachment before judgment disappeared as soon as the claim was dismissed and that the reversal of the order of dismissal on appeal did not revive the attachment, and that when in the execution proceedings started after the decree of the Appellate Court a fresh attachment was effected the plaintiff had a right to prefer a fresh claim, on the dismissal of which he was entitled to bring a suit for declaration and that his present suit was, therefore, not barred under Art. 11 of Sch. I to the Limitation Act. C SAILESH CHANDRA DUTTA *v.* JOY CHANDRA ROY 756

——— Sch. I, Arts. 30, 31—*Railways Act (IX of 1890), s. 56—Goods consigned to Railway Company for carriage—Suit for compensation for non-delivery—Limitation, commencement of—Delivery refused by Railway Company—Sale of goods—Plaintiff, whether entitled to recover market value—Company, whether can dispute title of consignor—Estoppel.*

On 4th November 1922 plaintiff consigned certain goods in nine bags to the defendant Railway Company for carriage. When the goods arrived at their destination it was found that two of the bags were missing. On 5th December 1922 the consignee who went to take delivery of the goods and discovered the loss of the two bags offered to take delivery of the seven bags but the Station Master refused to allow this. Later on the higher Railway Officials agreed to let the consignee have delivery of the seven bags but delivery was again refused by the Station Master. Subsequently, the plaintiff was called upon to take delivery of the goods but he failed to do so and the goods were consequently sold by the Railway Company. On 3rd December 1923, plaintiff brought a suit to recover from the Company the market value of the goods:

Held, (1) that the suit was governed by Art. 31 of Sch. I to the Limitation Act and that the limitation began to run from the 5th December 1922, when the Station Master refused to deliver the goods to the plaintiff and consequently the suit was within time;

(2) that even if it were assumed that with regard to the value of the two bags which were missing the suit was governed by Art. 30 of Sch. I to the Limitation Act, as there was nothing to show that the two bags, which were missing on the 5th of December 1922, had really been lost earlier than that date, the suit was still within time, the burden of proof being on the defendants to prove when the actual loss took place as the matter was within their peculiar knowledge;

(3) that the defendants having twice refused to give delivery to the plaintiff, the plaintiff was not bound to take delivery on the 3rd occasion when called upon by the defendant Company to do so, and that, therefore, he was entitled to recover the market value of the goods and not merely the price fetched by the sale held at the instance of the defendant Company.

Section 56 of the Railways Act does not apply where a consignee, at the request of the Railway Company itself, wanted to remove the goods but was not allowed by the Railway Company to do so.

In a suit for recovery of compensation for the non-delivery of goods consigned to a Railway Company for carriage, the Company cannot, as between themselves and the consignor, dispute the title of the consignor to the goods. A G. I. P. RAILWAY *v.* RADHDEY LAL MANNI LAL, 23 A. L. J. 398; 47 A. 549 579

——— Art. 31—*Suit against Railway Company for compensation of non-delivery of goods—Limitation, commencement of.*

On 27th July 1922, certain goods were consigned to the defendant Company for carriage and delivery to

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the plaintiff. On 21st August 1922, plaintiff sent his man to take delivery of the goods who paid the freight, handed over the Railway receipt and obtained permission to remove the goods. The goods could not, however, be found and the plaintiff consequently instituted a suit on 10th December 1923 for recovery of compensation for non-delivery of the goods consigned:

Held, (1) that the suit was governed by Art. 31 of Sch. I to the Limitation Act and that limitation began to run from the date when the goods ought to have been delivered;

(2) that as in this case the parties expected that the goods would be delivered on the 21st August 1922, limitation began to run from that date and the suit having been filed more than one year after that date was barred by time. A DURGA PRASAD-BADRI PRASAD *v.* B. B. & C. I. R., L. R. 6 A. 414 Civ. 763

——— **Sch. I, Art. 44.** *See* HINDU LAW—MARRIAGE 1018

——— **Arts. 44, 144**—*Hindu Law—Joint family—Alienation by eldest brother—Suit to challenge alienation—Limitation.*

Where several brothers constitute a joint Hindu family, though undoubtedly the elder brother is the manager of the family yet he is not the guardian either *de facto* or *de jure* of his minor brothers. Even assuming that he might be styled the *de facto* guardian of his younger brothers that would not make him a guardian within the meaning of Art. 44 of Sch. I to the Limitation Act. A suit, therefore, by one of the younger brothers to challenge an alienation of family property by the eldest brother would not be governed by Art. 44 of Sch. I to the Limitation Act. B DNYANU YESU JAGDARE *v.* VISHNU PARSHARAM CHITNIS, 27 Bom. L. R. 495; (1925) A. I. R. (B.) 372 721

——— **Art. 75**—*Instalment bond—Stipulation to pay total amount on default in payment of one instalment—Suit to recover amount of bond—Limitation, commencement of—Waiver, what amounts to.*

An instalment bond contained a stipulation that in case of default in the payment of any instalment the obligor would pay the entire amount due on the bond irrespective of the instalments. None of the instalments were paid. In a suit to recover the amount of the bond:

Held, (1) that the suit was governed by Art. 75, Sch. I to the Limitation Act and that limitation for the suit began to run from the date of the default in payment of the first instalment;

(2) that the mere omission of the creditor to sue the debtor on the occurrence of a default in payment of an instalment did not amount to such waiver as was contemplated by Art. 75 of Sch. I to the Limitation Act. A KANHAI *v.* AMRIT, 23 A. L. J. 424; L. R. 6 A. 265 Civ.; (1925) A. I. R. (A.) 499; 47 A. 552 162

——— **Art. 85**—*Employee engaged on annual salary—Advances taken from time to time—Suit for recovery of excess drawings—Limitation applicable.*

A suit for the recovery of excess drawings by an employee who was engaged on an annual salary and used to draw advances against such salary is governed by Art. 85 of Sch. I, to the Limitation Act, and limitation begins to run from the end of the year in which the last item is entered in the accounts.

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It is not necessary for the applicability of Art. 85 of Sch. I to the Limitation Act that the accounts should give rise to independent obligations or mutual demands or that the balance should shift from one side to the other, it is sufficient if the amount to the credit of the plaintiff varies from day to day and might exceed the amount due by him. N MOTIRAM *v.* GAMBHIR PRASAD, (1925) A. I. R. (N.) 295 832

——— **Sch. I, Arts. 95, 142**—Suit for possession—Plaintiff not bound by decree—Decree, whether must be set aside—Limitation. *See* HINDU LAW—MITHILA SCHOOL 849

——— **Art. 96.** *See* C. P. C., 1908, s. 11 EXPL. IV 1017

——— **Art. 120.** *See* CO-OWNERS—PARTY WALL 977

——— **Art. 120.** *See* SPECIFIC RELIEF ACT, 1877, s. 42 647

——— **Ar .123**—"*Deliverable*," "*payable*," *meaning of—Will construction of—Legacy, suit to recover—Limitatio commencement of.*

A share in the property of an intestate does not become "deliverable" within the meaning of Art. 123 of Sch. I to the Limitation Act until the administrator, to whom Letters of Administration have been granted, has in his hands the share to be delivered, and similarly, a legacy or a share in a legacy does not become "payable," within the meaning of the Article, until the executor or other person liable to pay it has in his hands money with which it can be paid.

The intention of a testator, when not expressly and unambiguously stated in his Will, may be inferred by a Court from other facts stated or referred to in the Will, that legacies bequeathed by the Will should not be paid until the conclusion of a litigation in which the testator was engaged when he made his Will.

A Hindu lady who had brought a suit contesting a certain adoption and who would be entitled to certain moveable property in the custody of the Court if her suit were successful, made a Will stating that she had spent the greater part of her jewellery and valuables in fighting the suit and directing that certain legacies should be paid out of the property which was in the custody of the Court and to which she was entitled:

Held, that the testatrix intended that the legacies should be payable and be paid after the final determination of the suit which she had brought contesting the adoption and that, therefore, under Art. 123 of Sch. I to the Limitation Act, limitation did not begin to run against the legatees till the final determination of that suit in favour of the testatrix. P C VENKATADARI APPA RAO BAHADUR *v.* PARTHASARATHI APPA RAO, 23 A. L. J. 261; 48 M. L. J. 627; L. R. 6 A. (P. C.) 82; (1925) A. I. R. (P. C.) 105; 27 Bom. L. R. 823; 3 Pat. L. R. 208; (1925) M. W. N. 441; 29 C. W. N. 989; 48 M. 312 (P. C.) 324

——— **Art. 134**—*Mortgage—Mortgagee, transfer by—Transferee acknowledging title of mortgagor—Person claiming under transferee, position of—Ejectment suit—Limitation.*

Where a mortgagee in possession of the mortgaged property sells it to a third person as if he was the absolute owner thereof, but the transferee deals with the mortgagor, acknowledges his title throughout, assumes his own possession to be only that of a mortgagee tenant and pays rent to the mortgagor; he

is liable to be ejected at the instance of the mortgagor and Art. 134 of Sch. I to the Limitation Act has no application to such a case. A person claiming title from such a transferee stands on no higher footing than the transferee himself. M VEETIPARAMBIL AHAMMAD *v.* CHERIATH CHENNAMANGALATH 578

——— **Sch. I, Art. 141**—*Suit by reversioners to recover property on death of widow—Limitation.*

Where on the death of a Hindu his widow takes possession of his estate, it is not incumbent upon his reversioners to bring a suit for a declaration that a certain person who claims to be the adopted son of the deceased was not in fact adopted by him. The reversioners are entitled to wait till the death of the widow and then bring a suit for recovery of possession, and if such a suit is brought within twelve years of the death of the widow it cannot be held to be barred by time. A SHIB DEO MISRA *v.* RAMPRASAD, 22 A. L. J. 690; 46 A. 637; (1925) A. I. R. (A.) 79 938

——— **Arts. 142, 144**—*Ejectment suit—"Discontinuance of possession," meaning of—Adverse possession—Article applicable.*

The starting point for limitation under Art. 142 of Sch. I to the Limitation Act is the date of dispossession or discontinuance. The words "discontinuance of possession" mean an abandonment of possession by one person, followed by actual possession of another person; for, if no one succeeded to the possession vacated or abandoned, there could be no one in whose favour or for whose protection the Statute could operate. To constitute discontinuance there must both be dereliction by the person who has the right, and actual possession, whether adverse or not, to be protected. The Article has no application to claims which neither in terms nor in substance are claims to possession made necessary by reason of dispossession or discontinuance of possession.

Where in a suit in ejectment, the plaint does not show any case of dispossession or discontinuance of possession and the defendant denies the plaintiff's title and sets up a claim by adverse possession, the proper Article applicable is Art. 144 of Sch. I to the Limitation Act. M PERIYA JEEYANGARSWAMI *v.* MAHOMED ESOOF SAHIB, 21 L. W. 398; (1925) A. I. R. (M.) 834 386

——— **Arts. 142, 144**, *scope of—Suit for possession after dispossession—Limitation—Burden of proof.*

Every suit for possession of immoveable property in which the plaintiff alleges that he has had possession must fall under Art. 142 of Sch. I to the Limitation Act. It is only where the plaintiff does not allege that he has ever been in possession, that the case will fall under Art. 144. Where the plaintiff while in possession has been dispossessed and is out of possession, the onus is upon him to prove that he was in possession and was dispossessed within twelve years of the suit. N SINGUAJI *v.* GAMBHIRJI 1023

——— **Arts. 142, 144**—*Suit to recover possession from Hindu widow—Limitation applicable.*

Obiter dictum.—To a suit for possession involving the question as to whether possession of certain property by a Hindu widow is in lieu of her maintenance or is adverse the Article applicable is Art. 144 and not Art. 142 of Sch. I to the Limitation Act. O LAL BAHADUR SINGH *v.* MATHURA SINGH, 1 O. W. N. 740 164

——— **Art. 144**—*Hindu Law—Joint family—Alienation of family property—Suit to challenge alienation—Limitation—Reversioner capable of challenging alienation in existence at date of alienation, effect of.*

If at the date of an alienation of joint family property there is in existence any person who has a cause of action for a suit to set aside the alienation, time begins to run from the date of the alienation and cannot be extended by the subsequent birth of other members of the family who would also be entitled to challenge the alienation. In such a case, after the expiry of twelve years from the date of the alienation, the alienation cannot be challenged at the instance of another person whether he was or was not in existence at the date of the alienation. A THAKUR PRASAD *v.* GULAB KUNWAR, L. R. 6 A. 320 Civ.; (1925) A. I. R. (A.) 563 662

——— **Sch. I, Arts. 144, 148**—*Adverse possession—Mortgage—Mortgagee put in possession as purchaser—Registered deed, absence of, effect of—Redemption, whether can be allowed.*

Where a mortgagee is put in possession of the mortgaged property on the basis of an arrangement that the property is sold to the mortgagee in lieu of the interest due under the mortgage, the possession of the mortgagee is adverse to the mortgagor, and after the expiry of the statutory period the property cannot be redeemed on the allegation that in the absence of a registered deed of sale the transfer in favour of the mortgagee was invalid and that the mortgage still subsists. O SHEONATH *v.* TULSI PAT RAM, 12 O. L. J. 139; (1925) A. I. R. (O.) 385 188

——— **Art. 171.** *See* C. P. C., 1908, s. 115 173

——— **Arts. 181, 182**—*Execution of decree—Stay order—Execution suspended by order of Court—Application for revival—Limitation.*

Where the execution of a decree is stayed pending the decision of a suit the Court making the stay order must make it clear as to when the order is to come to an end. An order staying execution until the decision of a suit is not satisfactory. In one sense a suit is not decided until it is no longer appealable. Where a right of appeal is given a suit is often finally decided in the Appellate Court, and the Court ought to make its order clear by saying whether the stay is to operate until the decision of the suit in the Trial Court or the decision of the appeal, if any.

Where the execution of a decree has been suspended through no act or fault of the decree-holder, the latter has a right to ask the Court to revive and carry through the execution proceedings which have been thus suspended, and no question of limitation arises with regard to an application made under these circumstances to revive and carry through the proceedings. A GANGA JEE *v.* SAT NARAIN LAL, L. R. 6 A. 249 Civ.; (1925) A. I. R. (A.) 572 205

——— **Art. 182**—*Execution of decree—Objections—Dismissal of execution—Objection case, pendency of—Limitation.*

An application for execution of a decree may be treated as one in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless.

An application for execution was filed on 12th June 1918. The judgment-debtor filed objections to the execution which were dismissed on 21st February 1919 and on that date the execution case was also dis-

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missed, but not for any default of the decree-holder. The judgment-debtor appealed against the order dismissing the objections and the case was remanded by the Appellate Court for re-hearing. The case was re-heard and the objections were again dismissed on 20th May 1920. The judgment-debtor appealed and this appeal was dismissed on 4th April 1921. The decree-holder made an application for execution on the 19th June 1922:

Held, that the application for execution was not barred by time inasmuch as,

(*a*) the order dismissing the execution case on 21st February 1919 was not a final order in the sense that it barred the right of the decree-holder to continue the execution without presenting a fresh application for execution and the present application must, therefore, be treated as a continuation of the previous application;

(*b*) the time occupied in the proceedings started by the judgment-debtor against the order dismissing his objections which terminated either on 20th May 1920 when his objections were finally dismissed or on 4th April 1921 when the appeal from the order of dismissal was also dismissed, must either be deducted in computing the period of limitation or a fresh start of time must be reckoned from one of those dates. C MADHUSHUDAN KOWOR *v.* GIRINDRA NARAYAN SINGHA 561

——— **Sch. I, Art. 182 (5)**—*Execution of decree—Payment of process fees, whether application for step-in-aid of execution.*

The deposit of process fees for the issue of attachment in execution of a decree is not an application for execution or an application to take a step-in-aid of execution within the meaning of Art. 182 (5) of Sch. I to the Limitation Act so as to operate to extend limitation for the execution. A JAIDEO PRASAD *v.* GHASI 745

——— ——— **Art. 182 (6).** *See* C. P. C., 1908, O. XXI, R. 22 531

——— ——— **Art. 183**—*Civil Procedure Code (Act V of 1908), O. XXI, rr. 22, 23—"Revivor", what amounts to—Transmission of decree, order for, whether revivor—Dismissal of execution application for default—Notice of assignment and substitution.*

An order directing the transmission of a decree is an administrative act which does not judicially determine the enforcibility of the decree. Neither an application for transmission nor an order for such transmission does, therefore, amount to a "revivor" within the meaning of Art. 183 of Sch. I to the Limitation Act.

In order to constitute a "revivor" within the meaning of Art. 183 of Sch. I to the Limitation Act, there must be a determination, either in express terms or by implication, that the decree is still capable of execution. An order dismissing an application for execution for the decree-holder's default does not amount to a "revivor" of the decree.

The mere issue or service of a notice under O. XXI r. 22 of the C. P. C., is not sufficient to declare that the decree is capable of execution so as to constitute "revivor" within the meaning of Art. 183 of Sch. I to the Limitation Act. A further order by the Court under r. 23 of O. XXI is necessary for the purpose of determining that the decree may be executed or is capable of execution. C AMULYA RATAN BANERJI *v.* BANKU BEHARI CHATTERJI, 41 C. L. J. 152; (1925) A. I. R. (C.) 668 61

Lunacy Act (IV of 1912), s. 62—*"Residing", meaning of—Actual stay, whether necessary.*

If a person has a private house to which he may resort in a certain town he has a residence there, and therefore "resides" there within the meaning of s. 62 of the Lunacy Act even if he goes there only occasionally. For the purposes of this section a person may have several residences and may be residing in more places than one. A TAWASSUL HUSAIN *v.* WAJID ALI, L. R. 5 A. 695 Civ.; (1925) A. I. R. (A.) 140 795

Madras Civil Rules of Practice, r. 64. *See* C. P. C., 1908, s. 115, O. XIII, RR. 1, 2 351

Madras District Municipalities Act (V of 1920), *election held under—Voting paper—Name of candidate struck out—Marks or writing on voting paper—Cross-marks bisected by line between names of two candidates—Validity of votes.*

In an election held under the Madras District Municipalities Act, a vote recorded in favour of a candidate will not be invalidated by the fact that the name of the candidate for whom the vote was not cast was struck out on the voting paper. Nor will mere unintelligible tracings, or other mark or writing, on the voting paper invalidate a vote unless the Court finds that the tracing, mark, or writing is such by which a voter may afterwards be identified.

Where the intersecting point of the cross mark on a voting paper is bisected by the line between the names of two candidates the vote cannot be counted in favour of any of those candidates and must be excluded altogether. M T. C. XAVIER *v.* E. C. JOSEPH, 48 M. L. J. 268; (1925) A. I. R. (M.) 614; 21 L. W. 654 216

——— *Rules for Conduct of Elections, r. 8 (e)—Electoral roll, correctness of, whether can be questioned by Court holding election enquiry—"Election proceedings," meaning of—"Failure to observe other directions", meaning of—Election petition—Objection that petition does not disclose ground for enquiry, dismissal of—Revision—Civil Procedure Code (Act V of 1908), s. 115.*

Under r. 8 (*e*) of the Rules for the preparation of electoral rolls prepared under the Madras District Municipalities Act, the electoral roll when finally settled must be taken as final for the purposes of election proceedings. The expression "election proceedings" in the rule includes all proceedings relating to an election until it is finally determined who the candidate is who has been properly elected. The expression thus includes an election enquiry and it is not competent to the Court holding such enquiry to question the correctness of the electoral roll.

The expression "failure to observe other directions" in r. 8 (*e*) is not confined to directions contained in the Rules but includes directions contained in the Madras District Municipalities Act as well.

Where an objection is taken to an election petition on the ground that it does not disclose any ground for enquiry, and the objection is disallowed, the order disallowing the objection is open to revision under s. 115 of the C. P. C., inasmuch as if the order is erroneous the lower Court in holding an enquiry would be exercising a jurisdiction not vested in it. M JANARDHANAN *v.* N. M. VERGHESE, 48 M. L. J. 451; (1925) A. I. R. (M.) 707; (1925 M. W. N 305 113

Madras Local Boards Act (XIV of 1920), ss. 8, 15, 56 cl. (4), 57—*Taluk Board President—Absence for three months from meetings, effect of—Presidentship, whether vacated—Restoration to membership, whether operates as restoration to Presidentship—Effect on ex-officio membership of District Board—Member-*

ship—De facto *member—Collateral attack in election petition—Election Rules—Invalid nomination—Fresh election.*

Under the Madras Local Boards Act of 1920, a President of a Taluk Board who absents himself for 3 successive months from the meetings of the Taluk Board, not only ceases to be a member of the Taluk Board but vacates his office as President of the Board under s. 15 (1) of the Act. A restoration of him to his office as member of the Board under s. 56, cl. 4 of the Act does not operate to restore him to the office of President as well.

A President of a Taluk Board who is an *ex officio* member of a District Board under s. 8 of the Madras Local Boards Act and who subsequently ceases to be President of the Taluk Board also ceases to be a member of the District Board and is not entitled to take part in the election of its Vice-President.

The Madras Local Boards Act does not recognise any *de facto* member as distinguished from a *de jure* member. When the Act speaks of a member, President or Vice-President, it refers to a member, President or Vice-President validly elected or appointed according to the provisions of the Act.

The effect of s. 57 of the Madras Local Boards Act and the rules framed under the Act is that, in the *case of elected members*, the validity of the election can be questioned by (1) an election petition under the rules or (2) by a petition under s. 57. In the latter case the petitioner is confined to certain grounds. The *election cannot be questioned in any other way*. In the case of a nominated member, the validity of his membership can be questioned by a petition under s. 57 on the grounds alleged in it. But there is nothing in the Act to prevent the fact of membership of a person claiming to be an *ex officio* member from being questioned collaterally in another election petition.

Where on an election petition, the nomination of one of the candidates is found to be invalid under r. 12 of the Election Rules under the Madras Local Boards Act, the Judge has a complete discretion to declare the only other candidate elected or to order a fresh election. M S. DEVASIGAMONY *v.* M. R. SETHURATANA IYER 363

——— **ss. 159, 207, 223**—*Failure to remove alleged encroachment after notice — Offence—Acquittal—Fresh notice—Second prosecution, legality of—Period of three months under s. 223, extension of, by fresh notice, whether permissible.*

In a prosecution against an accused for an offence under s. 207 (c) read with s. 159 of the Madras Local Boards Act XIV of 1920, for failure to remove an alleged encroachment after due notice by the local authority, the real offence is the wrongful encroachment that is committed by the person. The notice referred to in s. 159 is in a sense merely in the nature of a condition precedent to the prosecution.

An offence within the meaning of the sections comes to be committed, at any rate, on the expiry of the notice by which the person is called upon to remove the encroachment and fails to do so within the time limited in the notice. Where a person commits an offence by disobeying the terms of the notice, he should not be deemed to commit a fresh offence every time the local authority chooses to give a fresh notice calling upon him to remove the obstruction.

The real principle underlying s. 223 of the Madras Local Boards Act is that it should not be within the power or province of a local authority to molest and annoy persons by prosecutions which are not promptly undertaken by the local authority. The local authority has no power by giving fresh notices to constitute the disobedience to each of such fresh notices as amounting to a fresh offence under s. 207 of the Act.

Where an accused person who was charged under s. 207 of the Local Boards Act for failure to remove an alleged encroachment after due notice under s. 159 is acquitted, a second prosecution for the same offence after a fresh notice is illegal, especially where it is instituted more than three months after the issue of the first notice. M RAMANUJACHARIAR *v.* KAILASAM IYER, (1925) M. W. N. 472; 49 M. L. J. 386; 26 Cr. L. J. 1014 969

——— **ss. 159 (1), 163 (1).** *See* CR. P. C., 1898, s. 423 924

——— **s. 170**—*Market, what is—Market in existence before Act, whether "new market".*

A market is a place set apart for the meeting of the general public, of buyers and sellers, freely open to any such, to assemble together, where any seller may expose his goods for sale and any buyer may purchase.

Where arecanuts were brought to certain premises weighed and there purchased or sold to or by people and a fee was levied by the owner thereof:

Held, that the place constituted a "market" within the meaning of the Madras Local Boards Act.

The expression "new market" in s. 170 of the Madras Local Boards Act is used in its ordinary signification as "for the first time opened or kept open." M PUBLIC PROSECUTOR *v.* CHERU KUTTI, 26 Cr. L. J. 1053 973

——— **as amended by Madras Act II of 1922, Sch. X, r. 15, sub-cl. (3)**—*Local Board—Oath of allegiance, failure of members to take—Election of President by such members, validity of—Meeting for election of President—Adjournment—Election at adjourned meeting, legality of*

Under the Madras Local Boards Act of 1920 as amended by Madras Act II of 1922 every person appointed or elected to be a member of a Local Board is bound to take the oath of allegiance before he takes his seat, that is to say, before he enters upon the rights and duties of his office.

The election of a President by members who have not taken their oaths of allegiance is an election not by members of the Union Board at all, and is invalid.

Under sub-cl. (3), r. 15 of the Transitory Provisions in Sch. X of the Act, the power to elect a President is conferred only on a meeting called by the President on the date and at the time fixed by him.

Where a meeting called for such a purpose is adjourned, an election of a President held at the adjourned meeting is invalid. M DIVI DWARKACHARYULU *v.* KOTHAPALLI SRIKRISHNAN 825

Malabar Law—*Maintenance deed*—Tavazhi, *whether constituted—Suit to recover maintenance by some members, maintainability of.*

A deed executed by a Malabari in favour of one of his children recited that the properties of the executant were assigned in favour of the children named in the deed and "for those children, boys and girls who are uterine relations below you and your mother for your livelihood." In a suit to recover maintenance on the basis of the deed by some of the children:

Held, (1) that the donees under the deed with their mother constituted a *tavazhi*;

Malabar Law—concld.

(2) that, therefore, the *karnavan* of the *tavazhi* was a necessary party to the suit. M KAZHIPPURATH PAPPIAMMA *v.* KUNHU, 21 L. W. 432; (1925) A. I. R. (M.) 761 198

Master and servant—*Master, criminal liability of, for acts of servant.*

A master is not criminally responsible for the acts of his servant unless he expressly commands or personally co-operates in them or such responsibility is expressly imposed on him by Statute or contract. N FAKIRA SAMBHAJI *v.* EMPEROR, 26 Cr. L. J. 1030 918

Mortgage—Declaration of title, suit for, by mortgagor against mortgagee, whether maintainable. *See* SPECIFIC RELIEF ACT, 1877, s. 42 647

——— or sale. *See* CONSTRUCTION OF DOCUMENT 546

——— Redemption by co-mortgagor—Subsequent suit by another co-mortgagor, whether barred. *See* C. P. C., 1908, ss. 10, 11, 47, O. XXXIV, R. 8 290

——— **suit**—*Interest* pendente lite—*Discretion of Court—Appellate Court, interference by—Hindu Law*—Damdupat, *rule of, applicability of.*

In a mortgage-suit there is a discretion vested in the Court to decide whether interest should be allowed on the redemption money from the date of the suit. Where the Trial Court does not deal with the question of interest *pendente lite* at all, the Appellate Court is entitled to consider whether such interest should or should not be allowed.

It cannot be said that a person who has invested his money in a mortgage and has succeeded in doubling his capital in less than ten years has any particular claim on the Court to award him any further amount as interest.

Semble:—The rule of *damdupat* has no application in calculating interest in a mortgage-suit from the date of the suit to the date fixed for redemption. The matter is entirely in the discretion of the Court. B ACHYUT NARAYAN KHARE *v.* RAMCHANDRA KESHAV UKIDEE, 27 Bom. L. R. 492; (1925) A. I. R. (B.) 362 719

——— ———*Mortgaged property purchased by mortgagee during pendency of suit, effect of—Procedure.*

During the pendency of a mortgage suit the mortgagee purchased the right, title and interest of the mortgagor in the mortgaged property in a Court auction in execution of a money-decree:

Held, that the purchase operated to discharge the mortgage and that the mortgage suit ought to be dismissed. M BALAMANI AMMAL *v.* K. N. RAMA IYER, 48 M. L. J. 213; (1925) M. W. N. 163; 21 L. W. 528; (1925) A. I. R. (M.) 786 57

Muhammadan Law—Hanafi *school—Gift — Life-interest, whether can be created—Possession, delivery of, what constitutes—Will in favour of heir, validity of—Estoppel—Ignorance of law.*

Per *Ashworth, A. J. C.*—There can be no estoppel in favour of a party who was not misled except by his own ignorance of the law.

A family arrangement cannot be effected by mere conduct apart from any explicit agreement.

Where a Muhammadan after making a Will gifts away the whole of his property the gift has the effect of operating as a revocation of the Will.

A *Hanafi* Muhammadan cannot make a Will in favour of one of his heirs.

Under the Muhammadan Law the owner of an estate may retain what is virtually a life-estate, but he cannot transfer anything more than a mere use. If he purports to transfer something more than a use, namely

Muhammadan Law—contd.

a use, which is not revocable during the term for which it is granted, and which can be lent or leased to another or otherwise alienated, he will be held to have transferred not only the use, but also the *corpus*. A life-estate, therefore, can only, under the Muhammadan Law, be created by reservation after the transfer of the *corpus*. It cannot be created by transfer to another whether the *corpus* is retained or not by the donor.

The requirements of the Muhammadan Law that a gift must be perfected by delivery of possession negatives the possibility of a life-estate being conferred by gift under that law.

Under the Muhammadan Law delivery of possession may be given in such a way as the nature of the gift permits but this does not mean that delivery of the *corpus*, either constructive or actual, can be entirely absent in the case of a gift.

The word "construction" used with reference to a document may mean the meaning which the person executing the document expressed, and it may also mean the effect which the law allows the deed to have. The Muhammadan Law does not in fact require that a deed giving a life-estate should be construed against the intention of the donor as having meant that he gives an absolute estate, but it requires that whatever his intention was, the deed is to be treated as giving an absolute estate.

Under the Muhammadan Law there must be evidence produced by the person claiming under a gift that the donor did all in his power to enable the donee to exercise his possession over the property gifted. It is necessary for a gift by a husband to a wife, who is not a minor, to be completed by some act of delivery of possession other than a mere declaration in the deed of gift that possession has been transferred to the donee.

Per *Wazir Hasan, A. J. C.*—In order to construe a deed of gift it is necessary to ascertain the intention of the donor and this must be done primarily with the help of the language used by him. For this purpose it is permissible to derive such assistance as can be derived from the surrounding circumstances.

Under the Muhammadan Law proof of the intention of a donor to create a life-interest is permissible. The giving of interest in a certain property is different from, and is not the same thing as, the gift of the *corpus*, and such an interest may be supported on the basis of a trust resulting from an agreement for valuable consideration. Where the manifest intention of the donor is to give the *corpus* of, and the absolute interest in, the property gifted to one person and such gift is accompanied with a reservation of a limited estate in the same property in favour of another, both the gift and the reservation are valid.

There is no rule of Muhammadan Law to the effect that where a donor in a transaction of a simple gift merely creates a life-interest in the property gifted in the donee and reserves the reversion to his heirs-at-law the donee of the interest takes the absolue estate.

The argument that where the intention of the donor is to give merely an interest in, and not the whole of, his property the gift must be construed to convey the whole is erroneous.

If the law of the Muhammadans or of any other class of people must keep pace with the progress of society and the multifarious relations arising therefrom, interests in property apart from the property itself must be recognized.

Muhammadan Law—concld.

Mutation of names in the Collector's office is not actually necessary to complete a transfer of possession under a deed of gift. The reason of the rule of the change of possession will be fully satisfied where in the circumstances of a particular case such a change may only be constructive.

A Muhammadan executed a deed of gift in favour of his wife who was a *pardah nashin* lady, the subject-matter of the gift being merely a life-interest in the property dealt with by the deed and not the *corpus* of it. The deed contained a recital that possession of the property gifted had been transferred to the donee. The donor continued to live for a year after the execution of the deed of gift and continued to collect the rents and profits of the property, the wife living in the same house with him:

Held, that, under the circumstances, the collection of the rents and profits by the husband after the execution of the deed must be taken to have been made in the capacity of an agent of his wife and it must be held that possession of the interest gifted had been transferred to the wife so as to satisfy the requirements of the Muhammadan Law. O AMJAD KHAN *v.* ASHRAF KHAN, 2 O. W. N. 83 . 445

——— *Heba-bil-ewaz*, whether gift or sale. *See* HINDU LAW—MITHILA SCHOOL 849

——— *Jointness, presumption of—Debt incurred by member of Muhammadan family—Liability of other members.*

There is no presumption of jointness in the case of a Muhammadan family, and when money is borrowed by one member of a Muhammadan family he alone is liable to repay it and the other members of the family do not incur any liability in respect of the loan, merely because they have also benefited from the loan. C FATEMA BIBI *v.* RADHA SYAM SAHA BANIK 660

——— **Wakf**—*Coercion—Undue influence.*

A childless Muhammadan of about 67 years of age executed a deed of *wakf*, comprising the greater portion of his property, by which he appointed himself the *mutwalli* of the *wakf* during his lifetime and appointed one of his nephews as *mutwalli* after his death. Another nephew was appointed supervisor and provision was made for the emolument and expenses of both of them. It was found that the settlor was of sound disposing mind at the time of the execution of the deed. He reserved a substantial portion of the property for the maintenance of himself and his wife. He continued to live for seven years after the execution of the deed and gave effect to it in the character of *mutwalli*:

Held, that it could not be said that the provision in favour of the nephews was at all unreasonable or that the settlor had been dominated or coerced by his nephews into executing the deed. P C FIDA RASUL *v.* YAKUB BEG, 12 O. L. J. 98; (1925) A. I. R. (P. C.) 101; L. R. 6 A (P. C.) 55; 27 O. C. 346 (P. C.) 702

Negligence—*Invitee, duty towards—Injury by dog—Damages.*

A man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it.

Plaintiff went to the defendant's house on lawful business, and not finding any servant or any other means of announcing her visit to the defendant proceeded towards the dining room door with the intention of entering that room and waiting there till the defendant came to her. Before she could enter the room she was bitten by a ferocious dog that had been chained behind the door. She sued the defendant for damages:

Held, that the plaintiff was in the position of an invitee and defendant was guilty of negligence in keeping a fierce dog in the room at a time when it was possible that a person coming to him on lawful business might go to the room, and that, therefore, the plaintiff was entitled to recover damages for the injury done to her. B MARY LENNON *v.* PERCY FISHER, 25 Bom L. R. 873; (1924) A. I. R. (B.) 207 75

Negotiable Instruments Act (XXVI of 1881), ss. 9, 118—*Person holding bill for collection with lien on bill; whether holder in due course.*

Under s. 118 of the Negotiable Instruments Act the holder of a bill is to be presumed to be a holder in due course until the contrary is proved.

A person holding a Bill of Exchange for collection with a lien on the bill is a holder of the bill for consideration within the meaning of s. 9 of the Negotiable Instruments Act. B ROYAL BANK OF SCOTLAND *v.* RAHIM CASSUM & SON, 27 Bom. L. R. 506; 49 B. 270; (1925) A. I. R. (B.) 369 982

——— **ss. 13, 87**—*Pro-note payable to specified person, whether negotiable instrument — Material alteration in pro-note after execution, effect of.*

A promissory-note payable to a specified person only is a negotiable instrument within the meaning of s. 13 of the Negotiable Instruments Act and is subject to the provisions of s. 87 of the Act. Where, therefore, a material alteration is made in a promissory-note after its execution without the knowledge or consent of the executant the note becomes void. A SUNDER KHATIK *v.* MAHADEO PANDE, 23 A. L. J. 253; (1925) A. I. R. (A.) 282 796

——— **s. 33**—*Goods ordered by Company—Bill of Exchange drawn on Agent of Company—Acceptance "for and on behalf of the Company," effect of—Agent, personal liability of.*

The alleged acceptance of a Bill of Exchange must, if possible, be construed *ut res magis valeat* and not *ut res magis pereat*. Where, however, the proper construction is clear on the face of the document, there is, no room for the application of this principle.

Company management is different in India to what it is in England and in the great majority of Companies the entire management rests with the Secretaries and Agents according to the terms of their agreement with the Company subject to the supervision of the Directors.

A certain Company indented certain goods from a firm in England and it was arranged that the latter firm should draw Bills of Exchange on the Company in respect of the said goods. Some of the bills in respect of the goods so indented for by the Company were drawn on the defendants who were the Secretaries and Agents of the Company. The bills were sent by the plaintiff Bank to the Company for acceptance and were accepted by the defendants "for and on behalf of the Company." In a suit by the plaintiff Bank to recover the amount of the bills from the defendants:

Held, that the form of acceptance adopted by the defendants clearly excluded the personal liability of the defendants in respect of the bills and that the plaintiff was not entitled to a personal decree against the defendants on the bills. B IBRAHIM FAZALBHOY *v.* INTERNATIONAL BANKING CORPORATION, 27 Bom. L. R. 283; (1925) A. I. R. (B.) 252 485

Negotiable Instruments Act—contd.

——— **ss. 58, 85**—Hundi—*Forged endorsement—Holder, whether acquires title—Payment by drawee to holder, effect of—Wrongful conversion—Suit to recover amount, maintainability of—Property in* hundi, *when passes—Post Office, whether agent of payee.*

If a party primarily liable on a negotiable instrument pays the amount thereof to a wrong person, who holds it under a forged indorsement, he remains liable to the true owner. The only exception to this is where the payee's indorsement on a cheque payable to order is forged.

No holder of a negotiable instrument, though he may be a holder in due course, can acquire a title to the instrument through a forged indorsement.

Section 58 of the Negotiable Instruments Act, which protects a holder in due course where a negotiable instrument has been obtained by means of an offence, does not apply to a case of forgery.

If a person wrongfully convert a bill and receive the amount, the owner of the bill may either sue in tort or may waive the tort and recover the money as received to his use.

In order to make the property in a bill pass it is not sufficient to indorse it; it must be delivered to the indorsee.

The Post Office is the agent of the person to whom the bill or note is posted if there be express or implied authority to send by post, but if there be no such authority the Post Office is the agent of the sender. **B** THORAPPA DEVANAPPA *v.* UMEDMALJI, 25 Bom. L. R. 604; (1924) A. I. R. (B.) 205 **226**

——— **s. 76 (b)**—*Bill of Exchange accepted by drawee—Presentment, whether necessary—Presentment before maturity, validity of—Endorser, whether can waive presentment—Promise to pay, effect of.*

A Bill of Exchange comes to maturity on the expiry of the period of grace and no presentment of the bill is valid unless it is made after the bill has reached maturity.

Where a person is himself the drawer and the acceptor of a Bill of Exchange it is open to a holder of the bill to treat it as a promissory note and the drawer would be liable on the bill whether there was presentment of the bill or not.

All the provisions relating to the presentment of a Bill of Exchange are made for the protection and benefit of the party who is liable on the bill and it is open to such a party to waive a presentment for payment.

Where a Bill of Exchange is presented to an endorser before it reaches maturity and he makes an oral promise to pay the bill after a certain period of time, the presentment itself is not valid but the promise by the endorser to pay the money can be treated as an undertaking to pay without any further presentment of the bill and presentment is consequently unnecessary in such a case. **A** JHANDU LAL-MITTHU LAL *v.* WILAYATI BEGUM, 23 A. L. J. 349; L. R. 6 A. 310 Civ.; (1925) A. I. R. (A.) 442; 47 A. 572 **488**

——— **s. 87**—*Pro-note executed by one person—Name of another person added as security—Pro-note, whether, vitiated—Illegal contract.*

No Court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court and if the person invoking the aid of the Court is himself implicated in the illegality. If the contract in itself is illegal, the plaintiff would not be entitled to enforce his remedy against any one who is a party to the contract. But where the contract is legal and as evidence of the contract something illegal is done, it cannot be said that the whole contract is void.

If after the execution of a negotiable instrument or any other document, the parties thereto alter it, such alteration does not vitiate the document; if, however, the alteration is made without the consent of the party against whom it is sought to be enforced, the document is vitiated. It is immaterial whether or not the alteration is beneficial to the person against whom the document is sought to be enforced.

Section 87 of the Negotiable Instruments Act has reference only to an alteration after execution and has no application to anything done at the time of the execution.

First defendant executed a promissory-note in favour of the plaintiff and for the purpose of giving additional security to the plaintiff the name of the second defendant was added to the pro-note. It was found that there was no intention to cheat or to deprive second defendant of her property. In a suit to enforce the pro-note:

Held, (1) that the pro-note could not be enforced against the second defendant;

(2) that so far as the first defendant was concerned the pro-note was not vitiated inasmuch as no alteration had been made in the pro-note after execution and without the knowledge or consent of the first defendant; the pro-note itself was legal and was consequently enforceable against the first defendant. **M** MADAM PILLAI *v.* ATHINARAYAN PILLAI, 21 L. W. 532 **48**

Oudh Laws Act (XVIII of 1876), s. 9—*Pre-emption—Member of village community, who is—Admission of fact and admission of law—Admission of fact made by Pleader, whether binding on party.*

An admission made by a Pleader on a point of law is not binding on the party whom he represents.

Whether an admission is one of law or of fact, must depend upon the circumstances of each case.

In the matter of pre-emption ownership of land is the one condition of the membership of the village community for the purpose of s. 9 of the Oudh Laws Act. It is immaterial whether the land consists of one plot only on which no revenue is assessed. The owner of a plot of land in the village on which there stands a grove for which no Government revenue is paid is a co-sharer for the purpose of pre-emption within the meaning of the Oudh Laws Act.

An admission of a Pleader that a certain person owns land in the village so as to be a member of the village community within the meaning of s. 9 of the Oudh Laws Act is an admission of fact and not one of law and is binding on the party whom the Pleader represents. **O** KANHAYA BAKHSH SINGH *v.* SHEO NATH **956**

Oudh Rent Act (XXII of 1886), ss. 108 (15), 126 (1) (2)—*Co-sharers—Suit for profits*—Lambardar, *liability of—Gross negligence, proof of—Decree, basis of.*

In a case falling under cl. (2) of s. 126 of the Oudh Rent Act, the *lambardar* is entitled to collect rent from the tenants and to act on behalf of the other co-sharers, and is liable to the latter for the collections.

Oudh Rent Act—concld.

Where in a suit for profits against the *lambardar* the plaintiff establishes gross negligence on the part of the *lambardar*, it is the duty of the *lambardar* to prove that he could not collect more than a certain percentage of the gross rental. In the absence of such proof the plaintiff is entitled to a decree on the basis of the gross rental. O KUNJAN LAL *v.* RUKMANGAD SINGH 1013

——— **ss. 126, 138**—*Joint estate*—Lambardars, *several*—Lambardar, *single, right of, to recover arrears of rent*—*"Third person", in s. 138, meaning of.*

Ordinarily the power in regard to the recovery of arrears of rent cannot be exercised by a co-sharer or a single *lambardar* when there are more *lambardars* than one in a joint estate.

The expression "third person" in s. 138 of the Oudh Rent Act means a person who has not the ostensible right to recover the rent and cannot include a co-*lambardar* who has a legal title to recover it.

A thing is deemed to be done in good faith where it is in fact done honestly and there can be no question of honesty where rent is paid to a person who has a legal title to receive it. As between a tenant and his landlord there is no doubt that a co-*lambardar* has such a title. O MAYA RAM *v.* SARJOO, 2 O. W. N. 150; 12 O. L. J. 185; L. R. 6 A. (O.) 81; (1925) A. I. R. (O.) 455 168

Partnership, *dissolution of*—*Accounts, suit for*—*Neglect of partner, liability for.*

In a suit for accounts upon a dissolution of partnership one partner is not liable for the probable loss sustained by the firm owing to the neglect or failure of such partner to carry out the duties imposed upon him by the partnership agreement to the prejudice of the firm's business. B MAHADEV VITHU PATIL *v.* GANOO CHANGOO PATIL, 27 Bom. L. R. 500; (1925) A. I. R. (B.) 324 735

——— *Partner*—*Arrangement to share in profits, effect of.*

An arrangement to share in the profits does not necessarily show that the person who shares such profits is a partner of the firm; but this fact must be considered along with the evidence relating to other characteristics of a partnership, such as sharing of losses, etc., in arriving at a conclusion whether the parties intended to carry on business in partnership. M CHOCKILINGA CHETTIAR *v.* MUTHUSWAMI CHETTIAR, 48 M. L. J. 518; 21 L. W. 541; (1925) A. I. R. (M.) 768 663

——— *Two firms*—*Partner in one firm owner of other*—*Mutual dealings*—*Suit by one firm against other, whether maintainable.*

When the owner of one firm is a partner in another firm, no suit can be brought by one of them against the other in respect of any dealings between them. B KRISHNA ANNAPPA GOREGAONKAR *v.* GANPAT SAKHARAM BHOSLE, 25 Bom. L. R. 1307; (1924) A. I. R. (B.) 263 289

Penal Code (Act XLV of 1860), ss. 29, 464, 473—*Reserved forest*—*Letters imprinted on trees, whether "document"*—*Counterfeit stamp for the purpose of imprinting letters on trees in reserved forest, possession of*—*Offence.*

Letters imprinted on a tree which are intended to be evidence of the fact that the tree has been passed by a Forest Officer and so can be removed from the place where it lies in the forest, constitute a "document" within the meaning of s. 29 of the Penal Code.

The possession of a counterfeit stamp, which is intended to be used for imprinting letters upon trees in a reserved forest so as to cause it to appear that those trees have been passed by a Forest Official for removal from the forest, is an offence under s. 473 of the Penal Code. B EMPEROR *v.* KRISHTAPPA KHANDAPPA, 27 Bom. L. R. 599; (1925) A. I. R. (B.) 327; 26 Cr. L. J. 1014 838

——— **ss. 34, 114, 307**—*S. 34, application of*—*Charge of substantive offence*—*Abetment, conviction for, whether legal.*

Where several persons conspire to kill another and one of them shoots him down, all the conspirators are guilty under s. 34, Penal Code.

Obiter:—A man charged with the substantive offence can be rightly convicted of that offence read with s. 114 of the Penal Code, although not charged with it. B RANCHHOD SURSANG *v.* EMPEROR, 26 Bom. L. R. 954; (1924) A. I. R. (B.) 502; 49 B. 84; 26 Cr. L. J. 1000 600

——— **ss. 99, 100**—*Attack, previous knowledge of*—*Right of private defence, whether exists.*

Where a party of men become aware that they are about to be attacked and they know that they can avoid the attack by dispersing or running away, it is their duty to get out of the way of their enemies until the anger and resentment of the latter have subsided. If, however, they have a reasonable belief that if they separate they will be pursued and attacked individually they have every right to keep together or to come together and to repel the attack when it is made with every means in their power.

Accused received information that they were about to be attacked by a hostile section in the village. They believed that if they separated they would be pursued and attacked individually and under this belief they collected together and awaited the attack. Their enemies then appeared on the scene and one of them fired a pistol and hit one of the accused. One of the accused then fired a pistol and hit the man who had first fired, and then a fight with *lathis* commenced during the course of which one member of each party was killed :

Held, that under the circumstances of the case the accused were entitled to exercise the right of private defence and it could not be said that they had exceeded that right. A AJODHIA PRASAD *v.* EMPEROR, L. R. 6 A. 81 Cr.; 26 Cr. L. J. 997 597

——— **ss. 120B, 193, 467, 471.** *See* CR. P. C., 1898, s. 403 847

——— **s. 147.** *See* CR. P. C., 1898, s. 297 98

——— **ss. 147, 323.** *See* CR. P. C., 1898, s. 423 842

——— **ss. 182, 211.** *See* CR. P. C., 1898, s. 195 (1) 418

——— **s. 186**—*Obstruction to public servant*—*Refusal to sit on* panchayat *with certain members, whether offence.*

The accused when asked by the Sub-Divisional Officer to sit on a *panchayat* with a member of the depressed classes refused to do so and told the Sub-Divisional Officer that the *panchayat* would cease to exist and instigated his fellow *panches* and other persons not to sit with members of the depressed classes in the *panchayat* :

Held, that the accused was guilty of bad manners and was not a good citizen or a useful member of the

community but that there was nothing in his conduct which would bring him within the purview of s. 186 of the Penal Code. A RAM GHULAM SINGH *v.* EMPEROR, 23 A. L. J. 352; (1925) A. I. R. (A.) 401; 47 A. 579; 26 Cr. L. J. 978 514

——— s. 216 A, applicability of. *See* ACCOMPLICE 916

——— s. 294 A—*Lottery—Publication of proposal to pay—Offence.*

Petitioner issued a circular relating to a lottery in which he stated that the Sweep would close on a particular day and that the Draw would take place on a certain day under the supervision of the patrons stated in the tickets and that the prize winners would be notified of the result by telegram. Prizes of different values were mentioned in the circular and orders were solicited :

Held, that the accused was guilty of an offence under s. 294-A of the Penal Code. B CHIMANLAL PRANJIVANDAS *v.* EMPEROR, 27 Bom. L. R. 363; (1925) A. I. R. (B.) 243; 26 Cr. L. J. 980 516

——— ss. 300 (4), 302, 304 A, 309—*Mother jumping into well and causing death of her child tied to her back—Attempt to commit suicide—Murder —Death caused by negligent act.*

Accused who was harassed and ill-treated by her husband, in a fit of disappointment and annoyance jumped into a well with the object of drowning herself. At the time when she jumped into the well she had her child tied at her back, but she was not conscious of the fact and the result was that although the accused escaped the child died:

Held, (1) that the accused was guilty of attempting to commit suicide ;

(2) that it could not be said that her act came within the purview of cl. (4) of s. 300 of the Penal Code and that, therefore, she was not guilty of the offence of murder with regard to the death of her child;

(3) that she was guilty of a negligent omission, that is the omission to put the child down before jumping into the well and that the death of the child having been caused by such negligence, the accused was guilty of an offence under s. 304A of the Penal Code. B SUPANDI *v.* EMPEROR, 27 Bom. L. R. 604; (1925) A. I. R. (B.) 310; 26 Cr. L. J. 1016 840

——— s. 302. *See* CR. P. C., 1898, ss. 423, 439 424

——— ss. 307, 326, 336, 511—*Firing gun in air —Rash and negligent act—Attempt to murder or cause grievous hurt.*

Section 336 of the Penal Code contemplates a lawful act, but it punishes the same act which is otherwise lawful only if it is done in a rash or negligent manner

A person who deliberately throws brickbats at passers-by and wants to shoot them and for that purpose aims a gun and fires shots, is guilty of an attempt at murder or of an attempt to cause grievous hurt with a dangerous weapon of shooting and not merely of an offence under s. 336 of the Penal Code.

When riots are taking place in different parts of a town a man possessing a gun may very well fire shots just to indicate to would-be mischief-makers that there are arms of defence in the house and that any body who might be mischievously inclined might take care of his safety. Such an act would not amount to an offence under s. 336 of the Penal Code.

Merely firing a shot is not punishable as an offence in itself. A BABU RAM *v.* EMPEROR, 23 A. L. J. 356; L. R. 6 A. 121 Cr.; (1925) A. I. R. (A.) 396; 47 A. 606; 26 Cr. L. J. 987 523

——— s. 363—*Kidnapping, what constitutes—Minor leaving guardian's protection—Intention—Offence.*

In order to support a conviction for kidnapping from lawful guardianship the following are the points which require proof :—

(1) That the person kidnapped was then a minor under sixteen years of age, if a female.

(2) That such person was in the keeping of a lawful guardian.

(3) That the accused took or enticed such person out of such keeping.

(4) That he did so without the consent of the lawful guardian.

The mere fact that the minor leaves the protection of her guardian, does not put her out of the guardian's keeping, but if she abandons her guardian with no intention of returning, she cannot be held to continue in the guardian's keeping. The decision of the question in each case depends upon the facts of the case. C R. W. VALLIANT *v.* MRS. N. ELEAZER, 26 Cr. L. J. 977 513

——— s. 368. *See* CR. P. C., 1898, s. 297 845

——— s. 377—Coitus per os.

Coitus per os falls within the provisions of, and is punishable under s. 377, Penal Code. S KHANU *v.* EMPEROR, 26 Cr. L. J. 945 97

——— s. 400—*Habitually associating for the purpose of committing dacoity—Previous conviction or order directing security to be of good behaviour, whether admissible.*

In a trial in respect of an offence under s. 400 of the Penal Code, evidence of the commission of an offence by the accused or that the accused were bound down under s. 110 of the Cr. P. C. is admissible for the purpose of proving habit as well as association. C LEDU MOLLA *v.* EMPEROR, 52 C. 595; (1925) A. I. R. (C.) 872; 26 Cr. L. J. 1037 925

——— s. 401—*Habitually associating for the purpose of committing theft—Gang, existence of, not proved, effect of.*

Ten persons were put on their trial for an offence under s. 401 of the Penal Code as being members of a gang associated for the purpose of habitually committing theft. Nine out of the ten were acquitted and the appellant alone was convicted. In addition to the evidence of the approver against the appellant there was the evidence that several thefts and several articles stolen from different houses were discovered on the information supplied by him and that he had made promises to restore certain stolen property :

Held, that the story of the approver having been disbelieved with regard to the remaining nine accused the inference was that his testimony that they were members of an alleged gang was not true and that the mere fact that certain stolen property had been discovered as the result of information given by the accused and that he had promised to restore other stolen property was not enough to prove that he was the member of a gang of habitual thieves whose existence had not been established. L BANWARI *v.* EMPEROR, 26 Cr. L. J. 1024 848

——— s. 409. *See* CRIMINAL TRIAL 962

Penal Code—concld.

——— **s. 411**—*Possession of stolen goods—Goods found in room belonging to joint family.*

Where stolen goods were found in a room which had no shutters and which was accessible to all the members of a joint family of whom the accused was one:

Held, that it could not be held that the accused was in possession of the goods within the meaning of s. 411 of the Penal Code. A RAM ACTAR *v.* EMPEROR, 23 A. L. J. 421; (1925) A. I. R. (A.) 478; 47 A. 511; 26 Cr. L. J. 1022 846

——— **s. 417**—*Criminal Procedure Code (Act V of 1898), s. 439—Debtor inducing creditor fraudulently to grant time for payment—Cheating—Acquittal—Revision—Procedure.*

Accused owed a sum of money to the complainant. The complainant served the accused with a notice requiring immediate payment. Accused thereupon approached the complainant and induced him to grant 15 days' time to pay up. During the time granted the accused removed their goods from their shop with the intention of escaping the payment of their debt to the complainant. Complainant prosecuted the accused for the offence of cheating and the accused were convicted. On appeal the Sessions Judge held that the prosecution evidence showed that the accused fraudulently induced the complainant to grant them time but that the fraud was inchoate and inconsequential, and on this finding the accused were acquitted. On an application for revision being made on behalf of the complainant:

Held, (1) that on the finding arrived at by the Sessions Judge there was a clear case of cheating and that the order of acquittal was, therefore, erroneous;

(2) that the order of acquittal must, therefore, be set aside and the case remanded to the Sessions Judge for re-hearing of the appeal. A RAMESHWAR *v.* GOBIND PRASAD, 23 A. L. J. 433; 26 Cr. L. J. 970; (1925) A. I. R. (A.) 473 426

——— **s. 456**—*House breaking—Trespass with intention to force illicit intrigue on woman—Offence.*

Accused broke the lock of a room in which certain women of the family of the complainant were sleeping and introduced his head into the room. The object of the accused was found to be to force an intrigue upon one of the women sleeping in the room:

Held, that the accused was guilty of an offence under s. 456 of the Penal Code. Pat MOHAMMAD NASIR-UDDIN *v.* EMPEROR, 4 Pat. 459; 26 Cr. L. J. 954; 6 P. L. T. 588 106

Pensions Act (XXIII of 1871), s. 4—*Assignment of land revenue—Subsequent settlement of proprietary rights—Merger—Mortgage—Decree for sale—Right to receive revenue, whether can be sold.*

Government assigned the right to receive the revenue in respect of two villages to the predecessors-in-title of the defendants. Subsequently the proprietors of the soil died out or became extinct and a settlement of the proprietary rights was made with the assignees of the land revenue, but no grant of the land was made in their favour. The defendants mortgaged the villages and the mortgagees obtained a decree on foot of the mortgage. In execution of the decree;

Held, (1) that the mortgagors held two separate capacities with respect to the village in question, that is to say, that they were assignees of land revenue and also the holders of the proprietary right;

Pensions Act—concld.

(2) that in the absence of a revenue-free grant from the Government, it could not be said that there was a merger of the two different rights.

(3) that the pure *zamindari* rights of the defendants in the villages could be sold in execution of the mortgage-decree but that their right to receive the Government revenue as assignees thereof was protected from sale by the provisions of s. 4 of the Pensions Act. A LALLA BABU *v.* LAL BAHADUR, 23 A. L. J. 463; L. R. 6 A. 289 Civ.; (1925) A. I. R. (A.) 565; 47 A. 557 569

Ports Act (XV of 1908), s. 54—"Disobedience", meaning of. *See* CR. P. C., 1898, s. 264 914

Practice—*Departure from rules of procedure—Privy Council, whether will interfere—Interpretation of Act—Special leave, whether will be granted.*

The Privy Council will interfere if there has been any departure from the ordinary rules of procedure such as to amount to a denial of ordinary justice but where the matter depends upon the particular view taken of sections of an Indian Act, it cannot be said that grave and substantial injustice has been done and special leave to appeal to the Privy Council will not be granted. P C UMRA *v.* EMPEROR, (1925) A. I. R. (P. C.) 52; L. R. 6 A. (P. C.) 16; 21 L. W. 160; 48 M. L. J. 61; 2 O. W. N. 5; 27 Bom. L. R. 701; 3 Pat. L. R. 93 Cr.; 6 L. 45 (P. C.); 26 Cr. L. J. 1020 844

——— *Pleadings—Variance between pleadings and proof—Duty of Court.*

As a general rule a Court ought not to set up on behalf of a party a new case which has not been pleaded by him. Where, however, neither party in his pleadings discloses the entire truth and the findings adduced disclose a set of facts which is either midway between, or, at any rate, different from the case which either party has set up in his pleadings, the Court is bound to take notice of the true state of facts as proved by the evidence and to give effect to the legal rights which arise on that state of facts. O ABDUL GHAFOOR *v.* RAM SEWAK, 2 O. W. N. 364; 12 O. L. J. 342 822

Pre-emption—Custom. *See* CUSTOM 298

———*Pre-emptor associating stranger in suit, effect of.*

It is fatal for a plaintiff in a pre-emption suit to associate with him in that suit any person who is not entitled to pre-empt. A UMAR DARAZ *v.* SRI RAM DAS, 23 A. L. J. 198; (1925) A. I. R. (A.) 355; 47 A. 450 55

——— *Sale or lease—Nature of transaction—Fraud.*

Where in a suit for pre-emption the question arises as to the nature of the transaction sought to be pre-empted, the true nature of which has been mis-described, the question must be decided on the particular circumstances of the case.

A transaction is determined by the right which it confers on the transferee and not by the name with which it is labelled by the parties for a fraudulent object.

Fraud would be presumed where on the face of the document it appears that a transfer was miscalled a lease when it in reality was a sale of under-proprietary rights.

A transfer was described as a perpetual lease and the consideration for the transfer was described as *nazrana*. The transferee was, however, given the power of transfer, and indulgence was granted to him so far that he was to have his name entered in the

Pre-emption—concld.

list of under-proprietors in the village record. In a suit for pre-emption :

Held, that the transaction was really a sale of under-proprietary rights and not a lease and was consequently liable to pre-emption. O HAR BUX SINGH *v.* RAM AUTAR, 1 O. W. N. 897 347

——— *Transfer by one of several vendees in favour of person having superior right, before institution of suit, effect of—Attestation of sale-deed—Estoppel.*

If out of several vendees the one whose rights are inferior to those of the pre-emptor sells his share, before the institution of a suit for pre-emption, to a person having rights not inferior to those of the pre-emptor, the claim of the latter would be defeated.

The attestation of a deed does not by itself estop the person attesting from denying that he knew of the contents of the deed or that he consented to the transaction which it effected. L ABDUL AZIZ *v.* ABDULLA, (1925) A. I. R. (L.) 413 652

——— Wajib-ul-arz, *entry in, construction of—Sale to co-sharer of inferior class—Pre-emption by co-sharer of superior class.*

In the absence of specific words in a *wajib-ul-arz* giving priority in the case of a sale by a co-sharer belonging to one category to a co-sharer belonging to another category, a clause for pre-emption defining the rights of co-sharers *inter se* as against a stranger cannot be construed so as to give a right of pre-emption to a co-sharer of a superior class upon a sale to a co-sharer of an inferior class.

The *wajib-ul-arz* of a village provided that if a co-sharer wanted to sell his share the right of purchase would belong, in the first instance, to a co-sharer who was a paternal kinsman, then to a co-sharer of the *patti* and then to a co-sharer of the village, on payment of the proper price, in preference to a stranger :

Held, that the right of purchase under the clause was given in the order mentioned in the event of a sale to a stranger, and though the different categories in which priority was to be exercised were mentioned, they were subject to the main qualification that the question of priority would only arise where a sale to a stranger was made. A KALIKA SINGH *v.* RAM LAL SINGH, L. R. 6 A 150 Civ.; 47 A. 320; (1925) A. I. R. (A.) 378 92

Presidency Towns Insolvency Act (III of 1909)—*Insolvency—Transaction between insolvent and creditor, validity of—Fraud—Transaction, whether can be enforced against third party.*

A transaction between an insolvent and one of his creditors conducted behind the back of the Official Assignee and without informing the Court is null and void. Any such transaction is wholly repugnant to the scheme of the Presidency Towns Insolvency Act, inasmuch as the whole of the insolvent's estate vests in the Official Assignee, his affairs have to be investigated by the Official Assignee and by the Court which deals with his discharge, and there is nothing left for the insolvent to do except to perform his duties which are prescribed by the Act by giving information and assistance to the Official Assignee, and to proceed to take the steps necessary to obtain his discharge.

Plaintiff obtained a decree against the first defendant who was subsequently adjudged insolvent. Plaintiff thereupon compromised his claim against the first defendant by accepting a cash payment of a certain amount from the first defendant and taking

Presidency Towns Insolvency Act—concld.

promissory notes for a portion of the balance. The second defendant was induced to sign the promissory notes without receiving any consideration for them. In a suit to recover the amount of the promissory notes :

Held, (1) that the transaction between the plaintiff and the first defendant was null and void as against the Official Assignee, as being fraudulent ;

(2) that as the whole transaction was tainted with fraud the plaintiff could not succeed as against the second defendant either. B MOHANLAL MOTILAL SHAH *v* HARILAL BHOGILAL SHAH, 27 Bom. L. R. 419; (1925) A. I. R. (B.) 346 929

——— s. 55—*Transfer of all available assets by insolvent in favour of creditor, validity of—Good faith—Burden of proof—Principles applicable.*

If a trader assigns all his property, except on some substantial contemporaneous payment, or some substantial undertaking to make payment in future, the assignment amounts to an act of bankruptcy and, is void against the creditors of the assignor because nothing is left with which to carry on his business, whereas if he had received substantial assistance, something would have been left to carry on the business.

When a transaction is challenged under s. 55 of the Presidency Towns Insolvency Act, the onus of proving that the transfer was in good faith and for valuable consideration lies on the transferee.

Per *Buckland, J.*—In considering the effect of a transaction which is challenged under s. 55 of the Presidency Towns Insolvency Act, the facts must be considered in the light of the law of bankruptcy the object of which is to ensure rateable distribution of an insolvent's property among his creditors. A transaction which may in other circumstances be free from all taint may amount to an offence when it is established that it contravenes the law of bankruptcy. C OFFICIAL ASSIGNEE OF BENGAL *v.* YOKOHAMA SPECIE BANK, LTD., 29 C. W. N. 374; (1925) A. I. R. (C.) 640 392

——— ss. 55, 56—*Transfer by insolvent, validity of—Purchaser in good faith and for valuable consideration—Burden of proof.*

Section 55 of the Presidency Towns Insolvency Act is quite general and a transfer of property made by an insolvent falling within the provisions of that section is void altogether as against the Official Assignee unless it is shown by the transferee that he is a purchaser in good faith and for valuable consideration. O BANWARI LAL BHARGAVA *v.* BISHAMBHAR NATH TANDAN, 2 O. W. N. 221; (1925) A. I. R. (O.) 396 935

Principal and agent—*Commission agent and principal, relationship of, after contract has been carried into effect.*

The agreement between a commission agent and the party for whom he is acting may, at the outset, be that as between a principal and his agent, and so long as the contract remains executory the relationship of principal and agent may subsist between the parties. But after the contract of purchase has been effected the relationship of the parties *quoad* the contract of sale ceases to be that of principal and agent and ripens into that of vendor and purchaser, though it may be necessary to refer to some other prior agreement in order to ascertain the terms and conditions of the contract of sale. C MCLEOD & Co. *v.* JVAN JONES & Co. 218

Privy Council appeal—*Decree, whether can be objected to—Objection not taken in grounds of appeal.*

A litigant cannot be allowed to take exception to a decree before the Privy Council on a ground which he did not urge before the Court below and did not embody in his grounds of appeal. **P C** DHANRAJ JOHARMAL *v.* SONIBAL, 23 A. L. J. 273; (1925) A. I. R. (P. C.) 118; 2 O. W. N. 335; L. R. 6 A. (P. C.) 97; 27 Bom. L. R. 837; 21 N. L. R. 50; 52 C. 482; 49 M. L. J. 173; (1925) M. W. N. 692 (P. C.) **357**

——— *Finding of fact—Interference.*

Where the question depends not upon any question of law but upon the general conclusion that is to be drawn from many minute portions of the evidence, the Privy Council will not on appeal disturb the judgment of the Court below unless there are brought before them particular instances of where the Court below has gone wrong. **P C** JAGANNADHA RAO *v.* SURANARAYANARAJ, (1925) A. I. R. (P. C.) 31; 21 L. W. 436 (P. C.) **252**

Probate, application for—Dismissal for default, effect of—Subsequent application, whether maintainable. *See* SUCCESSION ACT, 1865, ss. 50, 187 **621**

Procedure—*Decree conditional on payment of money within prescribed period—Court closed on last day for payment—Payment, whether can be made on re-opening.*

Where a decree is passed conditional on the payment of money and a period is specified within which the payment must be made, it is open to the decree-holder, if the Court is closed on the last date on which the money could be deposited under the terms of the decree, to make the deposit on the day on which the Court re-opens. **A** MUHAMMAD HASHIM *v.* RADHA KRISHUN, L. R. 6 A. 287 Civ. **620**

——— *Hearing of case concluded—Delivery of judgment, date fixed for—Accused, absence of—Complainant, whether can be required to deposit process fees—Acquittal of accused, legality of.*

After the hearing of a summons case was concluded a date was fixed for delivery of judgment. On that date the complainant appeared but the accused did not appear and the Court made an order directing the complainant to deposit process fees to secure the attendance of the accused and the case was adjourned to another date. On the next date it appeared that the complainant had failed to deposit process fees as directed and the Court made an order that the case may be dismissed for default of prosecution and that the accused be acquitted:

Held, (1) that the order of the Court directing the complainant to deposit process fees for securing the attendance of the accused was entirely illegal and without jurisdiction;

(2) that the accused having failed to appear on the date fixed for the delivery of the judgment the Court should have cancelled his bond and should have issued a warrant for his arrest;

(3) that the order dismissing the complaint and directing the acquittal of the accused was consequently also illegal and without jurisdiction;

(4) that the case must, therefore, be remanded to the Trial Court with the direction that it should fix a fresh date for delivery of judgment and should deliver a judgment on that date on the evidence already before it. **A** BHIMMI *v.* PERSHADI, 23 A. L. J. 304; L. R. 6 A. 105 Cr.; 26 Cr. L. J. 963, (1925) A. I. R. (A.) 392 **419**

——— *Offer made by party to suit, acceptance of, effect of—Terms of offer, compliance with, effect of.*

Procedure—concld.

It is open to a litigant, be he plaintiff or defendant, at any stage of the proceedings to make an offer to the other side to bring litigation to a close, and if the offer is accepted and its terms are complied with accurately and fully, the promise made by the offerer must be carried out by him.

During the pendency of a suit the defendant made an offer that if a certain witness who was about to be examined on behalf of the plaintiff would eat food cooked by a certain woman and served by the plaintiff, the plaintiff's suit may be decreed. The offer was accepted by the plaintiff and the witness named in the offer ate food cooked by the woman named in the offer and served by the plaintiff:

Held, that the offer having been accepted and its terms having been carried out, the Court was bound to decree the suit. **A** RAM SUNDER MISRA *v.* JAI KARAN SINGH, 23 A. L. J. 251; L. R. 6 A. 270 Civ.; (1925) A. I. R. (A.) 271; 47 A. 456 **174**

——— *Set-off, whether can be forced on defendant—Jurisdiction.*

It is not for the plaintiff to force the defendant to claim a set-off.

A person claiming to recover a certain amount of money cannot claim the sum due from him to the defendant on an altogether different transaction and thus bring his claim within the jurisdiction of a Small Cause Court. **S** AYASING-UTTAMSING *v.* CHETANDAS-TANOOMAL **955**

——— *Small Cause transferred to regular list—Re-transfer to Small Cause list, validity of.*

A suit was originally filed as a Small Cause by the plaintiff. On the application of the defendant it was transferred to the regular list and became a regular suit until the record was closed. The Judge, however, without recording reasons re-transferred the case back to the Small Cause Court's list and eventually dismissed the suit on the merits:

Held, that there being an order by a competent Court that the suit may be tried as a regular suit and not as a Small Cause Court suit, the Judge had no power to set aside that order and to re-transfer the case back to the Small Cause Court's list. **B** RAGHO LAXMAN LOHAR *v.* GOVIND VAMANDHAPRE, 27 Bom. L. R. 246; (1925) A. I. R. (B.) 246 **820**

Provincial Insolvency Act (V of 1920), ss. 4, 5—*Stranger claimant, suit by—Jurisdiction of Civil Court, when barred—Possession, whether proof of title—Presumption.*

Long continued exclusive possession gives rise to a presumption that such possession had a lawful origin, *i. e.*, it originated in an exclusive title.

If a stranger who is not bound to go to the Insolvency Court at all invites the decision of that Court upon the merits of a claim, he cannot afterwards turn round and question its jurisdiction. But where the Insolvency Court has refused to entertain and enquire into or adjudicate upon the rights of the stranger claimant or the latter has not preferred any claim for the consideration of the Bankruptcy Court there is no decision by it, which would operate to oust the jurisdiction of the Civil Court to decide the matter. **N** DEORAO *v.* VITHAL **1000**

——— **s. 24 (2)**—*Examination of debtor, absence of—Burden of proof—Adjudication—Petition, whether can be based on debt to which creditor is entitled along with others—Bond executed by debtor along with others, whether can form basis of petition—Suit to enforce bond, pendency of, effect of.*

One of several persons who is entitled to the benefit of a decree is not entitled to utilize the decretal debt so as to found upon it a petition for adjudication against the judgment-debtor.

A bond upon which a debtor is jointly and severally liable along with other persons is sufficient to support a petition for adjudication. It is immaterial that the petitioning creditor may not be absolutely entitled to all the money secured by the bond, it is enough that the bond is in his favour.

The fact that a suit has been commenced to enforce the bond is not necessarily a bar to a petition for adjudication based on the bond.

The provisions of sub-s. (2) of s. 24 of the Provincial Insolvency Act, with regard to the examination of the debtor are mandatory, but are applicable only to a case where the debtor is present. Where a debtor alleges a contravention of the provisions of the sub-section the onus is on him to show that he was present in Court at the time of the hearing of the petition. C ANANTA KUMAR SAHA *v.* SADHU CHARAN SAHA PODDAR 751

——— s. 28—*Hindu Law—Joint family—Insolvency of father—Share of sons, whether vests in Receiver—Transfer after adjudication, validity of.*

When a member of a joint Hindu family is adjudicated as an insolvent, the undivided share of his sons but not that of other members of the family, vests in the Receiver, though the sons' share would not be liable for any debts which they could prove to be illegal or immoral.

Section 28 of the Provincial Insolvency Act protects the secured creditor in respect of his security, but it does not protect the insolvent in respect of a voluntary transfer of his property. N SHIOGOPAL *v.* SUKHRU 957

——— ss. 39, 44—*Composition, whether binding on creditor not entered in schedule—Cancellation of adjudication, whether amounts to discharge.*

Section 39 of the Provincial Insolvency Act makes a composition binding on creditors entered in the schedule. A creditor who is not entered in the schedule and who has not consented to the composition is not bound by the composition.

An order cancelling an adjudication does not amount to a discharge within the meaning of s. 44 of the Provincial Insolvency Act. L RAM SARUP *v.* KHALIL-UL-RAHMAN, 26 P. L. R. 117; (1925) A. I. R. (L.) 376 348

Provincial Small Cause Courts Act (IX of 1887), s. 17——*"Amount due under decree," meaning of.*

The words "the amount due from him under the decree" in s. 17 of the Provincial Small Cause Courts Act, mean the amount due under the decree at the date it was given and not the amount due under the decree at the time of presenting the application. A BISESAR RAM-DASSI RAM *v.* HAR KISHAN-PAHLAD RAI, 23 A. L. J. 296; L. R. 6 A. 345 Civ.; (1925) A. I. R. (A.) 412 370

——— s. 23. *See* C. P. C., 1908, s. 102 659

——— ss. 23, 25—*Suit for rent—Denial of tenancy—Question of title—Order directing return of plaint—Revision, whether lies.*

Where a plaint is returned by a Small Cause Court under s. 23 of the Provincial Small Cause Courts Act, the case is disposed of by the Small Cause Court by its decision that it has no jurisdiction, and its order is open to revision under s. 25 of the Act.

The matter is, however, different where the Court after contest comes to the contrary opinion and decides that it has jurisdiction and continues with the proceedings. In such a case the proceedings are still pending in the Small Cause Court and no case has been decided, and the provisions of s. 25 of the Provincial Small Cause Courts Act would consequently be inapplicable.

Where in a suit for rent the defendant denies the tenancy set up by the plaintiff and claims ownership of the premises for a third person, no question of title arises between the parties, inasmuch as the defendant does not claim title in himself. The question at issue is one of tenancy only and a Court of Small Causes is capable of deciding that question. O DHANI RAM *v.* MAIKOO LAL, 1. O. W. N. 957 286

——— s. 25. *See* BUNDELKHAND ALIENATION OF LAND ACT, 1903, ss. 2, 16 262

——— Sch. II, Art. 28. *See* C. P. C., 1908, s. 102 354

——— Art. 31—*Legal representative of tenant holding over—Suit for damages for use and occupation, whether cognizable by Small Cause Court.*

The legal representative of a tenant holding over is a mere trespasser.

A suit for damages for use and occupation against such a person when the title of the plaintiff is in dispute falls within the purview of Art. 31 of Sch. II to the Provincial Small Cause Courts Act and is not cognizable by a Court of Small Causes. M KOPPA ANKI *v.* PONNAPALLI VENKATA SOBAYYA, 48 M. L. J. 685; (1925) A. I. R. (M.) 884 695

——— Art. 35 (a) (ii)—*Suit to recover value of property misappropriated by defendant—Small Cause Court, jurisdiction of.*

Plaintiff alleged that he gave a certain quantity of silver to the defendant to be made into bangles and that when the bangles were delivered to him he found that base metal had been substituted for silver. On the basis of this allegation he sued the defendant to recover a certain sum from him as the amount of which he had been defrauded by the defendant :

Held, that the allegations in the plaint amounted to an offence of criminal breach of trust and that the suit fell within the purview of Art. 35 (*a*) (*ii*) of Sch. II to the Provincial Small Cause Courts Act, and was, consequently, excluded from the cognizance of the Small Cause Court. O LALTA PRASAD *v.* MAHRAJ BAHADAR, 2 O. W. N. 374; 12 O. L. J. 358 346

Public Demands Recovery Act (I B. C. of 1895), s. 7—*Bengal Drainage Act (VI of 1880), s. 37—Notice under s. 37, absence of—Certificate proceedings, validity of.*

The failure to serve a notice in accordance with the provisions of s. 37 of the Bengal Drainage Act vitiates certificate proceedings under the Bengal Public Demands Recovery Act. C ARUN CHANDRA SINGH *v.* SECRETARY OF STATE FOR INDIA 339

Punjab Courts Act (VI of 1918), s. 41 (3). *See* PUNJAB TENANCY ACT, 1887, s. 59 (2) 902

Punjab Tenancy Act (XVI of 1887), s. 59 (2)—*Punjab Courts Act (VI of 1918), s. 41 (3)—Occupancy tenancy—Succession — Collaterals—Custom—Appeal second—Certificate, whether necessary.*

Under s. 59 (2) of the Punjab Tenancy Act, the right of succession to an occupancy tenancy must, where the collaterals are governed by custom, be regulated by the rules of Customary Law, and a finding with regard to such custom is not open to challenge in second appeal in the absence of a certificate under s. 41 (3) of the Punjab Courts Act. L PIRA *v.* MELA 902

Railway Company—*Carriage of goods—Risk Note Form "B"—Loss of goods—Wilful neglect—Burden of proof—"Robbery," whether synonymous with "theft."*

Certain goods were consigned for carriage to the defendant Railway Company under Risk Note Form "B." When the wagon containing the goods arrived at an intermediate station, it was found that the seals had been broken. Fresh seals were thereupon fixed on the wagon and it was shunted to a siding. Three days afterwards the wagon was opened by the Railway officials and its contents were checked whereupon a part of the goods were found missing. In a suit by the consignee to recover the price of the missing goods:

Held, that the action of the Railway officials at the intermediate station did not amount to wilful neglect and that the plaintiff having failed to prove that the loss had been caused through theft by the Railway servants he was not entitled to recover.

The word "robbery" in the proviso to Risk Note Form "B" is synonymous with the word "theft" which appears in the earlier portion of the Risk Note. L FIRM GULABRAI-LAHORI MAL *v.* E. I. RY. CO., CALCUTTA, 6 L. 305; (1925) A. I. R. (L.) 515 **592**

———*Carriage of goods—Risk Note Form "B"—Wilful neglect—Waggon sealed and not locked.*

In a suit to recover damages for the loss of goods consigned to the defendant Railway Company for carriage under Risk Note Form "B" it was found that the Company had sealed the waggon which contained the goods on one side and that the seal was broken and it was not known how the goods disappeared;

Held, that the putting of a seal instead of a lock on the waggon did not amount to wilful neglect on the part of the Railway Company and that the plaintiff's suit was liable to be dismissed. O FIRM BHAGAI RAM-BHADUR RAM *v.* B. N. W. RY., 1 O. W. N. 766 **215**

———*Risk Note Form "B"—Suit for damages for loss of goods—Burden of proof—Duty of Company—"Wilful neglect," meaning of—"Robbery," whether theft—Loss occasioned by failure of guard to stop train—Liability of Company.*

In a suit to recover damages for the loss of goods consigned to a Railway Company for carriage under Risk Note Form "B" the onus lies on the plaintiff to prove that the loss was due to theft or to the wilful neglect of the Company's servants. The Company must give *prima facie* or formal evidence that so far as they know, the Company or its servants through whose hands the goods have passed are not keeping back the goods. For this purpose they must tender their servants for cross-examination, and it is for the plaintiff, if he can, to prove by such cross-examination wilful neglect of, or theft by, the railway servants. It is not necessary for the plaintiff to show that there is no other possible explanation for the loss. It is enough if the facts proved strongly preponderate in favour of the theory which fixes the Company with liability.

Negligence is really the absence of such care as it was the duty of the defendant to use.

The word "wilful" ordinarily implies nothing blameable, but merely that the person of whose action the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will.

The word "robbery" in Risk Note Form "B" is equivalent to theft.

Where the loss is found to have been due to the failure of the guard to stop the train, after he had noticed that the doors of the wagon containing the goods were open, the Company must be held to have been guilty of "wilful neglect". M B. B. & C. I. RY. CO. LTD. *v.* FIRM NATTAJI PRATAPCHAND, 48 M. L. J. 400; (1925) M. W. N. 186; 21 L. W. 728; (1925) A. I. R. (M.) 745 **79**

Railways Act (IX of 1890), ss. 47, 72—*Rules framed under s. 47—Goods consigned for carriage—Delivery of goods, proof of—Evidence other than Railway receipt and signature in Railway books, whether admissible.*

Neither s. 72 of the Railways Act nor the rules framed under s. 47 of that Act lay down any rules of evidence with regard to the proof of delivery of goods by a Railway.

The facts that a consignor is in possession of the Railway receipt in respect of goods consigned to a Railway Company for carriage and that his signature as to the receipt of those goods does not appear in the Railway books, are not conclusive evidence that the goods have not been delivered to him, inasmuch as these facts are not the only evidence which is admissible to prove delivery of the goods. O DURGA PRASAD *v.* AGENT, BENGAL & N. W. RY., 12 O. L. J. 224; (1925) A. I. R. (O.) 389 **350**

———**s. 56.** *See* LIMITATION ACT, 1908, SCH. I, ARTS. 30, 31 **579**

Receiver *appointed by High Court—Subordinate Court, power of, to restrain Receiver from performing his duties—Procedure.*

It is not competent to a Subordinate Court to restrain a Receiver appointed by the High Court from performing his duties as a Receiver.

Where a Receiver is appointed in a suit pending on the Original Side of the High Court and is given permission to sell certain property, any person who desires to prevent the sale of the property by the Receiver must apply on the Original Side in the suit on notice to the Receiver asking the Court to direct the Receiver not to sell the property. C NURUDDIN AHMED *v.* SUBODH CHANDRA MITRA **808**

Record of Rights, *entry in—Presumption of correctness—Suit for declaration that entry is wrong—Burden of proof.*

Plaintiffs were landlords in a *patti* and defendants were tenants of certain land in the *patti* which belonged to persons other than the plaintiffs. A certain plot was recorded in the Record of Rights as *ghairmazrua bandh*, and as the property of the plaintiffs but certain trees standing on it were recorded as belonging to the plaintiffs and defendants jointly. Plaintiffs brought a suit for a declaration that the trees belonged to them and that the entry in the Record of Rights was wrong. It was found that the Survey Authorities in making the entry in dispute had proceeded solely on what was stated by the defendants on special oath which was administered to them at the instance of the plaintiffs' *gomashta*:

Held, (1) that the initial onus was on the plaintiffs to prove that the entry in the Record of Rights was incorrect and that they were entitled to the trees to the exclusion of the defendants;

(2) that the entry in the Record of Rights being based on no foundation at all and the plot in dispute having been recorded in the Record of Rights as *ghairmazrua bandh* and as the property of the plaintiffs in which the defendants had no interest at

all, the presumption was that the trees standing on the plot belonged to the plaintiffs. Pat SHEO PERSHAD *v.* JHAMAN SINGH, 3 Pat. L. R. 87; (1925) A.I.R. (Pat.) 498 741

Registration Act (XVI of 1908), ss. 17, 47. *See* TRANSFER OF PROPERTY ACT, 1882, s. 52 568

——— **ss. 17, 49**—*List of properties allotted on partition signed and attested, whether partition deed—Registration, whether necessary—Admissibility in evidence to prove division of estate.*

The question whether a document is a deed of partition or a mere memorandum of partition is a pure question of fact to be decided on a perusal of the actual document.

After an award directing a partition was passed by *panchayatdars*, a list was drawn up which contained the shares given to the different members and was signed by them and attested by witnesses:

Held, that the document was a deed of partition declaring an interest in the immoveable property mentioned therein and, if unregistered, it was not admissible in evidence respecting any transaction affecting such property.

Semble:—If the document were looked at not as evidence of a transaction affecting immoveable property but merely in order to show that a division of status had taken place it would only evidence an intention to divide and not the actual division itself. M. VEERAPPAN *v.* MYLAI UDAYAN 285

——— **ss. 17 (1) (b), 49**—*Surety—Hypothecation deed, unregistered, whether admissible to prove personal liability.*

Appellant stood surety for a judgment-debtor and executed a deed hypothecating his house as security for the performance of the decree. The deed was not registered. In a statement made before the Court the appellant made himself personally liable for the decretal amount:

Held, (1) that the surety having made himself personally liable for the decretal amount, the unregistered hypothecation deed may be ignored and by virtue of the personal liability of the surety the very house which he had hypothecated by the unregistered deed could be attached and sold in satisfaction of the personal liability;

(2) that the hypothecation deed, though inadmissible in evidence in order to affect the house, for want of registration, was admissible in evidence in proof of the personal obligation which the surety had thereby undertaken. L BASANT LAL *v.* JOWAHIR SINGH, 7 L. L. J. 3; (1925) A. I. R. (L.) 356 609

——— **ss. 82, 83**—*Prosecution for offence under s. 82—Sanction of Registering Officer, whether necessary.*

The permission of the Registering Officer under s. 83 of the Registration Act is not a necessary condition precedent to the initiation of a prosecution by a private individual against a person for an offence under s. 82 of the Act. N INDRANI BAHU *v.* RANI BADI DULAIYA, 26 Cr. L. J. 1025 913

Res judicata—*Compromise rent-decree, previous, operation of, as regards rate of rent.*

A rent-decree passed in a previous suit on the basis of a compromise is, in the absence of the terms of the compromise, by itself no evidence to prove what the defendant admitted, and amounts only to proof of an admission in respect of the amount claimed. It does not operate as *res judicata* in a subsequent suit between the parties with regard to the rate of rent. C OFFICIAL TRUSTEE OF BENGAL *v.* SAGAR PAIK. 781

——— *Cross-appeals—Two decrees—Appeal against one decree, whether competent in absence of appeal from other decree.*

Where there are two decrees arising out of two appeals to a Subordinate Appellate Court and only one of such decrees is brought up in second appeal and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of *res judicata* or at all by reason of the failure of the appellant to appeal from the decree which does not prejudice him.

A suit to recover damages for a period of six years was decreed by the Court of first instance in respect of a period of five years. Both parties appealed, the defendant claiming in appeal that the whole suit ought to have been dismissed as time-barred and the plaintiff claiming that his suit with regard to the sixth year should also have been decreed. The two appeals were heard together and were disposed of by one judgment by which it was held that the plaintiff was entitled to claim damages for the sixth year and that no part of his claim was barred by time, but the rate of damages allowed by the First Court was reduced and the net result was that the decree which had been passed by the First Court in favour of the plaintiff was reduced in amount. Two separate decrees were prepared in the two appeals. The defendant filed a second appeal in the High Court only from the decree in the appeal filed by him in the lower Appellate Court in which his objection, that the whole suit ought to have been dismissed, was not allowed. It was objected by the plaintiff that the decree in the other appeal having become final, operated as *res judicata* and that the defendant's appeal was not, therefore, competent:

Held, that the decree in the other appeal, which had not been appealed from by the defendant, being substantially in his favour, the second appeal preferred by them was not barred by the fact that no formal appeal had been preferred from the decree in the other appeal. A RAM NARAIN *v.* NIHAL SINGH, L. R. 6 A. 222 Civ.; (1925) A. I. R. (A.) 488 804

Riparian owners, *rights and liabilities of—Obstruction—Injunction, suit for—Cause of action—Present use of water, whether necessary.*

Every riparian proprietor has, subject to similar natural rights of upper and lower proprietors, the right to have the water of a natural stream come to him in its ordinary and accustomed course, undiminished in flow, quantity and quality, and unaffected in temperature and to go from him without obstruction. The same principle applies to a natural stream flowing in an artificial channel.

An upper proprietor has, in the absence of a right acquired by contract or by prescriptive use, no right to dam back a river running through his land and impound as much of the water as he may find convenient for the purpose of irrigation, leaving only the surplus, if any, for the use of the proprietors below.

In such a case in order to give a riparian owner a cause of action for a suit it is not necessary that the plaintiff or any other riparian proprietor should make any actual use of the water at the time of the suit; it is sufficient if he is prevented by the action of the defendant from any possible use of the water due to

Riparian owners—concld.

the obstruction caused by erecting the dam. N BHIKU *v.* R. M. DOYE, 8 N. L. J. 41; (1925) A. I. R. (N.) 273 184

Sale of goods—*Acceptance of bill against documents —Suit on bill—Consideration, want of—Burden of proof.*

A purchaser of goods who has accepted a bill against documents is under an obligation, as the acceptor of the negotiable instrument, to pay for the value of the instrument according to its tenor, notwithstanding that at the time when the bill is duly presented for payment the goods may not have arrived at the place where they are to be delivered and, therefore, the purchaser may not have had an opportunity before payment of examining the goods. The position in law of such a purchaser is this that although he is bound to honour the bill according to its tenor the payment of the bill will not in any way prejudice his right subsequently to reject the goods if he is entitled to do so under the contract after examination. But in a suit to recover the amount of the bill the onus is upon the defendant to prove that no consideration passed to him which would sanction the obligation under which he accepted the bill. C MCLEOD & Co. *v.* IVAN JONES & Co. 218

Specific performance—*Agreement to re-sell—Strict compliance with terms—Part-performance, doctrine of, applicability of.*

A right to re-purchase reserved in a deed of sale must be exercised according to the strict terms of the covenant.

It is not every kind of part-performance that will attract the operation of the doctrine of part-performance. The acts relied upon as part-performance must be unequivocal and in their own nature referable to some such agreement as that alleged. They must be consistent with the contract alleged and also such as cannot be referred to any other title than the contract, nor must they have been done with any other view or design than to perform the contract.

Where the main contract is one of re-sale and there is a subsidiary contract of tenancy upto the period allowed for the enforcement of the contract of re-sale, and all the acts of part-performance are explainable either as due to some inaction or to a willingness to continue the tenancy as one from month to month, the doctrine of part-performance can have no applicability. M DAKSHINAMURTHI MUDALIAR *v.* DHANAKOTI AMMAL, 48 M. L. J. 661 552

Specific Relief Act (I of 1877), ss. 12, 20, 22—*Agreement to sell immoveable property—Penalty for default—Specific performance, whether should be decreed.*

A party to an agreement to sell immoveable property cannot be allowed to evade specific performance of the agreement merely because the agreement provides a penalty to be paid on default.

In a suit for specific performance of an agreement to sell immoveable property the onus is upon the defendant to show that the case is one in which the Court should not exercise its discretion and grant specific performance in favour of the plaintiff. L NAWAB *v.* HUKAM DIN, 2 L. C. 149 511

——— s. 23. *See* HINDU LAW—JAINS 724

——— s. 42—*Declaratory decree, when to be granted.*

The grant of a declaratory decree is a matter within the discretion of the Court and the Court is not bound to make a declaratory decree, simply because it is within its competence to do so. A declaratory decree should not be granted where the grant of the decree would be a useless affair. A LAKSHMI CHAND *v.* LILA DHAR, L. R. 6 A. 111 Rev. 182

——— s. 42—*Limitation Act (IX of 1908), Sch. I, Art. 120—Mortgage—Declaration of title, suit for, by mortgagor against mortgagee, whether maintainable —Revenue Records, entry in—Adjudication by Civil Court—Revenue proceedings after civil adjudication—Limitation, commencement of.*

Where after an entry is made in the Revenue Records which is adverse to the interests of the plaintiff, the latter obtains an adjudication of a Civil Court in his favour relating to the subject of such entry, but subsequently to such adjudication and in spite of it, proceedings are taken in the Revenue Courts the result of which is adverse to the plaintiff, there is a fresh denial of his rights as the result of such proceedings, and limitation in respect of a suit for declaration of his rights by the plaintiff commences to run not from the date of the first adverse entry but from the date of the fresh denial of his rights after the adjudication by the Civil Court in his favour.

A mortgagor has sixty years from the date of the mortgage within which to redeem the mortgaged property by tendering the mortgage money. If before the expiry of that period it turns out that the mortgagee is denying the title of the mortgagor and is casting a cloud on his title and there is a danger that by lapse of time reliable evidence may disappear it is open to the mortgagor to bring a suit for a mere declaration of his title if he is not prepared to pay the mortgage money at once and to redeem the property. A GAJADHAR SINGH *v.* HARI SINGH, 23 A. L. J. 291; L. R. 6 A. 237 Civ. & L. R. 6 A. 95 Rev.; 47 A. 416; (1925) A. I. R. (A.) 421 647

——— ss. 42, 45—*Suit to declare electoral rolls illegal and for injunction restraining election, nature of—Writ of mandamus—District Judge, jurisdiction of.*

A District Judge has no jurisdiction to make any order which would be in the nature of a *mandamus* in a suit under s. 45 of the Specific Relief Act. That jurisdiction has been given only to the High Courts mentioned in the section and it can only be exercised within the local limits of their Ordinary Original Civil Jurisdiction.

Plaintiff filed a suit against the Secretary of State for India in Council and the Collector of a District praying for a declaration that the preparation and publication of the lists for voters for a certain District Board constituency was illegal, void and *ultra vires* and that no valid election to the District Board could be held under those lists; he also prayed for an injunction restraining the Collector himself or by his subordinates from holding any elections to the District Board under the alleged illegal lists:

Held, that the suit fell within the purview of s. 45 of the Specific Relief Act and that the District Judge had no jurisdiction to grant an *interim* injunction in the terms prayed for by the plaintiff. B KANAIYALAL NANALAL DESAI *v.* SECRETARY OF STATE FOR INDIA, 27 Bom. L. R. 368; (1925) A. I. R. (B.) 255 475

——— s. 45. *See* CITY OF BOMBAY MUNICIPAL ACT, 1888, ss. 3 (*z*), 394, 515 771

——— s. 56 (1). *See* C. P. C., 1908, O. II, R. 2 994

Stamp Act (II of 1899), s. 35. *See* EVIDENCE ACT, 1872, s. 91 382

Subrogation, doctrine of, applicability of. *See* TRANSFER OF PROPERTY ACT, 1882, s. 101 264

Succession Act (X of 1865), ss. 43, 187. *See* C. P. C., 1908, s. 102 354

——— **ss. 50, 187**—*Hindu Wills Act (XXI of 1870)—Attestation—Witnesses, whether must attest in each other's presence—Unprobated Will, whether can be set up in defence—Probate, application for—Dismissal for default, effect of—Subsequent application, whether maintainable—Civil Procedure Code (Act V of 1908), s. 11, O. IX, rr. 8, 9.*

Where a person asks another to attest a document it may be legitimately inferred that he admits that the document has been executed by him and the person whom he wants to attest is required to attest the document in token of the executant's admission of execution.

Section 50 of the Succession Act, which is made applicable to Hindu Wills by the Hindu Wills Act, does not require the witnesses to a Will to attest the Will in the presence of each other.

Where a Will is disputed several years after its alleged execution, one important test is to see what was the conduct of the parties; and where the conduct of the parties can only be rationally explained by the fact of the existence of a Will, it will have a considerable bearing in appreciating the evidence of the witnesses as to its genuineness.

Section 187 of the Succession Act does not say that an unprobated Will should not be looked into for any purpose whatever. It only says that title cannot be proved to establish a claim as a legatee without taking out Probate of the Will. Where a plaintiff comes into Court claiming as on an intestate succession, his claim can be displaced by proving that the deceased did not die intestate but left a Will. In such a case the plaintiff who claims adversely to the Will is out of Court irrespective of any proof of claim or title by the defendant. In cases where the plaintiff necessarily fails on the ground that there is a Will left by a deceased person and that by reason of the Will his claim to succeed to the estate of the deceased on the ground of intestacy under the ordinary law is not sustainable, there is nothing to prevent the defendant from pleading and proving the existence of the Will. It is unnecessary in such cases for the defendant to prove any independent title of his own.

The dismissal for default of an application for Probate would not debar an application by another person claiming an interest under the Will or by the executor himself. An executor presenting an application for Probate of a Will cannot be regarded as a plaintiff who brings a suit in respect of a cause of action.

Where a suit is dismissed for default it does not extinguish the right of the party whose suit is dismissed. All it involves at best is that he cannot file a fresh suit in respect of the same cause of action. Where he is in the position of a defendant in another action it is open to him as defendant to set up his title as a bar to the plaintiff's suit.

A dismissal for non-prosecution or for the absence of the plaintiff does not operate as *res judicata*. M GANSHAMDOSS NARAYANDOSS *v.* SARASVATHI BAI, 21 L. W. 415; (1925) M. W. N. 285; (1925) A. I. R. (M.) 861 621

——— **ss. 173, 174, 175, 176**—*Evidence Act (I of 1872), s. 115—Will—Statement that certain property belonged to testator, admissibility of—Election by legatee—Estoppel.*

Succession Act—concld.

A Will made by a Hindu testator contained the following clause:—"I do hereby direct that all properties moveable and immoveable standing in the name of my wife including the house No. 45, G. P. C. Lane Calcutta, and all household furniture and articles of domestic use shall remain in the possession of my said wife who shall during her life enjoy all the income and profits arising therefrom. But my said wife shall have no power to sell, mortgage or dispose of any such property. After the death of my said wife the same shall form a part of the residue and remainder of my estate and shall be divided equally amongst my sons." After the death of the testator his widow sold one of the houses standing in her name and the executors of the Will of her husband joined in the sale. With the sale-proceeds and certain moneys paid to the widow by the executors which represented the share of the widow in the income of a certain business which was being carried on in the name of the testator, the widow purchased another house in her own name. Subsequently she sold this house also representing herself to be its real owner stating that she had purchased it with her *stridhan* money and that it was not included in her husband's estate. The executors of her husband's Will and her sons joined in this sale-deed also. Disputes subsequently arose as to whether the house mentioned specifically in the testator's Will and certain other houses were the property of the widow or of the testator:

Held, (1) that the statement in the Will that the house mentioned in the Will and certain other property standing in the name of the widow belonged to the testator was not admissible in evidence as a statement with regard to the title to the houses, but that the fact that the testator had treated the house specifically as being his to dispose of by Will was admissible as conduct on his part in regard to the ownership of the houses which showed what his attitude was shortly before his death, and that the Court was entitled to draw an inference from it as to his intention when he supplied the purchase-money;

(2) that the widow and her representatives were not estopped from setting up their ownership of the houses by virtue of any declaration or act of the widow, unless she had done or said anything which had caused the executors to believe something to be true and to act on such belief, which would operate as an estoppel under s. 115 of the Evidence Act;

(3) that the widow being a *pardanashin* lady of slight education and there being no evidence that the Will was ever explained to her, and the executors never having called upon her as they were required to do under s. 176 of the Succession Act to make her election under the Will, no case of an election had been made out.

Under s. 173 of the Succession Act acceptance of a benefit given by a Will constitutes an election by the legatee to take under the Will if he has knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances. Under s. 174 of the Act such knowledge or waiver of enquiry shall, in the absence of evidence to the contrary, be presumed if the legatee has enjoyed for two years the benefits provided for him by the Will without doing any act to express dissent. C INDUBALA DEBI *v.* MANMATHA NATH ROY, 41 C. L. J. 258; (1925) A. I. R. (C.) 724. 404

ults Valuation Act (VII of 1887), s. 8. *See* COURT FEES ACT, 1870, s. 7 *ii*, *iv* (*c*). 801

——— **s. 8.** *See* COURT FEES ACT, 1870, s. 7 *iv* (*c*) 190

Tariff Act (VIII of 1894), s. 10—*"Increase," meaning of—Contract after increase of tax—Contract Act (IX of 1872), s. 74—Contract of sale—Misunderstanding of market rate—Breach of contract.*

The word "increase" in s. 10 of the Tariff Act refers to the act of Government and not to the actual levy of the excise at the factory. Parties who have entered into a contract of sale before the date on which the increase is to come into force and whose contract is still subsisting on that date, would come within the mischief of the section but the section has no reference to parties who enter into a contract of sale after the date on which the increase of the tax is to come into force although they may never have heard of such increase.

In a suit to recover the value of salt sold by the defendant to the plaintiff but not delivered, the fact that the market rate on the date of breach was due to a misunderstanding of the intentions of Government in respect of the levy of the enhanced rate of salt tax is no reason for refusing compensation to the plaintiff at that rate. M SOLAIMALAI THEVAN *v.* SINNATHAMBI PADAYACHI, 21 L. W. 434; (1925) M. W. N. 301; 49 M. L. J. 331 119

Transfer of Property Act (IV of 1882), ss. 2, 8, applicability of. *See* HINDU LAW—MITHILA SCHOOL 849

——— **s. 6 (e).** *See* CONTRACT ACT, 1872, ss. 253, 254 812

——— **s. 15.** *See* LIMITATION ACT, 1908, ss. 5, 14 17

——— **s. 41**—*Charge created on property by decree—Judgment-debtor, whether ostensible owner—Transferee, whether gets good title.*

A charge created by a decree on property in the possession of a judgment-debtor reduces his full ownership to a limited ownership and the judgment-debtor is in no better position than a mortgagor who retains for himself the equity of redemption, so that it is only the equity of redemption that he can dispose of. A transferee from such a judgment-debtor cannot claim the benefit of the provisions of s. 41 of the Transfer of Property Act. The judgment-debtor in such a case is not an "ostensible owner" within the meaning of the section so as to be able to give a good title to a transferee for value without notice. B KALLAPPA RAMAPPA DEYINNAWAR *v.* BALWANT DASO BETTIGERI, 27 Bom. L. R. 434; (1925) A. I. R. (B.) 343 951

——— **s. 41**—*Transferee from Hindu widow, whether can claim benefit of section.*

A Hindu widow enters into possession of her husband's estate by right and not with any express or implied consent of the reversioners. While she is alive the reversioners have no voice in the matter and have no right to intervene. She can continue in possession in spite of their protest. A transferee from the widow, who is in possession by her own right and as to whose possession no consent of the reversioners can be implied by law, cannot claim the protection of s. 41 of the Transfer of Property Act. A SHIB DEO MISRA *v.* RAM PRASAD, 22 A. L. J. 690; 46 A. 637; (1925) A. I. R. (A.) 79 938

——— **s. 43.** *See* C. P. TENANCY ACT, 1920, ss. 12, 13, 35 115

——— **s. 43.** *See* HINDU LAW—WIDOW 790

——— **s. 51.** *See* HINDU LAW 44

Transfer of Property Act—contd.

——— **s. 52**—Lis pendens, *doctrine of, applicability of—Decree based on compromise—Collusion.*

The fact that a decree is made in pursuance of a compromise does not exclude the application of the doctrine of *lis pendens* provided, however, that such compromise is not tainted by fraud or collusion. A suit may be collusive at its very inception or a decree may be obtained by collusion in a suit which was honestly begun.

Where during the progress of a suit honestly instituted, the parties enter into a collusive agreement of compromise with the express object of defeating the rights of an auction-purchaser at the Court sale pending the suit, the doctrine of *lis pendens* is inapplicable. M PERIAMURUGAPPA ASARI *v.* MANICKA CHETTY, 49 M. L. J. 68 213

——— **s. 52**—Lis pendens, *doctrine of, applicability of—Mortgage-decree—Property sold in execution of money-decree—Subsequent sale in execution of mortgage-decree—Priority between purchasers.*

In a mortgage suit the applicability of the doctrine of *lis pendens* continues upto the date when either foreclosure takes place or the property is sold and the mortgage-decree is satisfied.

Where a person purchases in execution of a simple money-decree property in respect of which a mortgage-decree has already been passed, the purchase is affected by the doctrine of *lis pendens* and must be regarded as subject to the rights of the auction-purchaser in execution of the mortgage-decree. The purchaser in execution of the simple money-decree in such a case is the representative of the mortgagor judgment-debtor and is bound by the execution proceedings against the mortgaged property. M MARINA AMMAYI *v.* CHAGANTI SITARAMAYA 714

——— **s. 52**—Lis pendens, *doctrine of, applicability of—Mortgage suit—Transfer of mortgaged property* pendente lite, *effect of—Purchaser, rights of—Mortgage-decree—Private sale by judgment-debtor in favour of decree-holder—Decree-holder, whether can eject transferee* pendente lite.

Section 52 of the Transfer of Property Act does not say that any conveyance made *pendente lite* is void. It only says that such a conveyance does not affect the rights of any party under any decree or order which may be made in the suit. The effect of the doctrine of *lis pendens* is not to annul the conveyance made in contravention of it, but only to render it subservient to the rights of the parties to the litigation.

During the pendency of a mortgage suit the mortgagor sold a portion of the mortgaged property to the defendant. The plaintiff obtained a preliminary decree for sale which was made final, and the Court ordered the property to be sold and the case was sent to the Collector for execution. The mortgagor judgment-debtor applied to the Collector for permission to sell the property to the plaintiff and, permission having been given, the sale was effected. The plaintiff then brought the present suit to eject the defendant from the property purchased by the latter from the mortgagor during the pendency of the mortgage suit:

Held, that the defendant's purchase was subject to the decree eventually passed in the mortgage suit and that, therefore, the plaintiff was entitled to enforce the mortgage decree against the property in the hands of the defendant but was not entitled to eject the defendant from the property in his capacity of private

Transfer of Property Act—contd.

purchaser of the property from the judgment-debtor in execution of the decree. N SHEOKISAN *v.* DOMA 995

——— s. 52—Lis pendens, *doctrine of, effect of.*

Under s. 52 of the Transfer of Property Act, a transfer during the pendency of a suit, of property directly and specifically in question in the suit, cannot affect the rights of any other party thereto with respect to any decree or order which may be made therein. N BALWANTRAO *v.* FARID SAHEB, 8 N. L. J. 44; (1925) A. I. R. (N.) 274; 21 N. L. R. 133 253

——— s. 52—*Registration Act (XVI of 1908), ss. 17, 47*—Lis pendens, *doctrine of, applicability of—Sale-deed executed before but registered after filing of suit.*

A sale-deed executed before but registered after the filing of a suit is not affected by the doctrine of *lis pendens.*

It is not the registration of a document which operates to create title but it is the document itself. The Registration Act makes valid such documents as soon as they are registered but the right conveyed or transferred is the right which exists in the transferor on the date of the document. When the document is presented for registration, the executant simply admits execution whereupon the document is registered and if the executant does not admit execution or if he refuses to appear before the Registrar, the law provides for compulsory registration of the document. In such a case it cannot be said that the executant by any act of his gives validity to the document. M *In re* AKKI GURU BASAPPA, 48 L. L. J. 496; (1925) A. I. R. (M.) 710 568

——— s. 54—*"Delivery" and "possession", meaning of—Adverse possession—Usufructuary mortgage—Oral sale of equity of redemption—Possession for 12 years thereafter—Prescriptive title, acquisition of.*

A usufructuary mortgagee to whom the mortgaged property is sold without a registered instrument and who holds possession of the property for over 12 years from the date of sale acquires a title to the property by adverse possession, even if the sale is held to be infructuous.

The principle that possession can be adverse only to a person competent to sue does not apply where the change in the character of the possession is by mutual consent.

A direction by a mortgagor to the mortgagee to keep the property as absolute owner amounts to "delivery" within the meaning of s. 54 of the Transfer of Property Act.

The word "delivery" in s. 54 of the Transfer of Property Act means only such delivery as the thing to be delivered is capable of.

The word "possession" in s. 54, Transfer of Property Act, cannot be taken to be synonymous with occupation. M SHEIK DAWOOD SAHIB *v.* MOHIDEEN BATCHA SAHIB, 48 M. L. J. 264; 21 L. W. 327; (1925) A. I. R. (M.) 566 331

——— s. 54—*Muhammadan Law—Transfer in lieu of dower, whether sale—Registration, whether necessary.*

Where a transfer of property is made in lieu of a sum of money, whether the money is paid in cash or by the extinction of a dower debt, the transaction comes within the definition of sale contained in s. 54 of the Transfer of Property Act which is applicable to a transaction between Muhammadans. Where the value of the property transferred is over Rs. 100, the transfer must be effected by a registered

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instrument. O MUHAMMAD ZAKI KHAN *v.* MUNNU SAHU, 2 O. W. N. 171; 12 O. L. J. 267; (1925) A. I. R. (O.) 407; 28 O. C. 227 176

——— s. 55—*Sale of immoveable property—Encumbrance, existence of, not disclosed—Purchaser compelled to pay amount of encumbrance, whether can recover from vendor.*

If, when an immoveable property is sold, the vendor does not disclose an encumbrance on the property and subsequently the vendee has to pay off the encumbrance to save the property from sale in execution of encumbrancer's decree, there is a breach of warranty of title and possession and the vendee is entitled to recover from the vendor the amount paid by him. A KANIZ FATMA *v.* IMAM-UD-DIN, L. R. 6 A. 319 Civ 756

——— s. 60—*Mortgage—Clog on equity of redemption, what amounts to—Usufructuary mortgage for 95 years—Covenant to pay interest after expiry of period, validity of.*

Where a mortgage-deed is drafted with the intention that redemption of the mortgaged property should be practically frustrated, that is to say, made so difficult and so hedged about that there is no likelihood of its ever being redeemed, the covenants contained in the deed must be regarded as clogs on the equity of redemption and the mortgagor is entitled to be relieved from the operation of such covenants.

A usufractuary mortgage contained a stipulation that the mortgage would not be redeemed for a period of 95 years, and that in addition to the rents and profits of the property, the mortgagee would at the expiration of the period of the mortgage be paid interest at a certain rate along with the principal money:

Held, that the stipulation was inequitable and that the mortgagor was entitled to redeem the mortgage property at any time on payment of the principal and interest at the stipulated rate. A RAJAI SINGH *v.* RANDHIR SINGH, L. R. 6 A. 314 Civ. 30

——— s. 60—*Mortgage—Redemption—Clog on equity of redemption—Long term, coupled with other conditions.*

The ordinary rule relating to clogs on the equity of redemption is that wherever the bargain is unconscionable and makes redemption impossible the mortgagor is entitled to relief.

A long term is not by itself sufficient to constitute a clog on the equity of redemption but it is a factor to be considered in arriving at the conclusion where the terms of the mortgage amount to such clog. A term of seventy-five years by itself raises a strong ground for interference.

Under a deed of mortgage the mortgagee secured a profit at the rate of 25 per cent. and the period of redemption was fixed at seventy-five years. There was a further condition that if redemption was not effected in the 76th year, a further term of 75 years would be added:

Held, that the intention of the mortgagee was to make redemption impossible and that the mortgagor was, therefore, entitled to relief. O MADHO SINGH *v.* LACHHMIN 909

——— ss. 60, 63—*Mortgage—Redemption—Covenant permitting mortgagee to continue in possession after redemption—Clog on equity of redemption—Grove, whether accession—Grove planted with consent of mortgagor—Mortgagor, whether bound to pay cost of planting grove.*

Conditions which prevent or impede the right of the mortgagor to obtain possession of the mortgaged property even after redemption, if entered into at the time when the mortgage is made, must be taken to operate as a clog on the equity of redemption. On the other hand, a subsequent contract which modifies the right of redemption may not amount to such a clog.

A covenant contained in a mortgage-deed under which the mortgagee even after redemption is entitled to retain the property on payment of a fixed rent operates as a clog on the equity of redemption and is unenforceable in a Court of Equity.

A contract for the grant of a lease does not run with the land and cannot bind the representatives of the original parties thereto.

A grove as a grove is an accession to the mortgaged property within the meaning of s. 63 of the Transfer of Property Act and is incapable of separate possession and enjoyment. In order to be enjoyed as a grove a grove has to be maintained and the fruits and the produce of it are to be enjoyed. This cannot be done without detriment to the land on which the grove stands. Therefore, where a grove is planted by a mortgagee on mortgaged land with the consent of the mortgagor, the mortgagee is entitled to insist that at the time of redemption the mortgagor must take the land with the grove and pay to the mortgagee the cost of planting the grove. A PARMANAND *v.* MATA DIN RAI, 23 A. L. J. 307; L. R. 6 A. 305 Civ.; (1925) A. I. R. (A.) 427; 47 A. 582 **477**

——— **ss. 60, 72, 83, 84**—*Mortgage—Money spent by mortgagee in litigation, whether can be charged —"Mortgage-money," "amount due on mortgage," meaning of—Tender, insufficient, effect of—Bombay Regulation V of 1827, s. 14, applicability of.*

Section 72 (c) of the Transfer of Property Act cannot be taken to imply that a mortgagee not in possession has no right to charge the mortgaged property for payments properly made by him in relation to the security.

Under the ordinary law of mortgage the mortgagor is bound, so long as the equity of redemption remains with him, to indemnify the estate against expenses incurred by the mortgagee in protecting the title.

An incumbrancer is always entitled to add to his security the costs of proceedings to which he is properly made party in respect of his incumbrance.

The expression "the amount remaining due on the mortgage" used in ss. 83 and 84 of the Transfer of Property Act is a very wide one, and covers any just allowances or costs which can be tacked on under the ordinary law of mortgage.

The words "mortgage-money" in s. 60 of the Transfer of Property Act must be taken as including all money which, on taking an account between the parties, may be properly allowed to the mortgagee.

Section 14 of the Bombay Regulation V of 1827 must be read as if the words "in the absence of a contract to the contrary" preceded the operative words of the section.

If a debtor-mortgagor tenders an insufficient sum in payment of the entire mortgage-debt due from him and asks that the mortgagee shall accept that tender as being the full amount due to him under his mortgage, s. 14 of the Bombay Regulation V of 1827 will not operate to allow cessation of interest on the insufficient amount tendered. B NADERSHAW SHERIARJI RABADI *v.* SHIRINBAI BAPUJI MUSA, 25 Bom. L. R. 839; 1924) A. I. R. (B.) 264 **129**

——— **ss. 60, 101**—*Mortgage, indivisibility of— Mortgagee purchasing rights of one of several mortgagors in satisfaction of entire debt—Suit by puisne mortgagee—Option.*

In order that a mortgage may fully attain its end of securing satisfaction of the entire obligation in the rank and with the efficacy which the law or the will of the parties determined, it is essential that it should not suffer any disintegration. This character of indivisibility exists not only with reference to the mortgagee, who may generally be more benefited thereby, but also with reference to the mortgagor. And save as a matter of special arrangement and bargain entered into between all the persons interested, neither the mortgagor nor the mortgagee, nor persons acquiring through either a partial interest in the subject, can, under the mortgage, get relief except in consonance with the principle of indivisibility.

The mere circumstance that by a contract between the prior mortgagee and one of the mortgagors, the prior mortgagee purchases the share of that mortgagor in the mortgaged property in full satisfaction of the whole of the mortgage-debt due to him, cannot affect the principle of the indivisibility of the mortgage. In such a case the prior mortgagee has under s. 101 of the Transfer of Property Act, in answer to a claim based upon an intermediate mortgage, the option to stand by his purchase or to give up his rights thereunder, and fall back on his own prior mortgage. Where he elects to fall back on his prior mortgage and disclaims his rights *qua* owner of the equity of redemption the only capacity which remains with him is that of a prior mortgagee, and in virtue of that capacity he is entitled to demand the entire debt due to him from whomsoever may claim to recover the property in his possession by redemption. N LAXMANSINGH *v.* JANARDAN, 20 N. L. R. 115; (1924) A. I R. (N.) 266 **87**

——— **s. 68**—*Mortgage of occupancy holding—Sub-mortgage, legality of—Sub-mortgagee not put in possession—Suit to recover mortgage money, maintainability of.*

Where a mortgagee of an occupancy holding purports to make a sub-mortgage of his mortgagee rights, he is doing nothing forbidden by law and the sub-mortgagee is entitled to enforce his sub-mortgage by any of the means which are open to him in law. For instance, if his mortgagor fails to put him in possession of the mortgaged property, the sub-mortgagee may bring a suit to recover the mortgage money under s. 68 of the Transfer of Property Act. A RAM SARUP CHAUBE *v.* RAM DULAR PANDE, L. R. 6 A. 123 Rev **439**

——— **s. 72.** *See* C. P. C., 1908, O. XXI, R. 89 **829**

——— **s. 76**—*Mortgage— Mortgagee encroaching upon mortgaged land—Suit by mortgagor for restoration—Remedy.*

It is the duty of a mortgagee, when he takes possession of the mortgaged property, to manage it as a person of ordinary prudence would manage it if it were his own. A duty is cast on him to see that the property is not lost by any encroachment. So long as he is in possession as mortgagee he is trustee for the mortgagor and is bound to protect his rights.

Where immoveable property is trespassed upon, a money compensation is not the proper remedy to the plaintiff.

Defendants were put in possession of certain property by the plaintiff under a mortgage for a definite

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period. Shortly before the expiry of the period they erected a building on land adjoining to the mortgaged land and encroached upon a portion of the mortgaged land. After redeeming the property the plaintiff brought a suit for demolition of that portion of the building which stood on the mortgaged land and for restoration of the site to its original position :

Held, that during the period of the mortgage the defendants were entitled to use the land in any manner they pleased provided that on redemption they restored it to the same condition in which it was when the mortgage was made, and that, therefore, no question of acquiescence on the part of the plaintiff could arise and the plaintiff was entitled to have the building demolished and the site restored to its original condition. A DIP NARAIN SINGH *v.* JAGMOHAN AHIR, L. R. 6 A. 252 Civ.; (1925) A. I. R. (A.) 576 15

——— s. 98—*Mortgage, construction of—Anomalous mortgage—Lease for fixed period—Continuance in possession—Payment of rent—Implied tenancy.*

The terms of a mortgage in favour of the plaintiff were as follows :—"Having given to you the land for cultivation for an equal share for a period of three years, I have taken a loan of Rs. 750. This amount shall bear interest at the rate of 10 per cent. per year and the interest of each year shall be added on to the principal amount and the same accumulated. You shall obtain payment of the principal and interest by means of sale of the mortgaged property. As regards the *rajabhagam* paddy, etc., you shall be given the *rajabhagam* paddy at the *rajabhagam* rates." Eight years after the date of the mortgage the mortgagor gave a lease of the mortgaged property to the defendant who dispossessed the plaintiff. In a suit by the latter for possession :

Held, (1) that the document was in its terms neither a simple nor a usufructuary mortgage but was an anomalous mortgage and the rights of the parties must be determined according to its terms ;

(2) that the plaintiff had only a right to keep possession of the property for a period of three years fixed in the deed;

(3) that plaintiff's continuance in possession subsequently on payment of the *rajabhagam* to the mortgagor created an implied tenancy which in this case was a yearly one, the property leased being agricultural land ;

(4) that till the plaintiff's tenancy was properly and legally put an end to, he was entitled to enforce it. M GOPINATHA CHOWDHARI *v.* KRISTNO CHOWDHARI, 21 L. W. 582; (1925) A. I. R. (M.) 881 669

——— s. 101—*Limitation Act (IX of 1908), ss. 19, 20, Sch. I, Art. 132—Mortgages, prior and subsequent —Subsequent mortgagee paying off prior mortgage—Subrogation, doctrine of, applicability of—Intention of parties—Presumption—Suit by subsequent mortgagee on basis of prior mortgage redeemed by him—Limitation.*

Where a subsequent mortgagee pays off a prior mortgage, an intention to hold up the mortgage redeemed as a shield for his own benefit as against intermediate mortgagees must be presumed on behalf of the person paying off the mortgage, whenever necessity arises for such a presumption.

Where a man had a right to act in either of two ways he must be assumed to have acted according to his interest.

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Where a subsequent mortgagee paid off a decree obtained by a prior mortgagee the day after the execution of his own mortgage and obtained a receipt in the name of the mortgagor but kept it with himself and recited the fact of the existence of the decree on the prior mortgage in his own mortgage stating that part of the money under the mortgage was required for paying off the decree:

Held, that all the circumstances pointed to the conclusion that it was the intention of the subsequent mortgagee to keep the security under the prior mortgage alive for his own benefit.

The principle underlying s. 101 of the Transfer of Property Act is applicable to the case of a subsequent mortgagee paying off a prior mortgage.

Where a prior mortgage is paid off with money borrowed from a subsequent mortgagee and the document creating the first charge is handed over to the subsequent mortgagee, the latter is entitled to the benefit of subrogation on the principle that there is an assignment in his favour by operation of law.

The advantages of the doctrine of subrogation are available to strangers who are mere volunteers having no pre-existing rights to protect and even to persons holding under invalid transfers, for instance, a transfer made *pendente lite*.

The question as to whether the claim of a subsequent mortgagee based upon an earlier mortgage redeemed by him is within time depends upon the question, when the amount sued for became due to the prior mortgagee with reference to Art. 132 of Sch. I to the Limitation Act. If the due date fixed by the prior mortgage is found to have been beyond 12 years from the date of the suit, a further question of extension of time by payment of interest or by acknowledgment within 12 years of the due date would become material. N NARAYAN *v.* HAFIZ, (1925) A. I. R. (N.) 21 264

——— s. 106—*Notice to quit, service of—Joint tenants—Notice to each tenant, whether necessary.*

A notice to quit under s. 106 of the Transfer of Property Act must be addressed to and served on the persons intended to be bound by it in any one of the modes suggested in the section. The section does not make any exception or lay down any special or peculiar procedure in the case of joint tenants.

It is necessary, in order to bind even a joint tenant, that the notice must be addressed to and served on him in one of the ways mentioned in the second clause of the section. It should be addressed to him and may be served either on him personally or on one of the family or servants or affixed to a conspicuous part of the property.

A person whose tenancy or existence is ignored and not recognised, cannot be regarded as a "party to be intended to be bound" by the notice under s. 106 of the Transfer of Property Act. C BEJOY CHAND MAHATAB *v.* KALI PRASANNA SEAL, 29 C. W. N. 620; (1925) A. I. R. (C.) 752 708

——— ss. 108, 111—*Lease for term—Breach of condition by lessor—Lessee, whether entitled to put an end to lease—Waiver—Liability to pay rent.*

There is nothing in the provisions of ss. 108 and 111 of the Transfer of Property Act which entitles a lessee for a term to put an end to the lease on account of a breach of a term of the contract by the lessor.

Plaintiff granted a lease of a house for five years to the defendant and one of the terms of the lease was

that within six months from its date the lessor should have a latrine constructed, a well sunk and a room built upstairs. The term was not carried out by the lessor but the defendant continued to occupy the house for nearly two years after the expiry of the period within which the construction had to be made and then purported to put an end to the lease. In a suit by the plaintiff to recover rent:

Held, (1) that it was not open to the defendant to continue to occupy the house after the breach by the plaintiff of the terms of the lease, without giving notice that he was willing to extend the time for performance up to a specified date, and then to throw up the lease on a date arbitrarily chosen by him; (2) that under the circumstances it must be taken that the defendant had waived the benefit of the condition and that the plaintiff was, therefore, entitled to succeed. M GOVINDASAMI CHETTIAR *v.* PALANIAPPA CHETTIAR, 21 L. W. 271; 48 M. L. J. 397; (1925) A. I. R. (M.) 833 10

——— s. 108 (j)—*Tenants, ejectment of—Landlord, right of, to proceed against sub-tenant.*

Section 108, cl. (*j*) of the Transfer of Property Act preserves the right of the lessor to proceed against the tenant who transfers the tenancy but does not take away the lessor's right to proceed against the transferee. He is at liberty to proceed against both of them provided he can have execution only against one of them. S GOBIND RAM UTTAM CHAND *v.* MOHAMED HUSAIN 802

——— ss. 122, 123, 126—*Deed of gift—Execution—Attestation—Acceptance—Revocation before registration, validity of—Registration, subsequent, effect of.*

Per Full Bench (*Shah, A. C. J.* and *Mulla, J.*, dissenting).—Where a gift of immoveable property has been effected by means of an instrument signed by the donor and duly attested and accepted by the donee, it is not competent to the donor to revoke the gift before the instrument is registered.

Per *Shah, A. C. J.* and *Mulla, J.*—It is competent to a donor to revoke a gift of immoveable property before the instrument is in fact registered and the subsequent registration of the instrument against the wishes of the donor does not make the revocation ineffective.

Per *Shah, A. C. J.*—The essentials of a completed gift are that a transfer of the property should be made voluntarily and without consideration by an instrument which is signed by or on behalf of the donor and attested by at least two witnesses and which is registered, that is, registered in British India under the law for the time being in force regulating the registration of documents and that it should be accepted by the donee. Until all these conditions are fulfilled the gift is incomplete. So long as the transfer is incomplete it is open to the donor to resile from it and to cancel what he may have done. The gift is incomplete according to law so long as the document is not registered, and it is open to the donor to revoke it before it is completed.

Per *Mulla, J.*—The registration prescribed by s. 123 of the Transfer of Property Act is not mere evidence of the gift but is part of the gift itself. It is a necessary part of the proposition that a gift has been effected. It is not mere evidence to prove that there has been a gift, but it is a fact to be proved to constitute the proposition that there has been a gift.

Section 126 of the Transfer of Property Act applies only to a "gift", that is, a gift made in the manner

prescribed by s. 123 of the Act. Where there is no such completed gift s. 126 has no application. B ATMARAM SAKHARAM KALKYE *v.* VAMAN JANARDAN KASHELIKAR, 27 Bom. L. R. 290; (1925) A. I. R. (B.) 210; 49 B. 388 490

——— s. 123—*Retiring gratuity, nature of—Gift, when complete—Sending amount to Bankers, whether constitutes delivery—Imperfect gift—Construction.*

A retiring gratuity is in the nature of a gift and must be completed either by a registered document or by actual payment as required by s. 123 of the Transfer of Property Act.

Where, therefore, a Railway Company sanctions a gratuity to any one of their employers on his retirement, the mere fact of sending the amount to their Bankers is not equivalent to delivery, even though it is coupled with a request to remit it to their office at London where actual payment is to be made.

A transfer intended to operate as a gift, but invalid as such, will not constitute the donor a trustee of the property for the intended donee, in other words, an imperfect gift will not be construed as a declaration of trust. B NATHA GULAB & Co. *v.* W. C. SHALLER, 25 Bom. L. R. 599; (1924) A. I. R. (B.) 88 312

——— s. 130—*Assignment of debt, what constitutes—Words of transfer, absence of—Assignment of part of debt, validity of—Notice to debtor, whether assignment.*

To constitute a valid assignment of a debt under s. 130 of the Transfer of Property Act there must be words of transfer in the instrument which must be executed in favour of the assignment and such assignment must be of the whole debt and not merely of a part of the debt.

A notice to the debtor not containing words of transfer nor referring to a transfer does not amount to an instrument of transfer.

For a document to operate as an equitable assignment, the fund out of which the payment is to be made should be specified and if no fund is specified the order does not operate as an equitable assignment.

The word 'absolute' in s. 130, Transfer of Property Act, is used in contrast to the expression 'by way of security' and has nothing to do with the question whether the assignment is of the whole debt or of a part thereof. An assignment may be of the whole debt by way of security though when the security is worked out, a part only may suffice. M DORAISWAMI MUDALIAR *v.* DORAISWAMI IYENGAR, (1926) M. W. N. 180; 48 M. L. J. 432; (1925) A. I. R. (M.) 753 382

Trusts Act (II of 1882), s. 34—*Trust property—Court, whether can sanction sale—Bombay High Court—Extraordinary Civil Jurisdiction — Order sanctioning sale, when can be challenged—Marketable title—Vendor, duty of—Vendee, when can repudiate contract.*

Section 34 of the Trusts Act does not enable the Court to sanction a sale of the trust property by trustees when no power of sale is given by the trust deed.

The High Court of Bombay has Extraordinary Civil Jurisdiction to sanction a sale by trustees of property vested in them.

But this jurisdiction is of an extremely delicate character and has to be exercised with the greatest caution.

The Court will not in the exercise of its Extraordinary Jurisdiction sanction an unauthorised change

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of investment proposed on the mere ground that it will be to the advantage of the beneficiaries.

When an order sanctioning a sale of property by trustees has been made, it cannot be challenged except on the ground of "fraud or underhand dealing."

The title which the vendor must show must be a title in himself, or in those whom he has a legal or equitable right to require to join in the conveyance; he has no right to say that some other person is willing to enter into a contract, and to force the title of that other person on the purchaser.

When a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may repudiate the contract.

This right of repudiation must be distinguished from the common law right of rescission, and arises out of that want of mutuality which, unless waived, is generally fatal to relief by way of specific performance. But the right must be exercised, if it is to be exercised at all, as soon as the defect is ascertained. If, after ascertaining the defect, the purchaser still treats the contract as subsisting, he does not retain the right to repudiate at any subsequent moment he may choose. B PAULO DAVID DE SOUZA *v.* K. R. DAPHTARY, 25 Bom. L. R. 610; (1924) A. I. R. (B.) 252 230

U. P. Land Revenue Act (III of 1901), s. 36—*Ex-proprietary tenant, rent payable by—Agreement between parties, whether can be enforced.*

An agreement between a vendor and a vendee as to the amount of rent to be paid by the former as an ex-proprietary tenant is not by itself void. So long as a reasonable rent is fixed by the parties the Revenue Court can accept it as a fair estimate of the rent to be paid under s. 36 of the U. P. Land Revenue Act by the ex-proprietary tenant. The ultimate word on the question of the amount of rent, however, lies with the Revenue Court. A LAKSHMI CHAND *v.* LILA DHAR, L. R. 6 A. 111 Rev. 182

——— **ss. 111, 233 (k)**—*Partition, perfect and imperfect, difference between—Section 233 (k), applicability of, to imperfect partition.*

The substantial difference between a perfect and an imperfect partition is that in an imperfect partition the joint responsibility for payment of land revenue is not done away with, but subject to this joint responsibility the shares are just as much allotted in separate ownership in the one kind of partition as in the other. Section 233 (*k*) of the U. P. Land Revenue Act applies just as much to the case of an imperfect partition as to the case of a perfect partition.

The policy of the law is that all disputes as to ownership of a *mahal* or *patti* to be partitioned should be finally disposed of in the partition proceedings. A TEJ SINGH *v.* MITTER SEN, L. R. 6 A. 120 Rev. 719

——— **s. 111 (1) (b)**—Zemindari *belonging to joint family recorded in name of manager—Order directing institution of suit in Civil Court—Suit not filed within prescribed period—Suit by member of family, whether maintainable.*

It is a common practice in the case of a *zemindari* owned by a joint family for the name of the manager alone to be recorded in the revenue papers. In such cases the manager is recorded in a representative capacity, and it is really the joint family which is the recorded co-sharer.

U. P. Land Revenue Act—concld.

Where a valid order is passed under s. 111 (1) (*b*) of the U. P. Land Revenue Act directing a party to institute a civil suit for the determination of a question of title and the suit is not brought within the period of three months, no subsequent suit for the determination of the same question of title can be entertained.

Where a *zemindari* owned by a joint family is recorded in the name of the manager alone and an order is made under s. 111 (1) (*b*) of the U. P. Land Revenue Act against the manager and he fails to institute a suit within three months, a suit brought subsequently by another member of the family is not maintainable. O SHEO BAKHSH SINGH *v.* INDRA BAHADUR SINGH, L. R. 6 A. (O.) 65; 12 O. L. J. 239; 2 O. W. N 209; (1925) A. I. R. (O.) 392; 28 O. C. 194 185

——— **s. 120**—*Partition of* mahal—*Tank situated in* mahal *allotted to plaintiffs — Order declaring defendants entitled to use water of tank for irrigation —Injunction, suit for—Jurisdiction of Civil Courts.*

On the partition of a *mahal*, a tank situated within the *mahal* was allotted to the plaintiffs. The plaintiffs represented to the partition Court that the defendants who were co-sharers in the *mahal* before partition had no longer any right to irrigate their fields from the tank which had been allotted to the plaintiffs. The partition officer passed an order that the defendants had right to continue the irrigation from the tank in question as they used to do under the terms of the *wajib-ul-arz* previous to the partition. Plaintiffs thereupon instituted a suit in the Civil Court for an injunction restraining the defendants from irrigating their fields from the water of the tank:

Held, (1) that the tank must be taken to have been originally made for the benefit of the whole *mahal* as it stood prior to the partition and could be availed of for the benefit of those lands by virtue of the provisions of s. 120 of the U. P. Land Revenue Act;

(2) that the order of the partition officer was covered by the provisions of that section and that the Civil Court had consequently no jurisdiction to entertain the suit. O CHANDRA PAL SINGH *v.* BISHAN SINGH 1053

U. P. Municipalities Act (II of 1916), ss. 19 to 27—*Government of India Act, 1915, (5 & 6 Geo. V, c. 61), ss. 79, 107—Letters Patent (All.), cl. 11—Local Legislature, powers of legislation of, extent of —Municipal election—Election tribunal, creation of, whether* ultra vires*—Election tribunal, whether subordinate to High Court—Appeal, Reference, Superintendence, powers of—Election dispute, decision of—Jurisdiction of Courts—Procedure.*

The language of s. 79 of the Government of India Act, conferring Legislative power on a Local Legislature, is very wide. Such Legislatures have been given a general power to make laws for the peace and good government of the territories for the time being constituting the province; and this power includes the power to direct that disputes of a particular kind shall be decided in a particular way and before a tribunal specially created for the purpose. The provisions of the U. P. Municipalities Act, therefore, which provide a special Court or tribunal for the exclusive trial of election cases are not *ultra vires* of the U. P. Local Legislature.

The right of appeal is not an inherent right of the subject but only exists where it is expressly conferred by a Statute.

U. P. Municipalities Act—concld.

The term "Civil Courts" in cl. 11 of the Letters Patent of the Allahabad High Court was not intended to cover a tribunal created under a particular Statute for a particular purpose, for instance, the election tribunal created under s. 22 of the U. P. Municipalities Act. Nor is such an Election Court subject to the "superintendence" of the High Court within the meaning of that expression in cl. 11 of the Letters Patent.

There is a radical difference between a right of appeal and a power of reference. A right of appeal is a right conferred on the suitor. The power of reference is a power vested in the Court. It lies in the sole discretion of the Court to exercise such power or not to exercise it. An appeal pre-supposes a decree or order already passed against which the appeal is directed. The power of reference is exercised while the case is still pending in order to enable the Court to arrive at a correct decision.

However widely a power of superintendence may be construed, it does not extend to conferring a right of appeal in cases where an appeal is expressly barred by Statute.

The whole scheme of ss. 19 to 27 of the U. P. Municipalities Act implies an intention that the election of any person as a member of a Board shall only be challenged by an election petition presented in accordance with the Act. The enquiry held by the Commissioner is not a mere summary enquiry subject to the result of a suit. The Commissioner is armed with all the powers of a Civil Court and his decision is intended to be a final settlement of the question in dispute.

Where a Statute which creates a right also prescribes a specific remedy with respect to that right a person aggrieved is limited to the remedy so prescribed. **A** ABDUL RAHMAN *v.* ABDUL RAHMAN, L. R. 6 A. 191 Civ.; 23 A. L. J. 385; (1925) A. I. R. (A.) 381; 47 A. 513 51

Vendor and purchaser—*Portion of sale consideration left in hands of vendee for payment to other person—Failure of vendee to make payment—Suit for damages — Limitation—Limitation Act (IX of 1908), s. 23, Sch. I, Art. 115.*

Where a vendee is aware that a portion of the property which he is trying to purchase cannot be purchased by him under the provisions of the law and nevertheless enters into the contract with his eyes open in violation of the express provisions of the law, he cannot subsequently refuse to pay that portion of the sale consideration which is left in his hands at the time of the sale on the ground that the vendor has failed to fulfil his part of the contract in respect of that portion of the property which was not legally transferable in favour of the vendee.

Where a certain portion of the sale consideration in respect of a sale of immoveable property is left in the hands of the vendee for payment to a third person, no time being fixed for the payment, and the vendee fails to make the payment, the breach is committed by the vendee on the date when the sale-deed was executed and limitation for a suit to recover damages from the vendee for the breach commences from that date. In such a case there is no continuing breach within the meaning of s. 23 of the Limitation Act, nor successive breaches within the meaning of Art. 115 of Sch. I to the Act. **A** RAM NARAIN *v.* NIHAL SINGH, L. R. 6 A. 222 Civ.; (1925) A. I. R. (A) 488 804

Village Chaukidari Act (VI B. C. of 1870), s. 50: *See* BENGAL PATNI TALUKS REGULATION, 1819, s. 11 529

Waiver. *See* CONTRACT ACT, 1872, s. 74 129

Wajib-ul-arz, successive, entries in, value of. *See* CUSTOM—PRE-EMPTION 298

Watan property—*Mortgage by* watandar—*Death of mortgagor—Mortgagee, liability of, to pay mesne profits to successor of* watandar.

A mortgagee of *watan* land from a *watandar* is liable to pay mesne profits to the successor of the original mortgagor after the latter's death for the period between the death of the mortgagor and the time when his successor to the *watan* obtains possession. **B** SUNDRABAI VITHAL *v.* LAKSHMAN RAMCHANDRA, 27 Bom. L. R. 497; (1925) A. I. R. (B.) 325; 49 B. 583 723

Will, *construction of—Bequest to daughters followed by clause creating right of pre-emption—Estate taken.*

A testator directed his executors to alter a certain house belonging to him so as to convert it into four houses and to give one house to each of his four daughters after getting grants issued in their names. This was followed by a clause that in case any of the four daughters should be in need of money and should wish to sell her share, she should sell to the other daughters and not to strangers:

Held, that the Will conferred an absolute estate on the daughters and that the subsequent clause which only amounted to a direction in the nature of pre-emption did not operate to cut down the right of each of the daughters in the property given to her to a life-estate. **M** GANSHAMDOSS NARAYANDOSS *v.* SARASVATHI BAI, 21 L. W. 415; (1925) M. W. N. 285; (1925) A. I. R. (M.) 861 621

———, *construction of—Devise of absolute estate—Alienation, restriction on, validity of.*

A Hindu testator by his Will devised certain property to his daughter-in-law with power to make gift, sale, mortgage, or any permanent *morusi mukarrari* settlement. By a subsequent clause, however, it was provided that any transfer by the devisee should be made only with the consent of her husband and the other sons and grandsons of the testator:

Held, that the intention of the testator was to make an absolute gift in favour of his daughter-in-law and that the subsequent restriction on her power of alienation must be regarded as repugnant to the gift and consequently void. **C** DYAMOYI *v.* SANKAR NATH MUKHOPADHAYA, 42 C. L. J. 30 159

———— *Execution—Proof.*

The fact of the execution of a Will was put in issue 25 years after its alleged date of execution. The Will had been witnessed by several persons, all of whom, except two, had died before suit, but these two gave clear evidence that the Will was executed in their presence, that it represented what the testator wished, and that the testator, although he may not have understood some of the flowery expressions contained in the Will, was yet perfectly competent to comprehend the simple provisions of the Will. The Will was in favour of the son-in-law of the testator and was challenged by a distant reversioner, the question of whose relationship was not clear at the time of the execution of the Will. No Probate had been obtained, but the Will was produced before a Mutation Officer shortly after the death of the testator. The Courts in India held the execution of the Will proved:

Held, that under the circumstances their Lordships of the Privy Council did not see any reason to hold

WIH—contd.

that the judgment of the Court of Appeal in India was not correct. • P C CHANDIKA BAKHSH SINGH *v.* MADHO SINGH, 10 O. & A. L. R. 931; (1924) A. I. R. (P. C.) 231; 20 L. W. 699; 40 C. L. J. 466; (1924) M. W. N. 913; 27 O. C. 304; 1 O. W. N. 595; 29 C. W. N. 582 (P. C.) **95**

——— *Probate—Execution—Burden of proof—Signature, doubtful—Sound disposing mind, what constitutes.*

When a Will is propounded the burden lies upon the propounder of satisfying the conscience of the Court that the document in suit is in truth and in fact the last valid Will of a free and capable testator. The onus is in general discharged by proof of capacity and fact of execution from which knowledge of and assent to the contents of the instrument is assumed. But whenever circumstances exist which excite the suspicion of the Court, and whatever their nature may be, it is for those who are propounding the Will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only when this is done that the onus is thrown upon those who are opposing the Will to prove fraud and undue influence or whatever else they rely on to displace the case made of proving the Will.

The admitted abnormality of a signature is at least some evidence that it is not the handwriting of the person who purports to have written it.

Where the character of the alleged signature of a testator is such that the Court is satisfied that the signature is not that of the alleged testator, the Court must act upon its conviction and pronounce against the document as a valid testamentary disposition. But in a case where the witnesses have positively affirmed that the testator did in fact execute the Will in their presence, the Court will be slow to hold the document to be a forgery unless evidence is to be found *aliunde* which tends to confirm the conclusion at which the Court has arrived independently and from a consideration of the nature of signature by which the testator is alleged to have executed the Will.

In order to constitute sound disposing mind a testator must not only be able to understand that he is by his Will giving the whole of his property to one

WIH—concld.

object of his regard, but he must also have the capacity to comprehend the extent of his property and the nature of the claims of the others whom by his Will he is excluding from all participation in that property, and the protection of the law is in no case more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one and more especially when that one object may be so forced upon the attention of the invalid as to shut out all others which may require consideration. C LILA SINHA *v.* BIJOY PROTAP DEO SINGH, 41 C. L. J. 300; (1925) A. I. R. (C.) 768 **534**

Wrongful arrest—*Damages, suit for—Decree passed against legal representative—Arrest in execution of decree.*

A decree on a promissory note executed by a deceased member of a joint Hindu family was passed against the surviving member of the family and it was ordered that it was to be executed by seizure and sale of the property of the deceased that would come to the hands of the judgment-debtor as his heir and legal representative. More than a year after the date of the decree a notice for renewal of judgment was issued under O. XXI, r. 22 of the C. P. C. The judgment-debtor did not appear and an order was passed that execution was to issue against him. The decree-holder took out a warrant for arrest of the judgment-debtor, arrested him and brought him before the Court, where he was released on the ground that the decree was not capable of execution against him personally. The judgment-debtor, thereupon, brought a suit against the decree-holder for damages for wrongful arrest:

Held, (1) that the decree-holder must have known that he was not entitled to execute the decree against the person of the judgment-debtor, and that the order of the Court directing that execution should issue against the judgment-debtor was a merely formal order allowing execution to proceed;

(2) that the decree-holder's act in causing the judgment-debtor to be arrested was wrongful and the latter was entitled to recover damages for wrongful arrest. B VELJI BHIMSEY & Co. *v.* BACHOO BHAIDAS, 26 Bom. L. R. 349; 48 B. 691; (1925) A. I. R. (B.) 118 **199**

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242	...	LXXI	646
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253	..	LXXIII	530
255	...	LXXIV	373
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299	...	LXXIII	214
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701	..	LXXVII	1009
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763	..	LXXVII	26
765	...	LXXXII	507
769	...	LXXIII	10
772	...	LXXV	231
774	..	LXXII	202
783	...	LXXXII	348
787	..	LXXVII	529
792	...	LXXV	682
797	...	LXXII	286
802	...	„	187
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809	..	„	598
812	...	LXXV	466
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821	...	LXXXII	545
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925	...	LXXI	984
933	...	LXXX	510
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1004	...	*Not reportable.*	
1007	...	LXXIX	287
1013	...	LXXX	294
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49	...	LXXII	898
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73	...	LXXI	763
79	...	LXVI	853
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46	...	LXXI	459
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66	...	LXXIV	79
69	...	LXXVI	702
72	...	LXXIV	146
76	...	LXXII	765
85	...	LXXVI	267
90	...	LXXI	495
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99	...	„	921
102	...	LXXIV	589
106	...	LXXIII	893
109	...	LXXIV	600
111	..	LXIV	549
113	...	LXXI	829
116	...	LXXVI	946
120	...	LXXIV	433
122	...	„	451
127	...	LXXIII	673
130	...	„	779
133	...	„	613
137	...	„	318
140	...	„	655
142	...	LXXI	951
151	...	LXXV	827
156	...	„	99
158	...	LXXIII	813
160	...	„	791
164	...	„	442
165	...	„	106
168	...	„	799
171	...	LXXV	87
173	...	LXXIII	209
176	...	„	658
179	...	LXXV	542
182	..	„	456
185	...	„	520
187	...	„	528
189	...	LXXIII	452
192	...	„	590
195	...	LXXV	545
198	...	„	555
200	...	LXXIV	484
202	...	LXXIII	898
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271	..	LXXVI	385
282	...	LXXIII	988
284	...	LXXV	7
295	...	LXXIII	645
297	...	LXXVI	535
323	..	LXXV	915
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334	..	LXXXV	701
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350	..	LXXIV	462
354	..	LXXVI	605
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359	...	LXXVI	189
364	...	LXXVII	398
367	..	„	409
373	..	„	433
376	..	LXXV	980
382	...	LXXVII	425
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392	...	LXXIII	786
399	...	LXXVII	446
402	..	LXXIII	425
406	...	LXXV	375
408	..	LXXIX	201
423	...	„	194
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432	...	„	185
434	..	LXXV	938
439	...	LXXIX	248
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53	...	LXX	901
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81	...	„	
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87	...	LXXIII	331
89	...	LXXIX	504
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91	...	LXIX	283
92	...	„	330
95	...	LXXIX	286
97	...	LXXIII	817
99	...	LXXI	837
106	...	LXXIX	970
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109	...	*Not reportable.*	
111	...	LXXIX	294
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119	...	*Not reportable.*	
121	...	„	
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143	...	LXXII	405
146	...	LXXIII	459
148	...	LXVIII	461
150	...	LXVII	888
163	...	LXXIV	577
172	...	LXIX	723
174	...	LXXIII	817
175	...	„	889
178	...	LXIX	721
180	...	LXXXI	143
183	...	LXIX	370
185	...	LXXIII	894
187	...	LXXIV	682
190	...	„	685
193	...	LXXI	746
196	...	LXIX	6
198	...	LXXI	783
200	...	LXXII	452
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246	..	LXXIV	451
251	...	LXXII	91
253	..	LXXIV	589
257	..	LXXIII	927
259	..	LXXIV	122
262	..	LXXXI	322
266	..	LXXIV	489
269	..	„	497
271	...	LXXI	998
272	...	„	700
276	...	LXXVI	702
279	...	LXXVI	529
287	..	LXXXIV	24
289	..	LXXXV	24
292	..	LXXXI	331
296	..	LXXV	528
298	..	LXXII	403
300	...	LXXV	590
304	...	LXXIII	871
307	...	LXXII	586
310	...	„	385
317	..	*Not reportable.*	
322	...	LXXVI	824
325	..	LXXXIV	321
329	...	LXXIII	691
332	...	LXXVI	589
335	..	LXXIII	673
338	..	„	209
341	...	LXXVI	10
345	...	LXXIII	655
347	...	LXXVI	592
351	...	LXXV	94
355	...	„	99
357	...	LXXIII	767
361	...	LXXV	827
366	..	LXXII	480
370	...	*Not reportable.*	
372	..	LXXIII	779
375	...	„	272
377	...	LXXVI	606
381	..	LXXIII	370
384	..	LXXVI	496
389	...	„	501
392	..	LXXIII	650
394	..	LXXVI	445
398	...	LXXIII	461
401	..	„	590
404	...	„	988
406	...	„	442
407	..	LXXVI	398
412	...	LXXIII	699
414	..	*Not reportable.*	
417	..	LXXVI	397
420	..	LXXII	617
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459	...	LXXVII	585
462	...	LXXVI	91
469	..	LXXXV	701
471	..	LXXIII	759
473	...	„	895
475	...	LXXVII	894
477	...	LXXXIII	499
480	..	LXXIII	645
482	..	LXXIV	146
487	..	LXXIX	572
494	..	LXXIII	874
496		LXXVIII	266
505	...	LXXIII	896
507	...	LXXIV	1
509	..	LXXIII	785
511	...	„	1
513		LXXVIII	103
517	...	LXXIII	791
520	...	*Not reportable.*	
522	...	LXXIV	433
524	...	LXXIII	932
528	..	LXXVII	983
530	..	LXXVII	872
533	...	LXXIII	600
539	..	„	903
541	...	LXXX	494
543	...	„	496
546	...	„	503
548	..	LXXIII	911
551	...	LXXV	915
555	...	LXXIII	889
558	..	LXXIV	187
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123	...	LXXII	902
133	...	LXIX	994
135	...	LXXII	207
148	...	„	868
162	...	LXXI	514
167	...	LXXI	643
177	...	LXX	469
190	...	„	689
253	...	LXXI	212
257	...	„	242
259	...	LXXIV	785
300	...	LXXIII	991
349	...	LXXI	274
360	..	„	756
373	...	LXIX	123
382	...	LXXII	599
405	..	„	225
415	...	„	189
423	...	„	278
435	...	LXXIII	188
449	...	„	163
476	..	LXXII	358
478	...	„	727
488	...	LXXIII	106
506	...	LXXII	820
525	...	LXX	994
536	..	LXXI	1039
567	...	LXXII	833
574	...	LXXI	530
579	..	LXXII	5
583	..	„	545
592	..	„	925
597	...	„	145
605	..	LXXIII	343
631	..	„	87
650	..	LXXII	671
659	...	LXXIII	584
673	..	LXXIV	22
679	...	LXXIII	1050
685	..	LXXVI	721
706	..	LXXVII	621
712	..	LXXIII	926
715	..	LXIX	374
719	...	LXXI	608
721	...	LXXIII	944
723	...	LXXII	881
726	...	„	745
734	..	LXXIII	793
736	..	LXXV	869
751	..	LXXIV	492
758	...	„	945
766	...	„	959
768	..	„	155
782	...	„	198
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847	...	„	390
852	...	LXXVII	580
866	...	LXXV	38
873	..	LXXIV	896
895	...	LXXVI	594
903	...	„	873
919	...	„	886
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35	...	LXXII	202
39	...	LXX	780
43	...	LXXI	374
45	...	„	274
53	...	„	61
56	...	LXXI	514
60	...	LXIX	529
62	...	LXXI	298
64	...	LXXI	200
66	...	„	49
67	...	LXXII	622
69	...	„	902
74	...	LXIX	440
77	...	LXXI	288
80	...	LXXII	839
84	...	LXXI	212
87	...	LXX	446
90	...	LXXII	328
91	...	„	826
100	...	LXX	888
107	...	LXXII	868
116	...	LXXI	463
119	...	LXXII	885
122	...	„	874
123	...	„	187
128	...	*Not reportable.*	
130	...	LXIX	447
132	...	LXXII	214
138	...	LXXI	798
141	...	LXXII	857
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303	...	LXXII	488
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617	...	LXXIV	499
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198	...	„	820
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304	..	LXXII	558
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45	..	LXXIII	1041
46	..	LXXIV	218
48	...	LXXVII	347
53	...	LXXVI	886
57	...	LXXIII	584
64	...	LXXVI	761
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71	...	LXXVI	670
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101	...	LXXV	566
103	...	LXXVI	1011
106	..	LXXIX	651
110	..	LXXVI	873
119	...	LXXVII	216
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125	...	LXXVI	750
126	...	„	1018
130	..	LXXXI	241
137	..	LXXVII	631
146	..	LXXIX	510
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204	...	LXXVI	840
205	...	„	805
207	...	„	836
210	...	„	644
213	...	LXXV	987
215	..	LXXVI	813
217	...	LXXIX	809
221	..	LXXVI	786
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224	..	LXXV	985
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67	...	LXXII	874
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152	...	LXXII	46
154	...	LXXIX	40
155	...	LXXII	624
157	...	*Not reportable.*	
159	..	LXXI	204
161	...	„	756
169	...	LXXII	131
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179	...	LXXII	154
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188	...	„	207
197	...	LXXIII	147
208	...	LXXII	202
213	...	LXX	937
216	...	LXXII	868
226	...	LXXI	244
229	...	LXXII	885
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236	...	*Not reportable.*	
238	...	LXXII	925
241	...	„	63
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247	...	LXXII	525
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322	...	„	582
329	...	„	156
332	...	„	81
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346	...	„	838
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357	...	*Not reportable.*	
358	...	LXXIII	329
361	..	LXXXVI	647
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415	...	„	214
422	...	„	284
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426	...	LXXII	381
429	...	LXXIV	447
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451	..	LXXI	242
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500	...	„	165
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521	...	„	789
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535	...	„	356
536	...	„	833
541	...	LXXIII	297
545	...	„	670
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199	...	„	449
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212	...	„	225
217	...	„	464
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225	...	„	548
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299	...	„	897
301	...	LXXIV	309
306	...	LXXII	805
313	...	„	612
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392	...	LXXI	632
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402	...	LXXII	881
403	...	LXXVI	207
406	...	LXXIII	956
408	...	LXXV	739
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437	..	LXXII	616
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441	...	LXXI	646
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447	..	LXXIII	540
450	..	LXXVI	212
451	..	LXXIV	856
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508	...	LXXIII	1041
509	..	LXXIV	609
510	...	„	703
511	...	LXXVII	1048
518	...	LXXIV	1026
519	..	„	945
522	...	LXXI	753
524	..	LXXIV	968
525	..	LXX	932
526	...	LXVIII	900
528	...	LXIX	367
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662	...	LXXVII	148
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679	...	LXXVII	758
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682	...	LXXVII	347
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697	..	„	642
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702	..	LXXXII	879
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716	...	LXXVII	755
718	..	LXXV	556
719	..	„	604
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846	..	LXXXIV	737
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871	..	„	489
872	...	LXXII	703
873	...	LXIX	44
876	...	LXXIV	949
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34	...	LXXI	404
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45	...	„	443
48	...	„	669
50	...	„	445
54	...	„	816
56	...	LXXII	333
59	...	LXXI	777
64	...	LXXII	427
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37	...	LXXII	911
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93	...	LXIX	180
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205	...	„	485
207	...	„	558
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309	...	LXXIX	285
313	..	LXXVI	969
315	...	LXXII	390
319	...	LXXIV	573
321	...	„	582
324	...	„	543
327	...	LXXI	1032
332	...	LXXIII	591
341	..	LXXII	1046
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429	...	LXXII	86
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440	...	LXXIV	802
443	...	„	811
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563	...	LXXVIII	244
567	...	LXXIX	578
577	..	LXXVI	763
581	...	LXXIV	449
587	...	„	503
611	..	„	518
614	..	LXXVII	120
617	..	„	109
625	...	„	79
631	...	„	78
635	...	LXXIV	40
638	...	LXXVI	1033
642	...	„	1050
643	..	„	1017
645	...	LXXIV	905
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651	..	LXXVII	125
667	...	LXXVI	1053
672	...	„	1055
674	..	LXXIV	353
677	...	LXXIII	113
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696	..	LXXIX	693
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925	...	LXXIII	127
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217	..	LXXIV	449
223	...	LXXI	629
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242	..	LXXIII	261
244	...	„	215
245	...	LXXI	581
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282	..	LXXXI	314
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288	..	LXXIII	241
289	..	LXXIV	360
295	...	LXXVII	618
297	...	LXX	311
299	..	LXXIII	27
306	...	LXXII	390
308	..	LXXVII	125
317	..	LXXII	1031
319	..	LXXIV	802
321	..	LXXVI	1055
324	..	LXXIII	127
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46	...	LXXIV	304
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56	...	LXVIII	896
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61	...	LXXIII	27
68	...	LXXIV	434
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226	...	LXXIII	39
229	...	LXXVI	763
232	...	LXXII	1031
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348	..	LXXIX	576
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351	..	LXXVII	337
353	...	„	353
357	...	„	120
360	..	„	329
368	..	LXXIV	449
374	..	LXXVII	340
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379	..	LXXIII	244
383	..	LXXIV	476
390	..	LXXVII	383
393	..	„	391
399	...	„	79
404	..	LXXIX	666
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412	...	LXXV	227
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NOTE.—Decisions of the Board of Revenue, U. P., not printed in Indian Cases.

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317	...	LXXIV	150
319	...	LXXVII	1041
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414	...	LXXI	902
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435	...	LXXI	948
442	...	LXXII	440
452	...	LXXVII	32
459	...	LXXIV	536
466	...	LXXVI	988
469	..	LXXII	230
488	..	LXXIV	695
504	..	LXXII	629
508	..	„	811
517	..	LXXIII	561
534	...	LXXII	907
538	..	„	1049
548	..	LXXVI	113
554	...	LXXIII	542
585	..	LXXV	1022
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607	..	LXXIII	822
676	..	LXXIV	747
685	..	„	668
708	..	LXXVII	734
712	..	„	357
715	...	LXXIV	102
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784	...	LXXIV	847
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793	..	LXXV	72
796	..	LXXIV	867
800	...	LXXV	430
805	...	LXXXIII	478
809	..	LXXIV	174
814	..	LXXXI	326
819	...	LXXVII	209
829	..	LXXVI	927
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46	...	LXXXI	295
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49	...	LXXI	944
54	...	„	570
57	..	LXIX	565
61	...	LXXI	741
65	...	„	902
76	...	LXXII	860
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177	...	LXXV	1022
184	...	LXXII	1049
190	...	LXXVI	113
194	...	LXXI	937
197	...	LXXVII	14
202	...	LXXII	1035
205	...	LXXX	377
207	...	LXIX	624
208	...	LXXIII	317
209	...	LXXIV	144
213	...	LXXV	284
216	...	LXXIV	626
220	...	LXXVII	177
225	..	LXXVI	2
229	..	LXXIV	174
234	...	LXXVII	500
235	..	„	421
237	..	LXXXV	35
239	...	LXXV	72
241	..	LXXVII	209
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269	...	LXXII	157
271	..	LXXIX	696
273	..	„	5
276	...	LXXVI	950
280	...	LXXIV	753
283	...	„	838
284	...	„	993
287	...	LXXIX	56
290	...	LXXVII	718
293	..	LXXIV	820
298	...	LXXXIII	747
300	...	LXXII	938
305	..	LXXV	794
329	..	„	728
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28	...	„	950
29	...	„	891
31	...	LXIX	631
32	...	„	635
34	...	LXXII	71
35	...	LXIX	383
36	...	LXXII	875
41	...	LXXI	703
42	...	LXIX	367
45	...	LXXII	894
50	...	„	76
53	...	„	171
55	...	„	519
57	...	LXXI	209
68	...	LXXII	954
77	...	LXXI	353
93	...	LXXIII	161
97	...	LXXII	945
109	...	LXXXIII	345
117	...	LXXIV	947
130	...	LXXII	345
135	..	LXXXV	40
137	...	LXXIV	710
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151	...	„	360
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154	..	LXXIV	1047
158	...	LXV	576
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171	..	LXV	573
174	...	LXXXV	35
177	...	LXXXII	480
178	...	LXXIII	561
192	..	LXVII	502
195	...	LXXII	951
199	..	LXVIII	945
223	..	LXXV	531
229	...	LXXVII	177
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53 ...	LXXII	860
55 ...	LXIX	613
59 ...	LXXXIII	290
69 ..	LXXXIV	536
73 ..	LXXIV	134
80 ...	LXXI	589
86 ...	„	341
89 ...	LXXII	148
91 ...	LXXVII	929
99 ..	LXXI	1022
103 ..	LXIX	624
105 ...	*Not reportable.*	
109 ...	LXXII	138
111 ..	LXXI	902
127 ...	„	573
129 ...	LXXII	657
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190 ...	LXXVII	32
196 ...	LXIX	700
199 ...	LXXVII	865
201 ...	LXXII	230
217 ...	„	1049
225 ...	LXXI	944
233 ...	LXXVI	991
235 ...	„	1049
238 ..	LXXI	948
244 ...	LXXIV	649
252 ...	LXXI	843
258 ..	LXXIV	642
263 ...	LXX	402
267 ..	*Not reportable.*	
269 ...	LXXIII	451
270 ...	LXXXIV	1013
273 ..	LXIX	31
281 ..	LXXIV	693
285 ..	LXXI	957
288 ..	LXXII	135
289 ..	LXXIII	629
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370 ..	„	474
373 ..	„	758
377 ..	LXXVII	403
386 ...	LXXV	1046
390 ...	LXXIV	815
393 ...	LXXVI	49
398 ...	LXXIX	183
402 ..	LXXV	794
434 ..	LXXIV	396
445 ..	LXXI	933
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29	...	LXXI	933
35	...	LXXVI	136
39	...	*Not reportable.*	
44	...	LXXI	79
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54	...	LXXII	1003
58	...	LXVII	606
60	...	LXIX	383
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89	...	LXXII	910
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93	...	„	484
97	...	„	703
98	...	„	246
99	...	„	741
102	...	„	843
107	..	LXVII	592
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259 ...	LXIX	681
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279 ..	LXXIII	569
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306 ...	LXXII	625
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311 ...	LXXII	1049
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322 ..	„	848
326 ..	LXXI	280
329 ..	„	341
331 ..	„	565
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544 ...	LXXIV	87
545 ...	LXXXIV	1028
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571 ..	LXXIV	831
575 ...	LXXII	637
577 ..	LXXIX	420
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189	..	„	1027
196	...	„	835
199	..	„	1050
209	..	„	1042
211	...	„	954
218	...	„	960
220	...	LXXVI	519
226	...	„	479
231	...	„	482
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316	...	LXXXIII	10
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390	..	LXXVI	705
397	...	„	700
402	...	„	639
405	...	„	855
419	..	„	665
427	...	„	729
430	...	„	672
433	..	„	669
436	..	„	711
447	...	„	709
449	..	„	697
451	..	LXXVII	63
460	..	LXXVI	835
463	..	„	802
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481	...	LXXVI	841
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500	...	„	794
510	...	„	869
512	..	„	817
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557	...	„	362
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580	...	„	382
584	...	„	385
600	..	LXXVI	564
604	..	„	830
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618	...	„	393
629	..	LXXVI	719
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690	..	LXXXI	41
694	...	LXXIX	755
700	...	„	718
702	..	LXXVI	588
705	...	LXXIX	719
714	..	„	766
722	..	„	705
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30	...	LXXIV	6
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50	...	LXXIV	58
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98	...	*Not reportable.*	
99	...	„	
101	...	LXXV	296
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103	..	LXXVI	575
106	...	„	597
108	...	„	600
109	..	„	612
113	...	„	617
114	...	„	620
119	..	„	624
125	..	„	646
127	..	„	649
130	..	LXXIX	291
134	...	LXXVI	677
136	...	„	812
138	..	„	814
139	....	„	700
142	...	„	705
146	...	„	693
149	...	„	697
150	..	„	704
151	..	„	679
153	...	„	709
154	...	LXXXV	362
158	..	LXXVI	835
160	...	LXXXI	345
161	...	„	328
163	...	LXXIX	742
164	..	„	744
165	...	*Not reportable.*	
166	...	LXXIX	747
169	...	„	755
173	..	LXXVI	841
177	...	LXXVII	372
186	...	LXXVI	588
188	...	LXXXII	610
193	...	LXXVI	525
196	...	„	561
199	...	„	573
201	..	„	564
203	..	„	571
205	..	„	817
208	..	„	788
210	..	„	827
213	...	„	825
214	...	„	867
216	...	„	816
217	...	„	785
218	...	„	791
221	..	„	719
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241	..	LXXIV	1050
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248	...	„	919
252	...	LXXXIV	683
254	...	LXXVI	910
260	..	LXXVII	63
264	...	LXX	937
266	...	LXXXIII	329
270	..	„	668
275	...	„	334
277	...	LXXXI	945
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156	..	„	14
160	..	„	356
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171	..	LXVI	999
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180	..	LXVII	19
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71	..	LXVI	873
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79	..	„	796
87	...	LXXIX	819
98		LXXXVII	258
106	..	LXXIX	847
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131	...	LXVIII	835
133	...	LXXIX	841
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149	...	„	62
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169	..	„	697
174	...	LXXXI	653
195	...	LXXXIII	897
197	...	„	889
201	...	„	895
205	..	LXXXIV	329
207	...	LXXXIII	360
221	..	LXXIX	539
226	...	LXXV	497
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63	...	„	994
73	..	„	1002
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164	...	„	539
172	..	„	543
178	...	„	548
182	..	„	702
188	...	„	708
195	...	LXXXI	759
206	...	LXXVI	408
211	..	LXXXIII	913
223	...	LXXXV	893
228		LXXXVII	83
236	..	LXXVI	52
245	...	„	230
255	..	LXXIII	311
257	...	LXXXIII	870
260	...	„	893
263	..	LXXVI	119
268	..	LXXXIII	881
273	...	LXXXI	134
281		LXXVIII	279
288	...	LXXIX	376
300	...	LXXVI	250
306	...	LXXVIII	953
312	...	LXXIII	319
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15	...	„	63
17	...	„	65
29	...	„	77
31	...	„	79
33	...	„	81
62	...	„	110
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85	...	„	213
86	...	„	214
87	...	„	215
88	...	„	216
89	...	„	217
91	...	„	219
94	...	„	222
97	...	„	225
100	...	„	228
104	...	„	232
106	...	„	234
108	...	„	236
110	...	„	238
111	...	„	239
113	...	„	241
114	...	„	242
115	...	„	243
116	...	„	244
118	...	„	246
118	...	„	246
119	...	„	247
120	...	„	248
120	...	„	248
124	...	„	252
126	...	„	254
128	...	„	256
129	...	„	353
135	...	„	359
136	...	„	360
141	...	„	365
143	...	„	367
144	...	„	368
145	...	„	497
149	...	„	501
151	...	„	503
151	...	„	503
152	...	„	504
153	...	„	505
154	...	„	506
155	...	„	507
156	...	„	508
157	...	„	509
159	...	„	511
160	..	„	512
162	...	„	514
164	...	„	516
167	...	„	519
171	...	„	523
173	...	„	525
175	...	„	527
176	...	„	528
177	...	„	593
179	...	„	595
180	...	„	596
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183	...	„	599
184	...	„	600
185	...	„	601
186	..	„	602

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193	"	657
197	"	661
198	"	662
201	"	665
202	"	666
203	"	667
204	"	668
205	"	669
206	"	670
209	"	673
217	"	681
220	"	684
221	"	685
225	"	689
227	"	691
228	"	692
229	"	693
230	"	694
232	"	696
233	"	697
234	"	698
235	"	699
236	"	700
238	"	702
239	"	703
240	"	704
244	"	785
245	"	789
248	"	792
248	"	792
251	"	795
251	"	795
253	"	797
254	"	798
257	"	865
263	"	871
269	"	877
271	"	879
273	"	993
275	"	995
276	"	996
277	"	997
278	"	998
279	"	999
286	"	1006
289	LXXII	17
294	"	22
297	"	25
304	"	32
305	"	65
307	"	67
308	"	68
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311	"	71
311	"	71
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313	"	73
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319	"	79
321	"	161
325	"	165
331	"	171
332	"	172
333	"	173
335	"	175
337	"	337
339	"	339
340	"	340
345	"	345
348	"	348
349	"	349
351	"	351
353	"	353
355	"	355
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356	"	356
358	"	358
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360	"	360
360	"	360
361	"	361
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375	"	375
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413	"	525
414	"	526
415	"	527
417	"	529
421	"	533
424	"	536
426	"	538
429	"	541
432	"	544
433	"	593
439	"	599
449	"	609
451	"	611
452	"	612
453	"	613
453	"	613
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462	"	622
462	"	623
464	"	624
465	"	881
466	"	882
467	"	883
467	"	883
469	"	885
471	"	887
474	"	890
475	"	891
476	"	892
477	"	893
478	"	894
481	"	945
484	"	948
485	"	949
486	"	950
487	"	951
489	"	953
490	"	954
491	"	955
492	"	956
493	"	957
494	"	958
495	"	959
497	"	961
506	"	970
507	"	971
509	"	973
510	"	974
511	"	975
513	LXXIII	49
516	"	52
517	"	53
517	"	53
518	"	54
519	"	55
525	"	61
526	"	62
529	"	145
531	"	147
537	"	153
539	"	155
541	"	157
542	"	158
545	"	161
547	"	163
557	"	173
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65	..	LXXIV	51
66	...	LXVIII	832
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210*n*	...	LXXI	641
212	...	LXXIV	469
227	...	LXXV	392
239	..	LXXIV	499
247	..	„	906
255	...	„	362
265	..	LXXVI	922
276	...	„	929
283	...	„	910
295	..	LXXIV	492
301	...	LXXVI	594
308	...	LXXVII	100
324	..	LXXIII	436